IN THE SUPREME COURT OF MISSOURI

SC95358

FRANKLIN ALLEN
Respondent

vs.

ATAIN SPECIALTY INSURANCE COMPANY
Appellant

Appeal from the Circuit Court of Jackson County
State of Missouri
The Honorable John M. Torrence

Transferred Accepted by This Court
After Opinion of the Western District

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant Atain Specialty Insurance Company (hereinafter "Atain") appeals from a final Judgment rendered by the Trial Court. This Court has jurisdiction to hear this appeal pursuant to Article V, section 10 of the Missouri Constitution, which provides that "[c]ases pending in the court of appeals may be transferred to the supreme court ... by order of the supreme court ... after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule." On March 1, 2016, this Court ordered that the case be so transferred. This Court therefore has jurisdiction to hear the present appeal.

STATEMENT OF FACTS

A. The shooting

This case arises out of a shooting that occurred on or about June 10, 2012, at the Sheridan Apartments in Kansas City, Missouri, wherein Franklin Allen was shot by Wayne Bryers. (*L.F.* 396-398). Prior to the shooting, Bryers and Allen were arguing. (*L.F.* 256, 458, 460). During the argument, a police officer pulled up and told Allen to leave, at which point Allen walked away. (*L.F.* 256, 390, 457). After Allen walked away, Bryers started yelling at Allen. (*L.F.* 256, 390, 447-473). Allen walked back towards Bryers, and the two continued to argue. (*L.F.* 256, 390, 457-458). During this argument, Bryers had a gun in his hand, and at some point pushed Allen. (*L.F.* 256, 390-391). A physical altercation then ensued between Allen and Bryers. (*L.F.* 256, 297, 390-391). After Bryers pushed Allen, Allen swung and hit Bryers. (*L.F.* 256, 391). Bryers then swung at Allen, and hit Allen with the gun, knocking him to the ground. (*L.F.* 256, 298, 391). Bryers stood over Allen and pulled the trigger, shooting Allen in the back as he lay on the ground. (*L.F.* 256, 298, 391). Bryers knew what he was doing when he shot Allen. (*L.F.* 257, 391). Bryers had time to think about what he was doing before shooting Allen. (*L.F.* 257, 391). Bryers gun did not accidentally discharge. (*L.F.* 257, 391). Bryers intended to shoot Allen, tried to kill Allen, and wanted Allen to die. (*L.F.* 257, 391).

Allen admits that Bryers attempted to physically remove him from the property. (*L.F.* 636). He admits that he became unruly requiring Bryers to use force. (*L.F.* 636). Allen admits that he and Bryers were arguing, and that Bryers pulled a gun with the intent to scare him away. (*L.F.* 257, 637 and 643). Allen claims he then turned and walked away

for his safety. (*L.F.* 257, 643). As Allen was walking away, Bryers was still arguing with him, and shot him in the back. (*L.F.* 257, 636). Allen did not see Bryers when he pulled the trigger. (*L.F.* 257, 637). Allen does not know what caused the gun to go off. (*L.F.* 257, 640).

After the shooting, Bryers talked with the police. (*L.F.* 419 and 447-473). He told the police he lived at the Sheridan Apartments and was filling in as the building manager for the apartment in exchange for a free place to stay (*L.F.* 419, 448, 455 and 457). He explained that he had drank a pint of Remy the night Allen was shot, so things were "kind of blurry." (*L.F.* 440, 463). He also stated that he hardly could remember the shooting because it happened so fast. (*L.F.* 448, 460). He recalled arriving at the apartments on June 10, 2012, to find two men that had previously tried to rob him on the apartment property. (*L.F.* 448, 458). One of these men was Allen. (*L.F.* 448, 458). Bryers explained that on the previous Mother's day, Allen and the other man tried to rob him in the parking lot of the apartments which incident ultimately ended when Bryers pulled out his gun and shot it twice. (*L.F.* 448, 458). Accordingly, when Bryers found Allen and the other man on the apartment property as he returned home on June 10, 2012, he was angry. (*L.F.* 448, 458). Bryers started arguing with the men telling them to get off the property. (*L.F.* 448, 458). The police arrived and "shooed" the men off. (*L.F.* 448, 460-461). As Allen was walking away, Bryers and Allen started arguing again which brought Allen back to the property. (*L.F.* 448, 460-461). They argued for a good two minutes. (*L.F.* 460).

According to Bryers, the argument then escalated and became physical when Allen punched Bryers in the face. (*L.F.* 448, 458). After being punched the first time, Bryers told

Allen to "back up" because he was armed. (*L.F.* 448, 458). As Bryers was making this statement, Allen swung and hit Bryers a second time. (*L.F.* 448, 458). At that point, Bryers pulled his gun from his pocket and "popped it." (*L.F.* 448, 458).

Despite making the above statements to the police, Bryers later asserted his Fifth Amendment rights when asked about the shooting after the present Writ of Execution in Aid of Garnishment was filed. (*L.F.* 581-612). With the exception of stating his name and very limited background information, Bryers asserted his Fifth Amendment rights to every question asked during his deposition, including but not limited to the following questions regarding the incident:

- And the argument was so heated that the two of you got in each other's faces, correct? (*L.F.* 590).
- You told him he better get out of your face because you had a gun, isn't that right? (*L.F.* 590).
- Now, the verbal argument eventually turned physical, isn't that true? (*L.F.* 590).
- And it turned physical when Mr. Allen punched you, isn't that correct? (*L.F.* 590).
- And when he punched you, he actually hit you in the face, isn't that correct? (*L.F.* 590).
- Mr. Allen hit you in the face once but he also then did it again, isn't that correct? (*L.F.* 590).
- The first time he hit you in the face it didn't cause you to fall to the ground, correct? (*L.F.* 590).

- But the second time when he hit you, you lost your balance, isn't that correct? (*L.F.* 590).
- And Mr. Bryers, at that point you fell to the ground; true? (*L.F.* 590).
- Now, after you fell to the ground, you were able to get up back on your feet, isn't that right? (*L.F.* 590).
- As you got back up on your feet, that's when you pulled out your gun, correct? (*L.F.* 590).
- You first used the gun by swinging it at Mr. Allen, isn't that true? (*L.F.* 591).
- And you did that in an attempt to cause injury to Mr. Allen, correct? (*L.F.* 591).
- Now, when you swung the gun at Mr. Allen, you actually hit Mr. Allen, isn't that correct? (*L.F.* 591).
- And you hit him with the gun which caused him to fall to the ground, isn't that correct? (*L.F.* 591).
- Now when Mr. Allen was knocked to the ground, he wasn't able to get up, correct? (*L.F.* 591).
- And as he laid on the ground, you stood over him with a gun, isn't that true? (*L.F.* 591).
- And as you stood over him with the gun, you pointed the gun at him, correct? (*L.F.* 591).
- And as you pointed the gun at Mr. Allen, you pulled the trigger, correct? (*L.F.* 591).

- You shot him in the back, correct? (*L.F.* 591).
- And as you shot him, you told him that's what he gets for messing with you, correct? (*L.F.* 591).

B. Relationship between Bryers and the Sheridan Apartment Complex

The shooting occurred at the Sheridan Apartments. (*L.F.* 17). The Sheridan Apartments are owned by John Frank d/b/a the Sheridan Apartments. (*L.F.* 17). Frank denies that Bryers was ever a security guard at the apartment. (*L.F.* 235, 651). The Sheridan Apartments did not have employees performing security, armed or unarmed. (*L.F.* 235, 651 and 655). Frank denies ever requesting, instructing, or requiring Bryers to carry a firearm while performing his duties at the Sheridan Apartments or in the course and scope of Bryers' alleged employment at the Sheridan Apartments. (*L.F.* 235, 651). Bryers, on the other hand, claims that he was the property manager at the apartments, was responsible for providing security and was required to carry a gun for that purpose. (*L.F.* 445 and 524-527).

C. Insurance Policy

Back in October of 2011, Atain issued a Commercial General Liability policy to John Frank d/b/a the Sheridan Apartments. (*L.F.* 333-390). The insuring agreement of Atain's policy provided, in part, as follows:

> 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.

(*L.F.* 266, 346). The insuring agreement additionally stated that "This insurance applies to 'bodily injury' . . . only if: (1) The 'bodily injury' . . . is caused by an 'occurrence' that takes place in the 'coverage territory'; (2) the 'bodily injury' . . . occurs during the policy period; . . ." (*L.F.* 266, 346). The policy contained an exclusion for "Expected Or Intended Injury," which excludes coverage for "bodily injury . . . expected or intended from the standpoint of the insured." (*L.F.* 266, 346). The policy contained a COMBINED COVERAGE AND EXCLUSION ENDORSEMENT that included an exclusion for assault and battery, as follows:

IX. 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 or any Insured or any other person;

* * *

3. Any Assault or Battery resulting from or allegedly related to the negligent hiring, supervision or training of any employee of the Insured; or

4. Assault or Battery, whether or not caused by or arising out of negligent, reckless or wanton conduct of the Insured, the Insured's

> employees, patrons or other persons lawfully or otherwise on, at or near the premises owned or occupied by the Insured, or by any other person.

(*L.F.* 266-267, 382).

In addition, the Atain policy included a fraud and misrepresentation provision advising as follows:

> FRAUD AND MISREPRESENTATIONS ENDORSEMENT
>
> This policy was issued based on the information supplied on an application and other correspondence, including your claims or loss history. This information is attached to and considered to be part of this policy.
>
> You should review this information carefully because the truth of this information was of paramount importance in influencing our decision to issue this policy.
>
> You, for all the insureds under this policy, do warrant the truth of such information to the best of your and their knowledge at the inception date of this policy.
>
> If such information is false or misleading, it may cause denial of coverage or voiding of the policy. . . .

(*L.F.* 267, 341).

Frank represented in his application for insurance that Sheridan Apartments did not have employees performing security, armed or unarmed. (*L.F.* 268, 529-534, 653-655, 657). The Atain policy was issued based upon such information supplied by Frank. (*L.F.* 268, 653-655, 657). Allen filed his personal injury action against Bryers alleging that immediately before Bryers shot Allen, Bryers was in the course of performing required

armed security and in the course and scope of Bryers' alleged employment by Frank when Bryers shot Allen, resulting in Allen's paraplegia. (*L.F.* 10, 13–15, 267-268, 516-523).

These allegations were admitted by Bryers in his Answer to Allen's personal injury Petition, and ultimately became a part of the Judgment entered by the Court in the personal injury action. (*L.F.* 102-103). Allen and Bryers made similar allegations in a parallel declaratory judgment action. (*L.F.* 268, 536). Accordingly, based upon these statements and the representations made by Frank in the application, Atain voided and rescinded the policy and sought declaration from the courts in the parallel actions regarding such rescission. (*L.F.* 135-136).

D. Events Occurring Prior to Allen Filing Tort Action Against Bryers

Atain issued a Reservation of Rights Letter [hereinafter "ROR letter"] to Bryers on September 12, 2012. (*L.F.* 188, 235-236). This ROR letter was issued prior to Plaintiff providing any notice to Atain with respect to the claimed theories of liability against the alleged tortfeasor, Wayne Bryers. (*L.F.* 188, 235-236). At the time the ROR letter was issued, Plaintiff had not filed a lawsuit against Bryers. (*L.F.* 8, 9-16, 188, 235-236). The ROR letter specifically advised Bryers that if a lawsuit was filed against Bryers, Atain would provide him with a defense. (*L.F.* 188, 235-236). Atain further requested that Bryers notify Atain immediately if the lawsuit was filed. (*L.F.* 188, 235-236).

Sometime prior to November 9, 2012, Allen and Bryers agreed to enter a §537.065 agreement, which statute allows a tortfeasor to limit collection of a judgment against him to specified assets. (*L.F.* 58, Summary Judgment Exhibit Defendant 1). The §537.065 agreement between Allen and Bryers required Bryers to consent to entry of judgment

against him in the personal injury action filed by Allen. (*L.F.* 58). When asked about the agreement, Allen claimed he did not have any information regarding the settlement agreement, its terms or circumstances leading to the agreement. (*L.F.* 641-642). Bryers, on the other hand, asserted his Fifth Amendment rights when asked the following questions regarding the agreement:

- Rather than allowing Atain Insurance Company to defend you in [the tort] case, you entered into an agreement with Mr. Allen -- rather than giving notice and an opportunity to Atain Insurance Company to defend you in that personal injury action, you entered into an agreement with Mr. Allen to protect yourself, isn't that correct? (*L.F.* 238, 307, 600).
- And in terms of protecting yourself, you weren't looking to just protect your assets, you were looking to protect your criminal record, isn't that true? (*L.F.* 235, 307, 600).
- And so rather than defending yourself against those criminal charges, you agreed to an agreement with Mr. Allen that you would allow a judgment to be taken against you, isn't that right? (*L.F.* 232, 307, 600).
- And in terms of the judgment, you didn't care what was said in the judgment as long as there would be no criminal charges resulting from it, isn't that correct? (*L.F.* 239, 307, 600).
- And so to the extent that Mr. Allen was willing to make that stipulation, you certainly would be willing to stipulate to anything to avoid criminal liability, isn't that correct? (*L.F.* 239, 307, 600).

- And you did that to protect yourself from criminal charges rather than to protect any interest or assets you had, isn't that correct? (*L.F.* 239, 307, 600).
- You would agree with me that you entered into the agreement with Mr. Allen without giving any notice to our insurance company not only of the lawsuit, but also of your intent to enter into such agreement, isn't that correct? (*L.F.* 307, 600).
- And you did that with the intent to – or you did that with the understanding that only certain evidence would be presented to the Court instead of presenting all of the evidence to the Court, isn't that correct? (*L.F.* 307, 600).
- In terms of the evidence that was going to be presented to the Court, it was simply going to be evidence to establish a claim of negligence rather than the intentional conduct that actually gave rise to this injury, isn't that correct? (*L.F.* 307, 600).
- And it was the intentional conduct and the assault and battery that you committed on Mr. Allen that you and Mr. Allen stipulated to would not be a part of that underlying case, isn't that correct? (*L.F.* 307, 600).
- The terms of your agreement with Mr. Allen resulted in only certain evidence being presented to the trial Court, isn't that correct? (*L.F.* 307, 600-601).
- And the evidence that was presented to the trial Court wasn't true evidence, isn't that correct? (*L.F.* 308, 601).
- In other words, it was evidence that was simply stipulated to between you and Mr. Allen, despite the fact that it wasn't true, correct? (*L.F.* 308, 601).

- And that evidence misrepresented the true actions that took place on June 9 and June 10, 2012, isn't that correct? (*L.F.* 308, 601).

Thereafter, once the personal injury tort action was filed, Atain, through its attorney, sent an additional ROR letter to Bryers, supplementing the initial letter with additional facts that had been discovered and notifying Bryers that it had discovered a lawsuit had been filed by Allen and reiterating its agreement to provide a defense to Bryers in the lawsuit. (*L.F.* 236, 498). The December 14, 2012 ROR letter made clear that Atain was not denying coverage and was offering a defense and specifically advised of the counsel retained to defend Bryers. (*L.F.* 236, 498).

Despite Atain's offer to provide a defense to Bryers, Bryers refused to cooperate with Atain and the attorney retained by Atain for purposes of the defense. (*L.F.* 56, 498, and 524-528; Summary Judgment Exhibit Plaintiff's 2 and 3).

E. Allen Tort Action Against Bryers

On or about December 4, 2012, Allen filed a lawsuit against Bryers seeking to recover for the injuries he sustained in the June 10, 2012, shooting. (*L.F.* 9). Allen's lawsuit set forth 30 allegations of fact and contained a claim for negligence. (*L.F.* 9-16). Despite including allegations that Bryers was acting in the course and scope of his employment with Frank and/or the Sheridan Apartments, Bryers was the only defendant in the lawsuit. (*L.F.* 9-16). The Petition generally alleged that Allen was injured when Bryers's gun unintentionally, accidentally, negligently and/or recklessly discharged as Allen was escorting Bryers off the property. (*L.F.* 14-15). The Petition further contains

numerous allegations that Allen's injuries were not caused by an assault, battery, intentional act, etc. . . (*L.F.* 9-16). A copy of the Petition is included in the Appendix.

Atain retained attorney Dave Buchanan to represent Bryers in the lawsuit. (*L.F.* 498-500, Summary Judgment Exhibit Plaintiff's 3). Mr. Buchanan made multiple attempts to contact Bryers to discuss the lawsuit and his defense to the same. (Summary Judgment Exhibit Plaintiff 3). Bryers, however, refused to cooperate with Mr. Buchanan. (*L.F.* 501, Summary Judgment Exhibit Plaintiff 2 and 3) Ultimately, on January 14, 2013, as the deadline for filing an Answer to the lawsuit was near, Mr. Buchanan filed an Answer to protect Bryers' interests indicating a lack of information to respond to the allegations and further denying the allegations on such basis. (*L.F.* 50-55, Summary Judgment Exhibit Plaintiff 3). Bryers, through his personal counsel, thereafter told Mr. Buchanan that he would not accept Mr. Buchanan's defense of the case and instructed Mr. Buchanan to withdraw. (Summary Judgment Exhibit Plaintiff 3). Mr. Buchanan withdrew his appearance on January 11, 2013, allowing Bryers' personal counsel to proceed with the representation. (*L.F.* 56). On January 16, 2013, Bryers withdrew the Answer filed by Mr. Buchanan denying the allegations and filed notice of his "consent to entry of a judgment against him consistent with the 537.065 agreement" he had entered with Allen. (*L.F.* 58).

Atain thereafter sought to intervene in the tort action 1) for the limited purpose of seeking a stay of the action until resolution of the coverage issues in a pending declaratory judgment action, or 2) because Bryers (and Allen) had taken the position that Atain would be precluded from litigating the facts relating to the coverage issues in the declaratory judgment action because Bryers and Allen planned to litigate those in the personal injury

tort action, or 3) because an inherent conflict of interest existed between Bryers and Atain and given Bryers entry of the § 537.065 agreement, Atain should be permitted to intervene to not only contest liability and damages, but additionally represent its interests in litigating any facts relating to the coverage issues. (*L.F.* 62-89). Atain's Motion to Intervene was denied. (*L.F.* 98).

On April 18, 2013, the Court presided over a bench trial in the tort action. (*L.F.* 99). Prior to the trial, Atain moved the Court to reconsider the denial of its Motion to Intervene. (*Tr.* 3-4). The Court denied Atain's Motion to Reconsider and proceeded with the trial. (*Tr.* 4-29). Allen presented limited evidence without objection from Bryers. (*Tr. 4-26*). This evidence consisted of the testimony of Allen's doctor, depositions of Allen and his girlfriend, and a handful of exhibits, including multiple stipulations/admissions entered between Allen and Bryers. (*Tr.* 4-26). Bryers presented no evidence. (*Tr.* 26). At the conclusion of the trial, Allen submitted to the Court proposed findings of fact which he described as "mostly taken from the admissions" of Bryers. (*Tr.* 26-29). The Court adopted Allen's findings of fact and entered its Judgment on April 22, 2013, and an Amended Judgment on April 30, 2013. (*L.F.* 99-104). A copy of the Amended Judgment including the findings of fact is contained in the Appendix attached hereto.

F. Parallel Declaratory Judgment Action(s)

On October 22, 2012, Atain filed a Complaint for Declaratory Judgment ("DJ Action") in the Western District of Missouri, United States Federal Court seeking the court's declarations as to the rights and obligations of the parties under the subject insurance policy. (*L.F.* 239-240). Allen likewise filed a declaratory judgment action in

state court on December 4, 2012. Relying on the doctrine of abstention, the federal court dismissed Atain's DJ Action to allow all coverage issues to be determined in Allen's declaratory judgment action. Allen's declaratory judgment action was subsequently removed to federal court, and eventually dismissed after the trial court's entry of Summary Judgment in the present Writ of Execution in Aid of Garnishment. Allen filed another declaratory judgment action in state court following the Western District opinion in this matter that has been removed to federal court. This third declaratory judgment action remains pending.

G. Present Writ of Execution in Aid of Garnishment

After the trial court entered its Amended Judgment in the tort action, Allen served a Writ of Execution in Aid of Garnishment and accompanying interrogatories on Atain. (*L.F.* 105-113). The inquiry in the interrogatories was limited to whether, from the time of service until the return date on the summons, Atain 1) was bound or will "become bound in any contract of insurance to pay the judgment debtor money"; or 2) has a liability insurance policy that provides indemnity to the judgment debtor for the judgment debtor against him in this case?" (*L.F.* 113-114). Atain responded to the interrogatories in the negative. (*L.F.* 113-114). Allen filed his "Exceptions Objections and Denial" of Atain's answers to the interrogatories. (*L.F.* 117-129). Atain then filed its Answer to Allen's "Exceptions Objections and Denial," denying the allegations, statements and conclusions set forth by Allen and asserting its affirmative defenses, including rescission, void policy, fraud, collusion of cooperation clause, failure to meet conditions precedent to coverage among others. (*L.F.* 130-149). Atain sought to dismiss/stay the garnishment proceedings

pending determination of the coverage issues in the parallel declaratory judgment action. Allen did not oppose the motion. (*L.F.* 4, 150-155).

After agreeing to a stay, Allen filed a Motion for Summary Judgment before the coverage issues were determined in the parallel declaratory judgment action claiming that the uncontroverted facts set forth in such motion entitled Allen to judgment as a matter of law holding Atain liable for the full amount of the tort judgment. (*L.F.* 160-229). Allen's Motion for Summary Judgment set forth 26 alleged Statements of Uncontroverted Fact. (*L.F.* 162-166). The following states Allen's facts and summarizes Atain's response. Atain's full responses are contained in Appellant's Appendix.

1. Facts Not Supported by Evidence

The following three of Allen's alleged Facts, were not supported by evidence or citation to the record:

7. That Atain denied coverage to Bryers and Frank after receiving notice that Allen was claiming negligence as the cause of his injuries. (*L.F.* 162-166).

13. Atain's ROR Letter, Ex. 3 was issued before Atain compared the language of the Atain policy with the allegations alleged in the Petition file in Allen v. Bryers. (*L.F.* 162-166).

22. Medical evidence was presented at the trial through Daniel Zimmerman, MD who testified that Allen suffered permanent paraplegia from a gunshot injury to his spine and that the projected cost of his lifetime health care would exceed the sum of $10,000,000.00. (*L.F.* 163-165).

Atain denied each of these facts and where necessary supported the denial with additional facts with citations to the record demonstrating a genuine issue of trial. (*L.F.* 235-253). Atain's denial contained facts establishing that Atain did not deny coverage after receiving notice that Allen was claiming negligence as the cause of his injuries. Atain's facts included that it agreed to provide a defense to Bryers if a lawsuit was filed. Atain further instructed Bryers to provide Atain notice if a lawsuit was filed, but Bryers failed to do so. (*L.F.* 237-239). Atain, on its own, discovered the lawsuit and again reached out to Bryers reiterating its willingness to provide a defense to Bryers in that lawsuit. (*L.F.* 237-239, 498-500). Despite Atain's offer to defend, Bryers refused to cooperate. (*L.F.* 237-239, 501).

2. Facts Supported Only by Unauthenticated Letters

Four of Allen's alleged Facts were supported by unauthenticated letters written by his counsel, including the following:

1. On August 27, 2012 Allen's attorney sent a letter to John Frank advising him that Allen would assert a claim of negligence for the gunshot injury that occurred on the premises of the Sheridan Apartments. (*L.F.* 162-166).

5. In response to the September 12th letter Fatall sent a letter dated September 17th 2012 advising Atain that Allen was rendered a paraplegic as a result of a gunshot wound and that Allen was claiming "negligence of the employee for accidental discharge of his weapon. (*L.F.* 162-166).

9. On October 30th 2012 Allen's attorney sent a policy demand letter to Atain's counsel advising them that Allen would accept the policy limits of $1 million to settle all claims against Wayne Bryers. (*L.F.* 162-166).

18. On April 2, 2013 Allen's attorney submitted in camera to Judge John Torrence a Section 537.065 agreement that had been entered into between Allen and Bryers as a result of Atain's refusal to defend Bryers. (*L.F.* 162-166).

Atain objected to and denied each of these facts asserting that the unauthenticated letter was inadmissible hearsay and therefore could not be considered by the Court. (*L.F.* 231-248).

3. Unauthenticated Policy

While Allen's Motion sought a determination that Atain's Policy provided coverage for the shooting, Allen did not provide the Court with a full authenticated copy of the alleged Policy. Five of Allen's alleged Facts cited only to an unauthenticated partial copy of the alleged policy, including the following facts:

2. Atain issued a commercial general liability policy to John Frank dba the Sheridan Apartments with a policy period from October 4, 2011 through October 4, 2012, policy number CIP117483 under which Wayne Bryers was an insured based on his employment with John Frank. Said policy was in effect on June 10, 2012 at the time of Allen's injury. (*L.F.* 162-166).

23. Under the insuring agreement of the Atain policy it is liable for sums that the insured is legally obligated to pay as damages because of bodily injury that is caused by an "occurrence". (*L.F.* 162-166).

24. Under the Atain policy an "insured" is defined as employees for acts within the scope of their employment with the insured. (*L.F.* 162-166).

25. Under the Atain policy, "occurrence" means an accident. (*L.F.* 162-166).

26. Under the Atain policy, exclusions of coverage for expected or intended injury do not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property. (*L.F.* 162-166).

Atain denied each of these facts, except No. 25, and supported the denials with additional facts and citations to the record demonstrating a genuine issue for trial. (*L.F.* 231-255). Specifically, Atain highlighted the policy does not support Allen's claimed fact that Bryers was an insured based on his employment with Frank as the policy in no way relates to Bryers employment. In this regard, Atain set forth facts demonstrating that Bryers was not in the course and scope of employment of the Apartments at the time of the shooting. (*L.F.* 231-235). Further, Atain set forth facts demonstrating the subject policy is void and has been rescinded based upon material representations made in the application for such insurance. *(L.F. 231-235).*

4. Facts Controverted by Atain

Allen's Motion set forth the following facts which Atain controverted. For purposes of being brief, a condensed version of Atain's response to each fact set forth below. Atain's full responses are included in the Appellant's Appendix.

a. Fact No. 3

3. Atain issued a reservation of rights letter ("ROR Letter") to Bryers on September 12, 2012, wherein Atain acknowledged receipt of Fatall's August 27, 2012 lien letter and denied "any and all coverage" as to Allen's claims. (*L.F.* 162-166).

In responding to Fact No. 3, Atain admitted that it issued a Reservation of Rights Letter to Bryers on September 12, 2012, which acknowledged receipt of an August 27, 2012 letter from Plaintiff's counsel. Atain, however, noted that the Reservation of Rights Letter was issued on September 12, 2012, before Allen filed his personal injury action and prior to Allen providing any notice to Atain with respect to the claimed theories of liability against Bryers. The Letter specifically advised Bryers that if a lawsuit was filed against him, Atain would provide him with a defense. (*L.F.* 188-196, 235-236). Atain further requested that Bryers notify Atain immediately if the lawsuit was filed. (L.F 188-196, 235-236).

Additionally, Atain noted that the Letter set forth Atain's coverage arguments, including defenses beyond the intentional acts exclusion and reserved all defense relating thereto, but agreed to provide a defense to Bryers if a lawsuit was filed. (*L.F.* 188-196, 235-236). Once the lawsuit was filed, Atain sent an additional letter to Bryers, supplementing the initial letter with additional facts that had been discovered and notifying Bryers that it had discovered a lawsuit had been filed and reiterating its agreement to provide a defense to Bryers in the lawsuit. (*L.F.* 235-236, 498-500). The December 14, 2012 letter made clear that Atain was not denying coverage and was offering a defense and specifically advised of the counsel retained to defend Mr. Bryers. (*L.F.* 235-236, 498-500).

b. Fact No. 10

10. Atain rejected the policy demand in a letter written by its attorney dated November 19th, 2012. (*L.F.* 162-166).

Atain controverted this fact by establishing that Allen's demand was withdrawn less than 10 days after it was made as Allen and Bryers had agreed to a § 537.065 agreement. (*L.F.* 240-241, 535). Moroever, the Atain letter referenced by Allen written after Allen withdrew the demand invited settlement negotiations. (*L.F.* 208-209, 240-241).

c. Fact No. 11

11. Plaintiff Allen filed suit against Defendant Wayne Bryers on December 4, 2012, in state court wherein Allen alleged that his injuries were caused solely by negligence. (*L.F.* 162-166).

Allen supported this fact with only the Petition for Damages in the personal injury action. (*L.F.* 164). The statements contained in the Petition are hearsay and were not admitted by Atain. (L.R. 241-242). The Petition is not the requisite type of discovery, exhibits, or affidavits required to support alleged material uncontroverted facts. (*L.F.* 241-242).

Atain additionally controverted that Allen's injuries were caused by Bryers' negligence. Atain, relying on an affidavit from an eyewitness to the shooting, set forth facts demonstrating that Allen's injury was expected or intended and arose from an assault or battery. (*L.F.* 241-242, 390-391, 392-446, 447-473). The eyewitness described the verbal and physical altercation between Allen and Bryers, including Bryers' use of the gun to both physical strike Allen as well as shoot him in the back as he laid on the ground. (*L.F.*

241-242, 390-391). Atain additionally set forth Bryers deposition testimony where he asserted his Fifth Amendment Privilege further supporting Atain's position that the injury was intentional and resulted from an assault or battery. (*L.F.* 241-242, 297, 303).

d. Fact No. 12

12. Allen's Petition for damages against Wayne Bryers does not allege that an assault, battery, any intentional act, any criminal act or any expected or intended act by either Franklin Allen or Wayne Bryers caused Allen's injury. (*L.F.* 162-166).

Like Fact No. 11, Allen supported this fact with reference only to the Petition for Damages for Personal Injuries. Atain's response to Fact No. 12, including objections to the evidentiary support, as well additional facts set forth to controvert the substance of the statements was almost identical to its response to Fact No. 11, and therefore will not be repeated. (*L.F.* 243-244).

e. Fact No. 14

14. Atain has admitted through its attorney in an affidavit dated June 19th, 2013 and filed in the related DJ action that it needed additional time to obtain "essential facts" and file discovery requests, none of which was done prior to the time that the ROR letter was issued denying any obligation to defend or indemnify Wayne Bryers. (*L.F.* 162-166).

Atain controverted this Fact as Allen's statement wholly and disingenuously misconstrued defense counsel's Affidavit. The Affidavit clearly established that the the request for additional time was not needed to "investigate" the claim, but rather was necessary to gather the evidence in a form that is admissible for purposes of responding to the Motion for Summary Judgment. (*L.F.* 217-219, 245). Specifically, the affidavit stated

that "[a]dditional discovery needs to be conducted to obtain the essential facts in a form appropriate for submission to the Court to oppose the pending Joint Motion for Summary Judgment." (*L.F.* 217-219, 245).

f. Fact No. 15

15. As the affidavit from Atain's attorney attests, the Kansas City, Missouri Police Department ("KCPD") conducted a thorough investigation that produced "police investigation reports, statements of witnesses and interested parties, criminal investigative reports, and other investigative evidence." (*L.F.* 162-166).

Atain controverted this fact as the Affidavit relied upon by Plaintiff did not support the Fact alleged. The Affidavit simply indicated an intent to obtain information contained in the police file in a format sufficient to provide the necessary evidentiary foundation for submission to the Court on summary judgment. (*L.F.* 217-219, 245).

g. Fact No. 17

17. There is no evidence that either the KCPD or the Prosecutor's Office ever charged Wayne Breyers with criminal action. (*L.F.* 162-166).

Allen supported this fact with a citation to the Amended Judgment entered by the trial court in the Personal Injury action. (*L.F.* 164). Atain controverted this fact by first indicating that the Amended Judgment does not support the Fact alleged, and further that such fact is irrelevant and immaterial to the coverage issues in the present matter. (*L.F.* 246). Atain offered evidence that the reason there was no evidence presented in the Personal Injury action regarding Bryers' charges was because Bryers and Allen entered into an agreement wherein Allen agreed not to cooperate or pursue criminal charges in

exchange for Bryers' agreement to cooperate with Allen in the civil action to allow a significant judgment to be taken against him based upon limited and contrived evidence presented to the Court. (*L.F.* 246-247, 307). Further, even if charges had not been filed yet, the Missouri statute of limitations on the crimes arising out of Bryers' conduct has not run under §556.036. (*L.F.* 247).

h. Fact No. 19

19. On April 18th, 2013 a bench trial was held before the Hon. John Torrence, Judge Division 14 of the Sixteenth Judicial Circuit wherein evidence was presented on the issue of liability and damages. (*L.F.* 162-166).

Atain admitted that a bench "trial" occurred in the underlying personal injury action but offered additional facts that the evidence presented was stipulated and unopposed evidence. (*L.F.* 248-249). Atain further denied that it is bound by the factual determinations made by the trial court in the Personal Injury action, setting forth facts demonstrating genuine issues relating to the findings made by the trial court in the Personal Injury action. (*L.F.* 248-249).

Specifically, Atain presented facts showing that Allen acknowledged that he and Bryers were arguing, and that Bryers pulled a gun with the intent to scare him away, and he was shot in the back as he was walking away. (*L.F.* 248-249, 487, 493). Allen does not know what caused the gun to go off. (*L.F.*248-249, 490). With respect to the admissions and stipulations offered by Allen at the "trial," Atain presented facts including the deposition testimony of Bryers where he asserted his Fifth Amendment privilege,

demonstrating that Allen and Bryers perpetrated a fraud on the court in presenting false, limited, and manufactured evidence. (*L.F.* 248-249, 309-317).

i. Fact No. 20

20. On April 30th, 2013 Judge Torrence signed and filed an Amended Judgment Entry finding that the negligent conduct of Wayne Breyers was the cause of Franklin Allen's injury arising from the discharge of Breyer's weapon on June 10th, 2012 and awarding damages in the sum of $16,000,000. (*L.F.* 162-166).

Atain's response to Fact No. 20 was virtually identical to Fact No. 19 above and therefore will not be re-stated.

j. Fact No. 21

21. The findings of the trial court as a result of the bench trial to determine liability and damages include:

That Wayne Breyers was acting in the course and scope of his employment with John Frank dba The Sheridan Apartments at the time of the discharge of Breyers weapon;

That Breyer's conduct in the discharge of his weapon was accidental and not intentional and/or expected;

That Breyer's actions did not involve an assault or battery;

That to the extent that Breyers was escorting Allen off of the premises of The Sheridan Apartments, Breyers used only that amount of force that was necessary to remove Allen from the premises. (*L.F.* 162-166).

Atain's response to Fact No. 21 included a response similar to Fact Nos. 19 and 20, and additionally set forth facts that Allen's injuries resulted from the intentional conduct

of Bryers, the injury was expected or intended, and arose from an assault or battery, including testimony or statements from Allen, Bryers, and an eyewitness to the shooting. (*L.F.* 251-253, 390-391, 392-446, 447-473). The eyewitness described the verbal and physical altercation between Allen and Bryers, including Bryers' use of the gun to both physical strike Allen as well as shoot him in the back as he laid on the ground. (*L.F.* 251, 390-391). Atain additionally set forth Bryers deposition testimony where he asserted his Fifth Amendment Privilege further supporting Atain's position that the injury was intentional and resulted from an assault or battery. (*L.F.* 251-253, 309-317).

Further Atain demonstrated that the only evidence regarding the shooting in the "trial" of the Personal Injury action came from the admissions and stipulations of Bryers, and that Bryers' testimony in the present case supports a claim that Allen and Bryers perpetrated a fraud on the court in presenting this false, limited, and manufactured evidence. (*L.F.* 252-253). Bryers pleaded the Fifth Amendment when asked whether he made these admissions and stipulations in the tort action for purposes of perpetrating a fraud on this court. (*L.F.* 251-253, 309-317).

k. Fact No. 27

27. On November 28, 2013 after misleading the Court as to the reason Atain was seeking to Realign the Parties, Atain removed Franklin Allen's DJ Action to WDMO based on the fraudulent joinder of John Frank for the purpose of mounting a collateral attack the Court's Judgment of April 30th, 2013. (*L.F.* 162-166).

Atain denied this Fact establishing that the Declaratory Judgment action was removed to Federal Court based upon diversity of citizenship. (*L.F.* 255). Allen's claim of

"fraudulent joinder of John Frank," by Atain is negated by the fact that Allen made Frank a party to the lawsuit, not Atain. (*L.F.* 255). The Federal Court denied Allen's request to remand and accepted jurisdiction based upon its determination that diversity existed. (*L.F.* 255).

5. Admitted Facts

Atain admitted facts 4 & 16, and for all intents and purposes, Fact No. 8 (*L.F.* 231-255). These facts stated as follows:

4. Atain's Senior Claims Examiner requested in a September 12th, 2012 letter that Attorney Fatall advise Atain of "your theory of liability adverse to John Frank dba The Sheridan Apartments. (*L.F.* 162-166).

8. On October 22, 2012, Atain filed a Complaint for Declaratory Judgment ("DJ Action") in the Western District of Missouri, United States Federal Court wherein Atain sought a determination that Atain "owed no insurance coverage" for Bryers negligently injuring Franklin Allen. (*L.F.* 162-166).

(Atain simply denied the quoted material as it is not a direct quotation from the Declaratory Judgment Action. The Declaratory Judgment Petition and pleadings speak for themselves and Plaintiff improperly quotes such pleading). (*L.F.* 239-240).

16. As Atain's affidavit attests the Jackson County, Missouri Prosecutor's Office ("JCPO") conducted an investigation that produced a "prosecutor's investigation file." (*L.F.* 162-166).

6. Atain's Statement of Additional Facts

Atain set forth 33 Statement of Additional Facts in responding to Allen's Motion for Summary Judgment to demonstrate genuine issues for trial. Each of Atain's statements was supported by citations to authenticated documents, depositions, affidavits, and statements of the parties. The citations to the exhibits have been removed, but can be found in Appellant's Appendix. (*L.F.* 256-268). Atain's facts provided as follows:

1. The claimed "bodily injury" to Allen was expected or intended from the standpoint of Bryers.

2. Allen's claimed "bodily injury" arose from an assault or battery.

3. On June 10, 2012, Bryers and Allen were arguing.

4. During the argument, a police officer pulled up and told Allen to leave, at which point Allen walked away.

5. After Allen walked away, Bryers started yelling at Allen.

6. Allen walked back towards Bryers, and the two continued to argue.

7. During this argument, Bryers had a gun in his hand, and at some point pushed Allen.

8. A physical altercation occurred between Allen and Bryers.

9. After Bryers pushed Allen, Allen swung and hit Bryers.

10. Bryers then swung at Allen, and hit Allen with the gun, knocking him to the ground.

11. Bryers stood over Allen and pulled the trigger, shooting Allen in the back as he lay on the ground.

12. Allen acknowledged that he and Bryers were arguing, and that Bryers pulled a gun with the intent to scare him away.

13. Allen then turned and walked away for his safety.

14. As Allen was walking away, Bryers was still arguing with him, and then he was shot in the back.

15. Allen did not see Bryers when he pulled the trigger.

16. Allen does not know what caused the gun to go off.

17. Bryers knew what he was doing when he shot Allen.

18. Bryers had time to think about what he was doing before shooting Allen.

19. Bryers gun did not accidentally discharge.

20. Bryers intended to shoot Allen, tried to kill Allen, and wanted Allen to die.

21. Bryers pleaded the Fifth Amendment to the following questions regarding the incident:

Q. And the argument was so heated that the two of you got in each other's faces, correct?

Q. You told him he better get out of your face because you had a gun, isn't that right?

Q. Now, the verbal argument eventually turned physical, isn't that true?

Q. And it turned physical when Mr. Allen punched you, isn't that correct?

Q. And when he punched you, he actually hit you in the face, isn't that correct?

Q. Mr. Allen hit you in the face once but he also then did it again, isn't that correct?

Q. The first time he hit you in the face it didn't cause you to fall to the ground, correct?

Q. But the second time when he hit you, you lost your balance, isn't that correct?

Q. And Mr. Bryers, at that point you fell to the ground; true?

Q. Now, after you fell to the ground, you were able to get up back on your feet, isn't that right?

Q. As you got back up on your feet, that's when you pulled out your gun, correct?

Q. You first used the gun by swinging it at Mr. Allen, isn't that true?

Q. And you did that in an attempt to cause injury to Mr. Allen, correct?

Q. Now, when you swung the gun at Mr. Allen, you actually hit Mr. Allen, isn't that correct?

Q. And you hit him with the gun which caused him to fall to the ground, isn't that correct?

Q. Now when Mr. Allen was knocked to the ground, he wasn't able to get up, correct?

Q. And as he laid on the ground, you stood over him with a gun, isn't that true?

Q. And as you stood over him with the gun, you pointed the gun at him, correct?

Q. And as you pointed the gun at Mr. Allen, you pulled the trigger, correct?

Q. You shot him in the back, correct?

Q. And as you shot him, you told him that's what he gets for messing with you, correct?

22. Based upon Bryers pleading the Fifth, this Court can infer that Bryers pulled a gun with the intent to injure Allen; had a physical altercation with Allen; Bryers threatened Allen with a gun; and that Bryers hit Allen with the gun, knocked him to the ground, and while he was down on the ground, shot him in the back.

23. Bryers pleaded the Fifth Amendment when questioned regarding admissions and stipulations made in the tort action.

24. Bryers pleaded the Fifth Amendment to numerous questions regarding whether he admitted allegations in the tort action, while knowing they were false, in order to protect his own interests, including the following:

Q. Rather than allowing Atain Insurance Company to defend you in that case, you entered into an agreement with Mr. Allen -- rather than giving notice and an opportunity to Atain Insurance Company to defend you in that personal injury action, you entered into an agreement with Mr. Allen to protect yourself, isn't that correct?

Q. And in terms of protecting yourself, you weren't looking to just protect your assets, you were looking to protect your criminal record, isn't that true?

Q. And so rather than defending yourself against those criminal charges, you agreed to an agreement with Mr. Allen that you would allow a judgment to be taken against you, isn't that right?

Q. And in terms of the judgment, you didn't care what was said in the judgment as long as there would be no criminal charges resulting from it, isn't that correct?

Q. And so to the extent that Mr. Allen was willing to make that stipulation, you certainly would be willing to stipulate to anything to avoid criminal liability, isn't that correct?

Q. And you did that to protect yourself from criminal charges rather than to protect any interest or assets you had, isn't that correct?

Q. In the underlying personal injury action you made an admission that at no time during the evening of June 10, 2012, did you act out of personal animus, dislike, anger, or with any intent to hurt, injure or harm Franklin Allen, correct?

Q. You made that admission despite the fact that that statement is not true, correct?

Q. It is not true in the sense that -- it is not true because at the time of the June 10, 2012 incident you did have anger and dislike towards Mr. Allen, correct?

Q. Your anger and dislike towards him stemmed not only from the fact that he had robbed you on other occasions prior to that date, but also because of the verbal and physical altercation that pursued before you shot him, correct?

Q. You made that admission in the underlying personal injury action knowing that the statement was in fact untrue, correct?

Q. And you did so for purposes of perpetrating a fraud upon the Court, correct?

Q. And to misrepresent the true facts and circumstances to the Court regarding the incident that resulted in Mr. Allen's injuries, correct?

Q. In the underlying personal injury action you made an admission that you did not know that Mr. Allen had been injured until you were advised of Mr. Allen's injury by a member of the Kansas City, Missouri Police Department, correct?

Q. You made that admission knowing that that statement was not true, correct?

Q. In fact, the statement was not true, because you knew that Mr. Allen was injured because you shot him in the back, correct?

Q. And he was laying on the ground unable to move while you stood there at the scene of the accident, isn't that correct?

Q. You made that admission for purposes of perpetrating a fraud upon the Court, isn't that correct?

Q. And you did so in misrepresenting these facts so that the Court would not understand or appreciate or learn of the true facts and circumstances which surrounded the incident that gave rise to Mr. Allen's injuries on June 9 or June 10, 2012, correct?

Q. In the underlying personal injury action you made an admission that you admitted that as a direct result of your negligence and/or improper handling of the handgun, Mr. Allen was injured by a gunshot from your gun, isn't that correct?

Q. You made that admission knowing that that admission wasn't true, correct?

Q. But that statement is actually false, isn't that right?

Q. And that is because your actions were not negligent on June 9 or June 10, 2012, correct?

Q. In other words, your actions on June 9 and June 10, 2012, were intentional, correct?

Q. You admitted in the underlying personal injury action that on or about the evening of June 10, 2012, as a direct result of being escorted off and/or physically removed from the Sheridan apartment premises, Mr. Allen was injured when a handgun, that you had acquired at the direction of Mr. Frank, unintentionally, accidentally and negligently and/or recklessly discharged; true?

Q. You made that admission despite the fact that that statement is false, correct?

Q. And that statement is false because your discharge of the handgun wasn't unintentional, correct?

Q. That statement was false, because your discharge of the handgun on June 10, 2012, was not accidental, correct?

Q. And that statement is false because your discharge of the handgun on June 10, 2012, was not negligent or reckless, isn't that correct?

Q. You made that admission, though, in the underlying personal injury action for purposes of perpetrating a fraud upon the Court, correct?

Q. And you did so for purposes of concealing the true facts and circumstances from the Court regarding the nature of the June 10, 2012 incident, correct?

25. Bryers pleaded the Fifth Amendment to numerous questions regarding whether he made these admissions in the tort action for purposes of perpetrating a fraud on this court, including the following:

Q. In the personal injury action filed by Mr. Allen, you admitted that prior to June 10, 2012, and including the time period in which the handgun that you owned discharged, you did not formulate any intent to harm or injure Mr. Allen. You admitted that; true?

Q. While you admitted it in the personal injury action, it wasn't true, isn't that correct?

Q. In fact, you made all of these admissions for purposes of perpetrating a fraud on the Court, isn't that correct?

Q. In the underlying personal injury action you admitted that the discharge of the handgun that you acquired at the direction of John Frank was unintentional, accidental, negligent and/or reckless as a result of your intoxication, lack of training in the proper handling of the firearm, and the requirement that you display the handgun to encourage compliance while escorting off and/or physically removing Allen; true?

Q. You made that admission despite the fact that that statement is not true, correct?

Q. You made that admission for purposes of perpetrating a fraud; true?

Q. In the underlying personal injury action filed by Mr. Allen you made an admission that prior to June 10, 2012, and including the time period in which the handgun that you owned discharged, you were acting in the course and scope of your employment with John Frank and/or John Frank d/b/a the Sheridan Apartments, correct?

Q. You made that admission despite the fact that that statement is not true, correct?

Q. And you did so for purposes of perpetrating a fraud, correct?

Q. In the underlying personal injury action filed by Mr. Allen you made an admission that your actions that resulted from the discharge of the

handgun that injured Mr. Allen were negligent and that you were not intending or expecting to injure Mr. Allen, correct?

Q. You made that admission despite the fact that that statement is false, correct?

Q. And that statement is false because you were in fact intending and expecting to injure Mr. Allen when you discharged the handgun, correct?

Q. You made the admission for purposes of perpetrating a fraud, correct?

Q. In the underlying personal injury action filed by Mr. Allen you made an admission that your actions that resulted in the discharge of the handgun that injured Mr. Allen did not involve an assault, a battery, or any intentional act, correct?

Q. You made that admission knowing that that statement was in fact false, correct?

Q. You made the admission for purposes of perpetrating a fraud upon the Court, correct?

Q. In addition to these admissions that you made that we just talked about, you additionally made stipulations or entered into stipulations with Mr. Allen prior to a trial in the underlying personal injury action, isn't that correct?

Q. And those stipulations that you entered into you entered into for purposes of perpetrating a fraud upon the Court, correct?

Q. You made those stipulations for purposes of ensuring that the Court was not presented with the true facts and circumstances surrounding the incident that resulted in Mr. Allen's injuries, correct?

Q. You made those stipulations knowing that the stipulations were in fact not true, correct?

Q. You made those stipulations knowing that the stipulated facts were false, correct?

26. The insuring agreement of Atain's policy expressly states as follows:

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.

27. The insuring agreement additionally states that "This insurance applies to 'bodily injury' . . . only if: (1) The 'bodily injury' . . . is caused by an 'occurrence' that take place in the 'coverage territory'; (2) the 'bodily injury' . . . occurs during the policy period; and (3) . . . ."

28. The policy contains an exclusion for "Expected Or Intended Injury," which includes "bodily injury . . . expected or intended from the standpoint of the insured."

29. The policy contains the COMBINED COVERAGE AND EXCLUSION

ENDORSEMENT that contains an exclusion for assault and battery. (*See* Exhibit C). This exclusion provides as follows:

IX. 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:

2. Assault and Battery committed by any insured, any employee or any Insured or any other person;

3. The failure to suppress or prevent Assault and Battery by any person in 1. above;

4. Any Assault or Battery resulting from or allegedly related to the negligent hiring, supervision or training of any employee of the Insured; or

5. Assault or Battery, whether or not caused by or arising out of negligent, reckless or wanton conduct of the Insured, the Insured's employees, patrons or other persons lawfully or otherwise on, at or near the premises owned or occupied by the Insured, or by any other person.

30. The Atain policy states:

This Endorsement Changes the Policy - Please Read it Carefully

FRAUD AND MISREPRESENTATIONS ENDORSEMENT

This policy was issued based on the information supplied on an application and other correspondence, including your claims or loss history. This information is attached to and considered to be part of this policy.

You should review this information carefully because the truth of this information was of paramount importance in influencing our decision to issue this policy.

You, for all the insureds under this policy, do warrant the truth of such information to the best of your and their knowledge at the inception date of this policy.

If such information is false or misleading, it may cause denial of coverage or voiding of the policy.

All other terms and conditions of this policy remain unchanged.

This endorsement is effective on the inception date of this policy unless otherwise stated herein . . ."

31. On or about December 4, 2012, Defendant Franklin Allen filed a personal injury action against Bryers, Case Number 1216-CV31329, *Franklin Allen v. Wayne Bryers*, wherein Allen alleges that immediately before Bryers shot Allen, Bryers was in the course of performing required armed security supposedly in the course and scope of Bryers' alleged employment by Atain's Named Insured, Defendant John Frank d/b/a The Sheridan Apartments., i.e., removing Allen from The Sheridan Apartments' premises, when Allen assaulted Bryers resulting in Allen's paraplegia.

32. Defendant Bryers filed an Answer to Atain's federal court declaratory judgment action, stating, *inter alia*, "Bryers carried a firearm at the direction and insistence

of Defendant Frank," and, "a part of his employment with Defendant Frank, Bryers was to provide security…"

33. John Frank represented in his application for insurance that Sheridan Apartments did not have employees performing security, armed or unarmed. (*See* Application, attached hereto as Exhibit M).

(*L.F.* 256-268)

Allen did not file a reply to Atain's Response to the Motion for Summary Judgment. (*L.F.* 1-8). Allen, therefore, did not controvert any of Atain's Additional Statements of Uncontroverted Facts. (*L.F.* 1-8). The trial court held a hearing on July 2, 2014. (Tr. 1). The trial court entered Summary Judgment in favor of Allen on July 25, 2014, and denied Atain's Motion to Set Aside that same day. (*L.F.* 2, 760-768, 769-770). Atain appeals from the trial court's Summary Judgment. (*L.F.* 1, 790-792).

POINTS RELIED ON

POINT I

THE TRIAL ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN BECAUSE ATAIN IS ENTITLED TO AN OPPORTUNITY TO LITIGATE FACTS RELATING TO THE COVERAGE ISSUES UNDER THE CLAIMED POLICY IN THAT THE TRIAL COURT RELIED UPON FACTUAL DETERMINATIONS IN THE UNDERLYING TORT ACTION WHICH ATAIN WAS DENIED AN OPPORTUNITY TO PARTICIPATE, THE FACTS REGARDING ASSAULT, BATTERY, INTENTIONAL ACTS, AND COURSE AND SCOPE OF EMPLOYMENT DETERMINED IN THE UNDERLYING TORT ACTION WERE NOT MATERIAL TO THAT ACTION, AN INHERENT CONFLICT EXISTS BETWEEN ATAIN AND BRYERS PREVENTING ATAIN FROM LITIGATING SUCH FACTS, AND A FINDING OF NEGLIGENCE DOES NOT PRECLUDE APPLICATION OF THE INTENTIONAL CONDUCT TYPE EXCLUSIONS IN THE POLICY.

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

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

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

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN BECAUSE ALLEN FAILED TO ESTABLISH THAT EACH OF ATAIN'S

AFFIRMATIVE DEFENSES FAILED AS A MATTER OF LAW IN THAT ATAIN PLED AFFIRMATIVE DEFENSES INCLUDING FRAUD, COLLUSION, RESCISSION, VOID POLICY, AND VIOLATION OF THE COOPERATION CLAUSE AND OTHERS YET ALLEN'S MOTION FOR SUMMARY JUDGMENT DID NOT ADDRESS ANY OF THESE AFFIRMATIVE DEFENSES MUCH LESS ESTABLISH MATERIAL FACTS ENTITLING ALLEN TO JUDGMENT AS A MATTER OF LAW WITH RESPECT TO EACH OF THE DEFENSES.

Taggart v. Maryland Cas. Co., 242 S.W.3d 755 (Mo. App. 2008)

In re Estate of Murley, 250 S.W.3d 393 (Mo. App. 2008)

ITT Commercial Fin. Corp. v. Mid Am. Marine Supply Corp., 854 S.W. 2d 371 (Mo. 1993)

POINT III

THE TRIAL COURT ERRED IN GRANTING ALLEN SUMMARY JUDGMENT IN THE AMOUNT OF $16 MILLION BECAUSE DISPUTED QUESTIONS OF FACT REMAIN AS TO WHETHER ATAIN BREACHED ITS DUTY TO DEFEND BRYERS IN THAT ATAIN OFFERED TO DEFEND BRYERS, HIRED COUNSEL TO REPRESENT HIM, BRYERS REFUSED TO COOPERATE WITH COUNSEL, AND ENTERED INTO A §537.065 AGREEMENT TO CONSENT TO ENTRY OF JUDGMENT AGAINST HIM PRIOR TO THE PERSONAL INJURY ACTION EVEN BEING FILED.

Aetna Casualty & Surety Co. v. General Dynamics Corp., 968 F. 2d 707 (8th Cir. 1992)

POINT IV

THE TRIAL COURT EXCEEDED ITS JURISDICTION AND ERRED IN GRANTING SUMMARY JUDGMENT IN THE AMOUNT OF $16 MILLION DOLLARS TO PLAINTIFF BECAUSE RELIEF UNDER A STATUTORY WRIT OF GARNISHMENT IN AID OF EXECUTION IS LIMITED TO THE COLLECTION OF MONEY, GOODS, PROPERTY AND OTHER EFFECTS THAT THE GARNISHEE HAS A PRESENT OBLIGATION TO PAY THE DEFENDANT (DEBTOR) AND DOES NOT ALLOW FOR THE LITIGATION OF SEPARATE CLAIMS FOR DAMAGES IN THAT ATAIN HAD NO PRESENT OBLIGATION TO PAY THE DEFENDANT, THE POLICY DESCRIBED IN THE PROCEEDINGS (TO THE EXTENT SUCH POLICY EVEN EXISTED) ONLY HAD POLICY LIMITS OF $1 MILLION AND ALLEN'S CLAIM FOR "GARNISHMENT" IN THE AMOUNT OF $16 MILLION WAS BASED ON SEPARATE INDEPENDENT CLAIMS OF BREACH OF CONTRACT AND/OR BAD FAITH.

Landmark Bank of Ladue v. General Grocer Co., 680 S.W.2d 949 (Mo. App. 1984).

State ex rel. Gov't Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (Mo.App.1970)

Chapter 525 of the Missouri Statutes

Rule 90

POINT V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN IN THE AMOUNT OF $16 MILLION BECAUSE ATAIN'S EXPOSURE UNDER THE CONTRACT IS LIMITED TO THE POLICY LIMITS OF $1 MILLION ABSENT A SHOWING OF BAD FAITH IN THAT IN THE SUMMARY JUDGMENT BRIEFINGS ALLEN MADE NO SHOWING OF BAD FAITH AND TO THE EXTENT ANY SUCH SHOWING IS CLAIMED, THE DETERMINATIONS OF WHETHER BAD FAITH EXISTS ARE FACTUAL DETERMINATIONS THAT MUST BE RESOLVED BY THE JURY IN THIS MATTER.

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

Landie v. Century Indem. Co., 390 S.W.2d 558 (Mo. App. 1965)

Miller v. Secura Ins. And Mut. Co. of Wisconsin, 53 S.W.3d 152 (Mo. App. 2001)

POINT VI

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN BECAUSE SUMMARY JUDGMENT IS ONLY PERMITTED WHERE THERE ARE NOT GENUINE ISSUES AS THE MATERIAL FACTS IN THAT THE SUMMARY JUDGMENT RECORD WAS BASED DEMONSTRATES THAT MATERIAL QUESTIONS OF FACT EXIST AS TO: (1) THE EXISTENCE OF THE POLICY; (2) COVERAGE FOR THE CLAIMED LOSS UNDER SAID POLICY; (3) ATAIN'S "OPPORTUNITY" TO DEFEND THE UNDERLYING

TORT ACTION; AND (4) ATAIN'S AFFIRMATIVE DEFENSES INCLUDING FRAUD COLLUSION AND THE INSURED'S VIOLATION OF THE COOPERATION CLAUSE.

Fauvergve v. Garrett, 597 S.W. 2d, 252, 263 (Mo. App. 1980).

Strable v. Union Pacific Railroad Co., 396 S.W.3d 417, 425 (Mo. App. 2015)

Rule 74.04

POINT VII

THE TRIAL COURT ERRED IN DENYING ATAIN'S MOTION TO SET ASIDE THE UNDERLYING TORT JUDGMENT BECAUSE THE JUDGMENT WAS THE RESULT OF FRAUD, COLLUSION AND MISREPRESENTATION TO THE COURT IN THAT ALLEN AND BRYERS ENTERED A §537.065 AGREEMENT REQUIRING BRYERS TO CONSENT TO JUDGMENT, ALLEN AND BRYERS STIPULATED TO UNTRUE FACTS AND PRESENTED SUCH STIPULATION AND ADMISSIONS TO THE COURT WITH THE INTENT THAT THE COURT RELY ON SUCH REPRESENTATIONS TO FORECLOSE ATAIN FROM OPPORTUNITY TO LITIGATE THE FACTS RELATING TO ITS COVERAGE ISSUES UNDER THE SUBJECT POLICY.

Rule 74.06

Hewlett v. Hewlett, 845 S. 2d 717 (Mo. App. 1993)

State ex rel. Souri-Nebraska Express, Inc. v. Jackson, 876 S.W.2d 730 (Mo. App. 1994)

POINT VIII

THE TRIAL COURT ERRED IN DENYING ATAIN'S MOTION TO INTERVENE BECAUSE ATAIN HAD AN ABSOLUTE RIGHT TO INTERVENE IN THAT ATAIN HAD AN INTEREST IN THE UNDERLYING TORT PROCEEDINGS GIVEN BRYERS' ENTRY INTO A §537.065 AGREEMENT AND CONSENT TO JUDGMENT AND ATAIN, AS THE ALLEGED INSURER, WAS SO SITUATED AS NOW DETERMINED BY THE TRIAL COURT THAT THE FACTUAL DETERMINATIONS IN THE UNDERLYING ACTION IMPAIRED OR IMPEDED ATAIN'S ABILITY TO PROTECT ITS INTERESTS AS IT HAS NOT BEEN ALLOWED AN OPPORTUNITY TO LITIGATE THE FACTS RELATING TO COVERAGE UNDER THE SUBJECT POLICY.

In re Clarkson Kehrs Mill Transp. Dev. Dist., 308 S.W.3d 748 (Mo. App. 2010

Frost v. White, 778 S.W.2d 670 (Mo. App. 1989)

Rule 52.12

POINT IX

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF BECAUSE AWARDING PLAINTIFF $16 MILLION IN THIS WRIT OF GARNISHMENT IN AID OF EXECUTION HAS DEPRIVED ATAIN OF ITS CONSTITUTIONAL RIGHTS OF DUE PROCESS UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS IN THAT THE TRIAL COURT'S SUMMARY JUDGMENT REQUIRES ATAIN TO PAY $16 MILLION

IN A GARNISHMENT PROCEEDING BASED UPON A POLICY WHICH AT BEST ONLY CONTAINS INDEMNITY PROVISIONS UP TO THE $1 MILLION POLICY LIMIT AND SUCH SUMMARY JUDGMENT WAS ENTERED WITHOUT PROVIDING ATAIN ANY OPPORTUNITY TO LITIGATE THE FACTS CONTROLLING THE OBLIGATIONS OF THE PARTIES UNDER THE SUBJECT INSURANCE POLICY.

Belton v. Bd. of Police Comm'rs of Kansas City, 708 S.W.2d 131(Mo. banc 1986)

Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC, 361 S.W.3d 364 (Mo. 2012)

State ex rel. Nixon v. Peterson, 253 S.W.3d 77 (Mo. banc 2008)

Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution

Missouri Constitution Article 1, §§10, 18A, 19, 21 and 22A

ARGUMENT

STANDARD OF REVIEW

A. Summary Judgment Standard Regarding Point I, II, III, IV, V, VI & IX

When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. *Zaft v. Ely Lily*, 676 S.W.2d 241, 244 (Mo. *banc* 1984). Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. *Cherry v. City of Hayti Heights*, 563 S.W.2d 72, 75 (Mo. *banc* 1978). In summary judgment proceedings, the non-movant is accorded the benefit of all reasonable inferences from the record. *Martin v. City of Washington*, 848 S.W.2d 487, 489 (Mo. *banc* 1993).

This Court's review of the trial court's award of summary judgment is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid American Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. *Id*. (citing *E.O. Dorsch Electric Co. v. Plaza Construction Co.*, 413 S.W.2d 167, 169 (Mo. 1967)). The propriety of summary judgment is purely an issue of law. *Id*. Thus, because the trial court's judgment was found in on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment. *Id*. (citing *Elliott v. Harris*, 423 S.W.2d 831, 834 (Mo. *banc* 1968)).

B. Denial of Motion to Set Aside Standard Governing Point VII

A trial court's denial of a Motion to Set Aside a Judgment Based on Fraud is reviewed under an abuse of discretion standard. The trial court has broad discretion to grant or deny a motion to vacate a judgment, and its decision shall not be reversed unless the record clearly and convincingly proves an abuse of that discretion. *Clark v. Clark*, 926 S.W.2d 123, 126 (Mo.App.1996). An abuse of discretion is found where the ruling of the trial court is "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Bowman v. McDonald's Corp.*, 916 S.W.2d 270, 276 (Mo.App.1995). Where reasonable people may differ about the propriety of the action that was taken by court, no abuse of discretion will be found. *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988).

C. Denial of Motion to Intervene Standard Governing Point VIII

In reviewing the denial of a motion to intervene, an appellate court will affirm the denial of the motion unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *In re Liquidation of Prof'l Med. Ins. Co.*, 92 S.W.3d 775, 778 (Mo. banc 2003). Motions to intervene as a matter of right, are typically decided based upon the motion, pleadings, counsel's arguments, and suggestions in support or opposition to the motion. *Allred v. Carnahan*, 372 S.W.3d 477, 483 (Mo.App.2012). The circuit court usually does not hear any evidence or make any declarations of law. *Id*. Instead, the decision to grant or deny the motion "is one involving

application of the law." *Id*. However, "where intervention is sought as of right and the movant brings himself within the terms of [Rule 52.12(a)], the trial court has no discretion in the matter," and it must grant the motion. *Frost v. White*, 778 S.W.2d 670, 672 (Mo. App. 1989).

POINT I

THE TRIAL ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN BECAUSE ATAIN IS ENTITLED TO AN OPPORTUNITY TO LITIGATE FACTS RELATING TO THE COVERAGE ISSUES UNDER THE CLAIMED POLICY IN THAT THE TRIAL COURT RELIED UPON FACTUAL DETERMINATIONS IN THE UNDERLYING TORT ACTION WHICH ATAIN WAS DENIED AN OPPORTUNITY TO PARTICIPATE, THE FACTS REGARDING ASSAULT, BATTERY, INTENTIONAL ACTS, AND COURSE AND SCOPE OF EMPLOYMENT DETERMINED IN THE UNDERLYING TORT ACTION WERE NOT MATERIAL TO THAT ACTION, AN INHERENT CONFLICT EXISTS BETWEEN ATAIN AND BRYERS PREVENTING ATAIN FROM LITIGATING SUCH FACTS, AND A FINDING OF NEGLIGENCE DOES NOT PRECLUDE APPLICATION OF THE INTENTIONAL CONDUCT TYPE EXCLUSIONS IN THE POLICY.

In granting summary judgment in favor of Allen, the trial court held that Atain was precluded from litigating any of the facts determined in the underlying tort judgment. Specifically, the trial court, relying on *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700, 709 (Mo. *banc* 2011); *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64 (Mo. 2005); and *Columbia Casualty Co. v. HIAR Holding, LLC*, 411 S.W.3d 258 (Mo. *banc* 2013), held that Atain was "precluded from re-litigating any facts that were

determined as part of the judgment in the underlying case." [1] This is an incorrect statement of Missouri law. Atain acknowledges that Missouri law provides that where an insurer has been provided an opportunity[2] to defend its insured but elects not to defend, the insurer is bound to the determinations as to liability (i.e. fault or no fault) and the amount of damages. However, the law is not that any finding of fact made in the underlying judgment is binding upon the insurer with respect to the coverage issues under the policy.

"The underlying goal of issue preclusion, also known as collateral estoppel, is to promote judicial economy and finality in litigation." *Liberty Mutual Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 758 (8th Cir. 2003) (applying Missouri law). Missouri law recognizes that the doctrine of collateral estoppel/issue preclusion requires that the "precluded" issue was fully and fairly litigated, was essential to the earlier judgment, and that the earlier judgment was final and binding on the party against whom it was asserted. *Sangamon Associates Ltd. v. Carpenter 1985 Family Partnership Ltd.*, 280 S.W.3d 737 (Mo. App. W.D. 2009). More specifically stated, this Court has recognized the following elements to the application of the doctrine of collateral estoppel: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the

[1] It should be noted that the trial court quotes this language citing the *HIAR* case, but such language appears nowhere in the case.

[2] Whether Atain has been provided an "opportunity" to defend remains a question of fact that should have precluded summary judgment as discussed before.

party against whom estoppel is asserted was a party or was in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. See *James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001). The doctrine of collateral estoppel will not apply where doing so would be inequitable. *Id.*

James was decided on facts similar to those in this case and resulted in this Court's holding that the third factor in the collateral estoppel analysis had not been satisfied. In *James*, the insured was sued for negligently causing injuries resulting from an assault. *Id.* at 680-681. As in the present matter, the insured and the injured party in *James* entered a § 537.065 agreement whereby the injured party agreed to limit execution of the Judgment in the negligence suit to a specified policy of insurance. *Id.* at 681. After obtaining a Judgment, the injured party filed a garnishment action against the insurer to collect on it, arguing that the insurer was bound by the Judgment in the negligence suit and that collateral estoppel prevented the insurer from denying coverage. *Id.* at 681-682. The *James* Court, however, held that the insurer was not a party and was not in privity with any party to the underlying negligence suit, and it refused to apply collateral estoppel to the coverage issues against the insurer. *Id.* at 689. The *James* Court recognized that in the underlying negligence suit, both the insured and the injured party had identical interests in having the insured's conduct declared unintentional so as to shift the obligation of paying damages to the insurer. *Id.* In this regard, the *James* Court stated:

> "Both Paul and James had identical interests in having Paul's conduct declared unintentional so as to shift the obligation of paying damages to State Farm. State

> Farm's interest in relying on … the coverage exclusion were not aligned with either that of James or Paul in the civil action. As a result, the privity necessary to impose collateral estoppel against State Farm was absent. Finally, the inherent conflict between State Farm and Paul prevented State Farm from effectively asserting its policy defenses in the civil action until the garnishment proceeding. For all these reasons, it would be inequitable for State Farm to be collaterally estopped from asserting its coverage defenses in the garnishment proceeding." *Id.*

The *James* Court additionally acknowledged the inherent conflict between the insurer and the insured and recognized that such conflict prevented the insurer from effectively asserting its policy defenses in the civil action. *Id*. *James* is unlike the present case to the extent that *James* did not involve a situation where the parties committed fraud upon the Court in obtaining the personal injury judgment. *See also, Cox v. Steck*, 992 S.W.2d 221 (Mo. App. 1999) (Court held that despite a denial of coverage an insurer may contest the issue of defendant's conduct in a subsequent action on the policy)).

The Court in *Cox v. Steck*, 992 S.W.2d 221 (Mo. App. E.D. 1999), also similarly addressed the applicability of a claim of "issue preclusion" in a virtually identical context involving claims against an insurer. In so doing, the *Cox* Court, like this Court in *James*, held that an issue is not precluded where an insurer did not have a full and fair opportunity to litigate the fact in the underlying suit. *Id*. at 224. In *Cox*, the plaintiff sued the insured for injuries resulting from a bar fight. *Id*. at 222. The insurer initially undertook the defense of the personal injury lawsuit under a reservation of rights, but later withdrew its representation and denied coverage. *Id*. at 223. Pursuant to the terms of a section 537.065

agreement between the insured and the plaintiff, a short trial was held wherein the court was advised of the terms of the agreement and found that the defendant had negligently injured the plaintiff and entered Judgment in plaintiff's favor. *Id.*

In the subsequent garnishment action, the insurer argued that there was no coverage because of its policy's expected or intended injury exclusion. *Id.* The judgment creditor, however, argued that the underlying case found that the insured was negligent and that the insurer should be collaterally estopped from arguing that the acts were intentional. *Id.* On appeal, the *Cox* Court rejected the application of the doctrine of collateral estoppel or issue preclusion, holding that the insurer was not barred from litigating the issue of liability (negligent vs. intentional conduct) and policy coverage because it was unable to raise these issues in the underlying action. *Id.* The *Cox* Court recognized that the insurer must have the opportunity to litigate the issue of whether the insured's conduct fell within the policy's coverage. *Id.* at 223-224. Certainly, even if the insurer had undertaken the defense of the insured in the tort action, the insurer could not argue in that action that the insured's conduct was intentional as such argument does not further the insured's interests. Specifically, the *Cox* Court found that the insurer was not in privity with insured in the tort suit arising out of bar fight, and the insurer accordingly lacked a full and fair opportunity to litigate the issue of negligence vs. intentional conduct after withdrawing from the case. *Id.* Therefore, the insurer was not estopped from re-litigating whether the insured intentionally or negligently caused the injury. *Id.*

Atain cannot be bound by the judicial determinations in Allen's personal injury action against Bryers, specifically that the injury sustained by Allen was caused by an

unintentional accidental discharge of Bryers' weapon, resulted from the negligence of Bryers, did not arise from an assault and battery, Bryers' force was reasonable or that Bryers was in the course and scope of his employment. The doctrine of collateral estoppel or issue preclusion requires that the issue be "fully and fairly litigated." With respect to Atain, these issues were not "fully and fairly litigated." *James* and *Cox* are controlling. Atain was not provided an opportunity to fully and fairly litigate these issues. Atain was denied the opportunity to defend its insured. Atain was denied the opportunity to intervene. Moreover, even if Atain had been provided an opportunity to defend Bryers it could not have taken the position that Bryers' conduct was intentional, that Allen's injuries arose from an assault or battery, Bryers' force was unreasonable, or that Bryers was not in the course and scope of his employment at the time of the shooting, as these positions would be in direct conflict with Bryers' interests.

As indicated in *Cox* and *James*, Missouri law recognizes that Atain has an inherent conflict of interest with Bryers. That is, on the one hand, in an effort to claim coverage under Atain's policy such that Bryers is not subject to the policy's exclusions, Allen and Bryers presented false and fraudulent evidence to this Court that the shooting was not an assault and battery and was not intentional, but rather resulted from Bryers' mere negligence. Additionally, Allen and Bryers presented false evidence and testimony relating to Bryers' alleged employment with the Sheridan Apartments. Atain, on the other hand, maintains that the shooting was more than negligent; it was intentional and/or arose out of an assault or battery such that the shooting is not covered by the terms of the insurance policy and additionally did not occur in the course and scope of Bryers' alleged

employment with the Apartments. The *James* Court has recognized that in this situation, Bryers and Atain have an inherent conflict of interest such that Atain has an absolute right to contest the characterization of liability and particularly the nature of the conduct as being intentional and/or constituting an assault or battery in a subsequent action on the policy. *See James v. Paul*, 49 S.W.3d 678 (Mo. *banc* 2001). This right is even more absolute when the evidence, stipulations and testimony presented to the court in the underlying tort action was false and fraud upon the court has been committed.

In this case, the same principle applies. Given the inherent conflict of interest between Bryers and Atain created by their conflicting views of the nature of Bryers' conduct (intentional or negligent), Bryers refusal to allow Atain to provide a defense and the trial court's denial of Atain's Motion to Intervene, Atain cannot be bound by the factual determination in the underlying tort Judgment. Atain must be entitled to litigate the issue of the nature of Bryers' conduct (intentional or negligent) and other facts relating to the conduct alleged and the coverage defenses. As the *James* Court recognized, any other decision would be "inequitable". The trial court's application of collateral estoppel and refusal to allow Atain to litigate the facts controlling coverage under the policy is contrary to Missouri law and resulted in a substantial injustice to Atain.

Moreover, the trial court's determinations regarding the facts relating to the negligent vs. intentional conduct of Bryers, facts relating to whether an assault or battery occurred, facts relating to the reasonableness of the force exerted by Bryers, or facts relating to whether Bryers was in the course and scope of his employment at the time of the incident were not "essential" or material to the personal injury judgment. That is, the

tort action brought by plaintiff was for negligence. The only essential findings in a negligence claim are duty, breach and damages. *See Public Service Com'n of State v. Missouri Gas Energy*, 388 S.W.3d 221 (Mo. App. 2012). Whether the conduct of Bryers was intentional, constituted an assault or battery, or constituted reasonable force were not essential to that negligence action. Further, findings that Bryers was an employee of and in the scope and course of employment of Frank or the Apartments also were not essential. Neither Frank nor the Apartments were parties to the personal injury lawsuit; therefore, there is no need to find whether Bryers was "in the scope and course of employment". Thus, the doctrine of issue preclusion and collateral estoppel cannot be used against Atain in regards to these non-essential findings. *Sangamon Assoc.*, 280 S.W.3d at 737.

Even the cases cited by Allen in his summary judgment briefing recognize Atain's right to litigate facts relating to coverage under its policy, particularly in cases involving the applicability of an assault and battery exclusion or intentional acts exclusion. For instance, *Fostill Lake Builders, LLC v. Tudor Ins. Co.*, 338 S.W.3d 336 (Mo. App. 2011) specifically recognized the untenable situation an insurer is placed in when the applicability of the assault and battery exclusion or intentional acts exclusion is at issue. In *Fostill*, the Court acknowledged that in "*Cox* and *James*, the insurers were allowed to attack the underlying judgments collaterally even though they had refused to defend the respective insureds." *Id.* at 345. The *Fostill* Court further noted that:

> the insurers in those cases claimed that the intentional acts of the insureds served to exclude coverage under the policies at issue, which covered only negligent acts of the insureds. In both cases the insureds had agreed with the

> injured parties that they had acted negligently. The insurers in *Cox* and *James* could not have provided a defense to their respective insureds at trial because their claims that the insureds acted intentionally inherently conflicted with the insureds' positions that they acted only negligently.

Id. Unlike the insurers in *Cox* and *James* (and Atain in the present case), the insurer in *Fostill* did not face the same inherent conflict. In *Fostill*, the insurer's position was in line with the insured's best interest on liability and damages for the underlying tort claim. The *Fostill* Court noted that the insurers' claim of facts supporting no coverage would have favored both the insurer and the insured. *Id*. In other words, unlike *Cox*, *James*, and the present case, because the insured and the insurer in *Fostill* had identical interest in the factual determinations in the underlying tort action, the necessary privity existed to impose collateral estoppel.[3] Thus to whatever extent Allen and Bryers claim an insurer is barred

[3] However, it should be noted that in *Fostill*, the issues that the insured sought to collaterally estop the insurer from litigating were the equivalent of the insured's liability for the underlying tort and damages. Both the issues of liability and damages may be necessary determinations to the underlying action, where as in the present case, as well as *Cox* and *James*, facts relating to the applicability of coverage (i.e. whether the conduct was intentional, an assault and battery, reasonable force, in the course and scope of employment, etc. . .) were not necessary to the underlying tort action. Findings relating to these facts have no impact on the underlying action. That is, a finding of negligence can be made both in the presence of or absence of an assault or battery. Just because conduct

from litigating its coverage defenses because of refusal to defend (even if ultimately found to be unjustified), *Fostill*, *James*, and *Cox* all recognize the insurer's right to litigate facts relating to their coverage defenses, even in the face of contrary findings in the underlying tort claim.

None of the cases relied upon by Allen in his summary judgment briefing (or even the trial court in its Judgment) involve factual scenarios similar to the present case. For instance, Allen relies on *Assurance Co. of Am. v. Secura Ins. Co.*, 384 S.W.3d 224 (Mo. App. 2012). In *Assurance* there was no dispute between the insurer and the insured regarding the underlying facts giving rise to the loss. *Id*. at 230. Further, in *Assurance*, the insurer sought to attack the finding of liability against the insured, "not its obligation to provide coverage to its insured." *Id*. at 231. In *Assurance*, the Court recognized one particular factor that Plaintiff seems to ignore in attempting to impose collateral estoppel – *the requirement that the factual finding must be necessary to the underlying action*. *Id*. at 233. Specifically, the Eastern District noted that an insurer is only precluded from re-litigating facts that actually were determined in the underlying action ***AND*** were necessary to the judgment. *Id*.

Aside from a finding of liability on the negligence claim and damages, the factual statements contained in the Amended Judgment in the underlying tort claim were not "necessary to the judgment." In other words, the facts relating to the applicability of

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is negligent (failure to exercise ordinary care) does not negate the possibility that such conduct also rises to the level of intentional or the equivalent of an assault and battery.

coverage (i.e. whether the conduct was intentional, an assault and battery, reasonable force, in the course and scope of employment, etc. . .) were not necessary to the issues of liability and damages in the underlying tort action. The findings relating to these facts had no impact on the underlying action. That is, a finding of negligence can be made both in the presence of or absence of an assault or battery. Just because conduct is negligent (failure to exercise ordinary care) does not negate the possibility that such conduct also rises to the level of intentional or the equivalent of an assault and battery. Accordingly, the "necessary to the judgment requirement" for imposing collateral estoppel is not met in this case.

Allen, and ultimately the trial court, additionally rely on *Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700 (Mo. banc 2011), for the proposition that an insurer is not entitled to re-litigate facts determined in the underlying action. The Supreme Court's opinion in *Schmitz* is limited to a finding on the issue of whether an insurer is entitled to attack the reasonableness of the amount of damages awarded in the underlying tort judgment. The facts giving rise to the coverage issues were not at all disputed. The only dispute related to an interpretation of the policy in light of the uncontested facts. Accordingly, *Schmitz* lacks many of the important particulars that exist in this case as well as in *Cox* and *James* which give the insurer the right to litigate facts relating to the coverage issue. These particulars include the inherent conflict between the insurer and the insured, the lack of privity, a dispute regarding the underlying facts giving rise to the loss, and coverage facts that are not necessary to the liability and damage determinations. Accordingly, *Schmitz* is not controlling on the issues in this case.

Penn-Star Ins. Co. v. Griffey, 306 S.W.3d 591 (Mo. App. 2010), another case relied upon by Allen and cited by the trial court in its Summary Judgment, further supports Atain's right to litigate the coverage issues relating to the assault and battery exclusion and/or intentional acts exclusion. In *Penn-Star*, the Court noted that the insurer did not present any evidence in the declaratory judgment action to demonstrate an assault and battery or physical altercation, thereby expressly acknowledging the insurers right to present evidence applicable to the coverage defenses contrary to the stipulations and trial court findings in the underlying tort action. *Id*. at 603. Further, to the extent Allen claimed in his summary judgment briefing that *Penn-Star* states the "insurer is precluded from re-litigating any facts that were determined in the underlying case" such argument plainly ignores the requirement that such factual determinations must be "necessary to the judgment." *See Assurance*, 384 S.W.3d at 233. Lastly, in *Penn-Star*, unlike the present case, the insured tendered the defense of the lawsuit to the insurer after the lawsuit was filed and expressed a willingness to accept a defense under a reservation of rights. *Id.* In this case, Bryers never tendered the lawsuit to Atain. Bryers never expressed a willingness to accept a defense. In fact, Bryers refused to allow Atain to provide any defense, with or without a reservation of rights. (*L.F.* 56, 498, 501, 524-528, SJ Ex. P2 and P3).

Allen and the trial court also rely on *McCormack Baron Mgmt. Serv. v. American Guarantee & Liability Ins. Co.*, 989 S.W.2d 168 (Mo. banc 1999). *McCormack* is inapposite to the facts of this case. First, in *McCormack* there were no factual findings or underlying judgment made on the tort claim. *Id*. at 173. *McCormack* did not even involve a case where the issue of collateral estoppel or issue preclusion was asserted. *Id.* Rather,

there was no dispute about the facts giving rise to the underlying loss. The dispute was limited to the interpretation of the terms of the policy based upon the underlying facts. *Id*. Accordingly, *McCormack* has no application to the facts of the present matter.

Finally, Allen and the trial court rely extensively on *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258 (Mo. banc 2013). Aside from generally mentioning an insurance company's obligations with respect to defense and indemnity, the facts and circumstances in *HIAR* are inapposite of the facts and circumstances in the present case. Unlike *HIAR* , in this case the Bryers never requested a defense of Allen's personal injury claims. (*L.F.* 498). While Atain offered to defend against such claims, Bryers refused to allow Atain to defend. (*L.F.* 56, 488, 524-528, SJ Ex. P2 and P3). In fact, Bryers never even intended to defend and did not defend against the case. (*L.F.* 58). Rather, Bryers entered in a §537.065 agreement requiring him to consent to judgment against him before the tort action was even filed, and thus before any duty to defend could even arise. (*L.F.* 58, SJ Ex. D1). Bryers clearly did not want Atain to defend, with or without reservation. In *HIAR*, the insured requested a defense from the insurer on multiple occasions. *Id.* The insurer refused to provide a defense even under a reservation of rights, so the insured defended the lawsuit for 5 years.

This Court in *HIAR* , relying on *Schmitz*, highlighted that "[t]he standard is whether the insurer had the *opportunity* to control and manage the litigation, not whether the insurer had the *duty* to control and manage the litigation." *Id.* at 709–10 (emphasis in original). In this case, Atain did not have an opportunity to defend. Bryers did not tender the lawsuit to Atain. (*L.F.* 498). Bryers shut down and refused any defense offered by Atain. (*L.F.* 58

and Summary Judgment Ex. p. 2). Therefore, unlike *HIAR*, Atain did not have an opportunity to control or manage the litigation. The holding in *HIAR* and analysis included therein does not overrule or negate the holding in *James*, where this Court recognized and upheld the insurer's right to litigate facts related to coverage defenses in the context of an assault and battery case. *James*, 495 W. 3d at 682.

Finally, a review of the decision in *HIAR* demonstrates that an insurer, even in the face of a refusal to defend/indemnify, is entitled to litigate facts and issues relating to coverage under the policy. The facts controlling coverage were litigated in the coverage action *HIAR*, despite any findings to the contrary in the underlying tort action. It is fundamental that an insurer must be provided an opportunity to litigate the facts relating to its coverage defenses under the policy.

Further, it should be noted that even assuming that Allen established that his claims against Bryers were caused by negligence, and Atain is bound by such a finding, an assertion of negligence does not preclude the application of the assault and battery exclusion. In *Trainwreck West, Inc. v. Burlington Ins. Co.*, 235 S.W.3d 33 (Mo. App. E.D. 2007), the injured party, Ms. Neff, and the allegedly negligent party, Trainwreck, sought declaratory judgment that defendant's commercial general policy covered Ms. Neff's claims. Defendant argued that the assault and battery exclusion applied to Ms. Neff's claims, because the claim for negligence "arose out of an assault or battery." *Id.* at 43. The court stated "'[A]lthough the injuries may have been caused by the negligent acts of the defendant that does not necessarily mean that they did not arise out of an assault or battery.' Under the circumstances presented here, where a plaintiff's negligence claim arises out of

an assault or battery, the assault or battery exclusion bars coverage of the insured's negligence claim." *Id*. at 44 (quoting *Am. States Ins. Co. v. Herman C. Kempker Constr. Co.*, 71 S.W.3d 232, 236 (Mo. App. W.D. 2002))(internal citations omitted).

The exclusion at issue in *Trainwreck* uses the phrase "arising out of an assault or battery." *Id.* Similarly, the Atain policy uses similar language, providing an exclusion for "Assault or Battery, whether or not caused by or arising out of negligent, reckless or wanton conduct…" (*See* Statement of Uncontroverted Fact No. 29). As such, regardless of whether Allen can establish that the injuries were caused by negligence, the injuries still would be deemed to have arisen out of an assault and battery, and therefore subject to this exclusion. Accordingly, the trial court erred in granting summary judgment to Allen. The trial court's Judgment must, therefore, be reversed.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN BECAUSE ALLEN FAILED TO ESTABLISH THAT EACH OF ATAIN'S AFFIRMATIVE DEFENSES FAILED AS A MATTER OF LAW IN THAT ATAIN PLED AFFIRMATIVE DEFENSES INCLUDING FRAUD, COLLUSION, RESCISSION, VOID POLICY, AND VIOLATION OF THE COOPERATION CLAUSE AND OTHERS, YET ALLEN'S MOTION FOR SUMMARY JUDGMENT DID NOT ADDRESS ANY OF THESE AFFIRMATIVE DEFENSES MUCH LESS ESTABLISH MATERIAL FACTS ENTITLING ALLEN TO JUDGMENT AS A MATTER OF LAW WITH RESPECT TO EACH OF THE DEFENSES.

The present case involves the trial court's award of summary judgment to Allen, the "claimant" in the present garnishment action. This is significant in that a movant's right to judgment as a matter of law differs significantly depending on whether the movant is a "claimant" or a "defending party". *ITT Commercial*, 854 S.W.2d at 381. A "claimant" must establish that there is no genuine dispute as to those material facts upon which the "claimant" would have the burden of persuasion at trial. *Id.* Additionally, when a defendant has raised affirmative defenses, the claimant's right to judgment depends just as much on the non-viability of the affirmative defenses as it does on the viability of the claimant's claim. *Id.* This Court has recognized that it does not matter that the non-movant will bear the burden of persuasion on the issue at trial. *Id*. Thus, in order for a "claimant", such as Allen, to meet the burdens imposed by the summary judgment rules, Allen must not only establish that there is no genuine dispute as to the material facts upon which Allen

has the burden on his affirmative claims for relief, but also must establish that each of Atain's affirmative defenses fail as a matter of law. *Id.*

A. Atain's Affirmative Defenses

In the present Writ of Garnishment in Aid of Execution, Atain filed its Answer to Allen's Exceptions, Objections and Denials setting forth a number of its affirmative defenses. Atain's affirmative defenses included fraud, collusion, rescission, void policy, failure to cooperate and comply with conditions precedent to coverage as well as numerous policy defenses and constitutional challenges.

1. Void Policy / Rescission Defenses

Atain alleged that the subject policy upon which Allen's garnishment action was based was void and had been rescinded based upon material misrepresentations made by the applicant, John Frank. (*L.F.* 134-140) See Atain's Point V for complete discussion of the facts supporting Atain's rescission and void policy affirmative defenses.

2. Fraud and Collusion Defenses

Additionally, Atain's Answer included affirmative defenses that the §537.065 agreement and subsequent Judgment in the underlying action was the result of fraud and/or collusion between Allen and Bryers. (*L.F.* 134-140). In this regard, the facts set forth by Atain in responding to Allen's Motion for Summary Judgment demonstrate that Allen and Bryers made an agreement under §537.065 which shielded Bryers from criminal prosecution and allowed Allen and Bryers to present false evidence to the trial court to create coverage under the Atain policy where coverage would not otherwise exist. Ultimately, Allen and Bryers made false representations to the trial court in the underlying

tort action relating to the facts and circumstances of the shooting. These false misrepresentations were material in that it was the only evidence presented to the trial court on the issue. In presenting such false testimony, stipulations, admissions, evidence and proposed judgment with false findings to the trial court, Bryers undoubtedly knew such information was false, and Allen either knew such information was false or at a minimum lacked knowledge of its truth or falsity.

In presenting the false evidence and proposed judgment relating thereto to the trial court, Allen and Bryers intended that such testimony, stipulations and admissions be utilized by the trial court in its Entry of Judgment in the personal injury action. The trial court had no idea or reason to believe the evidence presented by Allen and Bryers at the trial was false or fraudulent. The trial court unfortunately relied upon such false evidence and the fraudulent judgment proposed in entering Judgment in the tort action. (*L.F.* 102-104). The trial court, as the trier of fact in the tort action, had the right to rely on evidence presented believing it to be true and the proposed fraudulent judgment proffered. As a result of such false representations and fraudulent evidence, the trial court entered Judgment in the amount of $16 million on the basis of a negligence claim and made 18 separate Findings of Fact (as proposed by Allen and Bryers) in reliance upon such false and fraudulent evidence and representations. (*L.F.* 102-104). Allen and Bryers now seek to rely upon such fraudulent Judgment in the present garnishment proceeding to deprive Atain of its constitutional rights of due process and a fair trial, including an opportunity to litigate the facts relating to its coverage defenses.

3. Failure to Cooperate and Comply with Conditions Precedent

In addition to the defenses of rescission, void policy, fraud and collusion, Atain's Answer alleged that Bryers failed to comply with the conditions precedent to coverage and particularly failed to cooperate with Atain as required by the subject insurance policy. (*L.F.* 134-140). In responding to Allen's Motion for Summary Judgment, Atain set forth facts demonstrating Bryers failure to comply with the conditions precent to coverage. These facts demonstrate that upon notice of the claim, Atain immediately sent correspondence to Bryers. (*L.F.* 188-196). Atain explained that if a lawsuit is filed against Bryers, Atain would provide him a defense. (*L.F.* 195). The correspondence reminded Bryers that if a claim was made or a lawsuit was brought against him, he needed to immediately send copies of any demands, notices, summons or legal papers to Atain. (*L.F.* 189).

Then, sometime prior to November 8, 2012 and before the tort action was filed, Allen and Bryers agreed to enter a 537.065 agreement. (*L.F.* 58, SJ Ex. D1). The §537.065 agreement between Allen and Bryers required Bryers to consent to entry of judgment against him in the tort action to be filed by Allen. (*L.F.* 58). When asked about the 537.065 agreement, Bryers asserted his Fifth Amendment rights to the following questions:

- Rather than allowing Atain Insurance Company to defend you in [the tort] case, you entered into an agreement with Mr. Allen -- rather than giving notice and an opportunity to Atain Insurance Company to defend you in that personal injury action, . . .isn't that correct?

- And so rather than defending yourself against those criminal charges, you agreed to an agreement with Mr. Allen that you would allow a judgment to be taken against you. . .?
- And in terms of the judgment, you didn't care what was said in the judgment as long as there would be no criminal charges resulting from it . . .?
- You would agree with me that you entered into the agreement with Mr. Allen without giving any notice to our insurance company not only of the lawsuit, but also of your intent to enter into such agreement . . . ?
- In terms of the evidence that was going to be presented to the Court, it was simply going to be evidence to establish a claim of negligence rather than the intentional conduct that actually gave rise to this injury . . . ?
- And it was the intentional conduct and the assault and battery that you committed on Mr. Allen that you and Mr. Allen stipulated to would not be a part of that underlying case. . . ?

(*L.F.* 232-239, 307, 600).

After Allen filed his personal injury action, Atain discovered the lawsuit, despite Bryers not providing notice to Atain, and hired an attorney to defend Bryers. (*L.F.* 498). Despite Atain's offer to provide a defense to Bryers, he refused to cooperate. (*L.F.* 56, 498, 524-528; SJ Ex. P2 and P3). The attorney retained to represent Bryers made multiple attempts to contact Bryers to discuss the lawsuit and his defense. (SJ Ex. P3). Ultimately, on January 4, 2013, as the deadline for filing an answer to the lawsuit was near, the attorney hired to represent Bryers filed an Answer to protect his interests indicating a lack of

information to respond to the allegations. (*L.F.* 50-55, SJ Ex. P3). On January 10, 2013 Bryers advised the attorney hired to represent him that he would not accept the defense of the case and instructed the attorney to withdraw. (SJ Ex. P2). The attorney hired by Atain to represent Bryers withdrew on January 11, 2013. (*L.F.* 56). On January 16, 2013, Bryers withdrew the Answer filed by the prior attorney and filed notice of his "consent to entry of judgment against him consistent with the 537.065 agreement" he had entered with Allen. (*L.F.* 58).

4. Policy Coverage Defenses

Atain additionally alleged that coverage for the claims against Bryers were not covered as 1) no occurrence had taken place; 2) Bryers was not an insured under the policy; and 3) the claim by Allen against Bryers was excluded by the express terms of the policy including the a) assault and battery exclusion, and b) intentional acts exclusion.

B. Allen's Motion for Summary Judgment

Allen's Motion for Summary Judgment did not address any of Atain's affirmative defenses. Rather, Allen simply sought summary judgment from the Court claiming that the subject insurance policy obligated Atain to defend Bryers in the underlying tort action and further obligates Atain to indemnify Bryers for the full amount of the Judgment, despite the $1 million policy limit. Allen's Motion does not address Atain's affirmative defenses of fraud, collusion, rescission, void policy, or violation of the cooperation clause or conditions precedent to coverage.

For Allen to be entitled to summary judgment, he must negate every affirmative defense asserted by Atain in order to prevail on summary judgment. *ITT Commercial*

Finance, 854 S.W.2d at 381; *Taggart v. Maryland Cas. Co.*, 242 S.W.3d 755 (Mo. App. 2008). Allen's Motion did not assert any facts or make argument regarding any of these affirmative defenses. Despite the fact that Atain made arguments in its Motion for Summary Judgment and Motion to Reconsider that plaintiff failed to address any of Atain's affirmative defenses, much less negate each and every one of them, the trial court granted summary judgment in favor of Allen, which Judgment also did not address Atain's affirmative defenses.

The claims in the present case are similar to *Taggart*, 242 S.W.3d 755. Like the present case, *Taggart* was a garnishment action where the trial court granted summary judgment against the insurer despite the plaintiffs' failure to address the insurer's affirmative defenses in their summary judgment motion. The *Taggart* court reversed the summary judgment because plaintiffs did not allege any facts that negated Maryland Casualty's affirmative defenses that the 537.065 agreement was unreasonable and resulted from fraud or collusion. *Id*. In this case, plaintiff not only failed to address Atain's unreasonable 537.065 agreement defense and defenses of fraud and collusion, plaintiff failed to address any of Atain's affirmative defenses. Accordingly, the trial court erred in granting summary judgment as Allen failed to meet the burden imposed upon a claimant seeking Summary Judgment. Therefore, the trial court's Summary Judgment must be reversed.

POINT III

THE TRIAL COURT ERRED IN GRANTING ALLEN SUMMARY JUDGMENT IN THE AMOUNT OF $16 MILLION BECAUSE DISPUTED QUESTIONS OF FACT REMAIN AS TO WHETHER ATAIN BREACHED ITS DUTY TO DEFEND BRYERS IN THAT ATAIN OFFERED TO DEFEND BRYERS, HIRED COUNSEL TO REPRESENT HIM, BRYERS REFUSED TO COOPERATE WITH COUNSEL, AND ENTERED INTO A §537.065 AGREEMENT TO CONSENT TO ENTRY OF JUDGMENT AGAINST HIM PRIOR TO THE PERSONAL INJURY ACTION EVEN BEING FILED.

To begin, as set forth in Point IV, it was improper for the Court to address any claim by Allen for breach of contract. The dictates of the present procedural garnishment action prohibit the litigation of these collateral matters. However, because the trial court made such a finding, Atain offers the following additional challenge to the trial court's summary judgment.

The summary judgment briefings indicate that a clear dispute exists as to whether Atain had an "opportunity" to defend the underlying tort action. In this regard, Allen's Motion for Summary Judgment offers no facts establishing that Atain had an opportunity to defend the underlying tort action. Instead, the summary judgment briefings and evidence presented at the hearing on the Motion for Summary Judgment plainly negates any argument that Atain had an "opportunity" to defend, or at a very minimum create a question of fact, regarding whether Atain had an "opportunity" which cannot be resolved by summary judgment.

The evidence presented by Atain in responding to Allen's Motion for Summary Judgment included the following facts:

Upon receiving notice of the claim, Atain immediately sent correspondence to Bryers explaining that if a lawsuit is filed against Bryers, Atain would provide him a defense. (*L.F.* 188-196). The correspondence advised Bryers that if a claim was made or a lawsuit was brought against him, he needed to immediately send copies of any demands, notices, summons or legal papers to Atain. (*L.F.* 189).

Allen and Bryers agreed to enter a 537.065 agreement sometime prior to November 8, 2012 and before the tort action was filed (*L.F.* 58, SJ Ex. D1). The §537.065 agreement between Allen and Bryers required Bryers to consent to entry of judgment against him in the tort action to be filed by Allen. (*L.F.* 58). When asked about the 537.065 agreement, Bryers asserted his Fifth Amendment rights to the following questions:

- Rather than allowing Atain Insurance Company to defend you in [the tort] case, you entered into an agreement with Mr. Allen -- rather than giving notice and an opportunity to Atain Insurance Company to defend you in that personal injury action, . . .isn't that correct?
- And so rather than defending yourself against those criminal charges, you agreed to an agreement with Mr. Allen that you would allow a judgment to be taken against you. . .?
- And in terms of the judgment, you didn't care what was said in the judgment as long as there would be no criminal charges resulting from it . . .?

- You would agree with me that you entered into the agreement with Mr. Allen without giving any notice to our insurance company not only of the lawsuit, but also of your intent to enter into such agreement . . . ?
- In terms of the evidence that was going to be presented to the Court, it was simply going to be evidence to establish a claim of negligence rather than the intentional conduct that actually gave rise to this injury . . . ?
- And it was the intentional conduct and the assault and battery that you committed on Mr. Allen that you and Mr. Allen stipulated to would not be a part of that underlying case. . . ?

(*L.F.* 232-239, 307, 600).

After Allen filed his personal injury action, Bryers did not provide notice of the suit to Atain. (*L.F.* 498). Atain discovered the lawsuit on its own accord, and hired an attorney to defend Bryers. (*L.F.* 498). Despite Atain's attempt to provide a defense to him, Bryers refused to cooperate. (*L.F.* 56, 498, 524-528; SJ Ex. P2 and P3). The attorney retained to represent Bryers made multiple attempts to contact Bryers to discuss the lawsuit and his defense. (SJ Ex. P3). Ultimately, on January 4, 2013, the attorney hired to represent Bryers filed an Answer to protect his interests indicating a lack of information to respond to the allegations. (*L.F.* 50-55, SJ Ex. P3). On January 10, 2013, Bryers advised the attorney that he would not accept the defense and instructed the attorney to withdraw. (SJ Ex. P2). The attorney hired by Atain withdrew on January 11, 2013. (*L.F.* 56). On January 16, 2013, Bryers withdrew the Answer filed by the attorney and filed notice of his "consent

to entry of judgment against him consistent with the 537.065 agreement" he had entered with Allen. (*L.F.* 58).

These facts negate Allen's claim that Atain had an opportunity to defend Bryers. Allen and Bryers entered a § 537.065 agreement before the tort action was even filed. It is the filing of the tort action that triggers the duty to defend. Accordingly, at the time the duty to defend was triggered, Bryers had already agreed to consent to judgment against him. As such, Bryers did not tender the subject lawsuit to Atain and refused to allow or cooperate with the counsel hired by Atain to defend him. Atain had no "opportunity" to defend Bryers.

The insuring agreement of the subject policy provides that Atain:

> "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' … to which this insurance applies. [Atain] will have the right and duty to defend the insured against any 'suit' seeking those damages. However, [Atain] will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' … to which this insurance does not apply."

With respect to the term "suit" as used in the insuring agreement, the Atain policy defines the term as "a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged". The plain language of the Atain policy demonstrates that the duty to defend under the contract does not arise until a civil proceeding is initiated.

Policy provisions similar to the insuring agreement and definition of "suit" in this case have been interpretted by various courts reaching the same conclusion. Specifically,

in *Aetna Causalty & Surety Co. v. General Dynamics Corp.*, 968 F. 2d 707 (8th Cir. 1992) the Eighth Circuit, applying Missouri law found that the term suit meant the filing of a civil action and therefore no duty to defend can arise until after the suit is file. *Id.*

In the present case, the underlying tort action was not filed until December 4, 2012. Bryers had entered into a §537.065 agreement agreeing to consent to judgment against him in the tort action, prior to the filing of such action. Despite such agreement, Atain offered to provide Bryers a defense. Bryers, however rejected such offer. These facts negate Allen's claim that Atain had an "opportunity" to defend Bryers, and at a minimum, demonstrate that a dispute exists as to whether Atain breached its duty to defend Bryers thereby precluding Allen's right to judgment as a matter of law. Accordingly, the trial court's award of Summary Judgment must be reversed.

POINT IV

THE TRIAL COURT EXCEEDED ITS JURISDICTION AND ERRED IN GRANTING SUMMARY JUDGMENT IN THE AMOUNT OF $16 MILLION DOLLARS TO PLAINTIFF BECAUSE RELIEF UNDER A STATUTORY WRIT OF GARNISHMENT IN AID OF EXECUTION IS LIMITED TO THE COLLECTION OF MONEY, GOODS, PROPERTY AND OTHER EFFECTS THAT THE GARNISHEE HAS A PRESENT OBLIGATION TO PAY THE DEFENDANT (DEBTOR) AND DOES NOT ALLOW FOR THE LITIGATION OF SEPARATE CLAIMS FOR DAMAGES IN THAT ATAIN HAD NO PRESENT OBLIGATION TO PAY THE DEFENDANT, THE POLICY DESCRIBED IN THE PROCEEDINGS (TO THE EXTENT SUCH POLICY EVEN EXISTED) ONLY HAD POLICY LIMITS OF $1 MILLION AND ALLEN'S CLAIM FOR "GARNISHMENT" IN THE AMOUNT OF $16 MILLION WAS BASED ON SEPARATE INDEPENDENT CLAIMS OF BREACH OF CONTRACT AND/OR BAD FAITH.

The present action against Atain was initiated through a Writ of Garnishment in Aid of Execution under Rule 90 of the Missouri Rules of Civil Procedure and/or Chapter 525 of the Missouri Statutes. Under the Missouri Rules and Statutes, relief this type of garnishment is limited to the property that is the "subject of the garnishment." Rule 90; RSMo. §525.010. Specifically, Rule 90.01 defines the property subject to garnishment as "all goods, personal property, money, credits, bonds, bills, notes, checks, choices in action, or other effects of debtor and all debts owed to debtor," and §525.040 similarly limits

garnishment to "personal property, money, rights, credits, bonds, bills, notes, drafts, checks or other choses in action of the defendant in the garnishee's possession or charge, or under his or her control" between the time of service of the garnishment and the return date.

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. *Landmark Bank of Ladue v. General Grocer Co*., 680 S.W.2d 949 (Mo. App. 1984). Because this remedy is a creature of statute and derogation of the common law, strict compliance with all the requirements formally imposed by statutes and now enjoined by civil rules is essential to confirm and support jurisdiction in a garnishment proceeding. *Id.* As an incidental remedy, garnishment was never intended to enable a plaintiff to enforce claims held by him directly against the garnishee. *Id*. Rather, the test of a garnishee's liability, as the Missouri courts have recognized, is measured by its liability to the defendant. *Tom Houlihan's Menswear v. Wilkerson*, 407 S.W.2d 58, 60 (Mo. App. 1966). Specifically, it has long been recognized under Missouri law that "if the garnishee owes the defendant nothing, then the garnishee is not liable to the defendant's creditor". *Id.* Missouri law is clear that a garnishee can only be compelled to deliver assets of the defendant to plaintiff if the garnishee is indebted to the defendant. *Frickleton v. Fulton*, 626 S.W.2d 402 (Mo. App. 1981).

The determination of whether a garnishee owes a defendant/judgment creditor is made at the time of the issuance of a writ of garnishment. *Id*. That is, under the strict dictates of Supreme Court Rule 90, Plaintiff's recovery under a writ of garnishment is limited to present obligations. In other words, a garnishor may only reach indebtedness

which the garnishee has a present obligation to pay the judgment debtor at the time of service of the writ of garnishment, and nothing beyond that. *Winaker v. Physician's Multi Specialty Group, Inc*., 814 S.W.2d 294 (1991). In this case, Atain was not indebted and had no present obligation to pay Bryers, the judgment debtor at the time of service. At the time the Writ of Garnishment in Aid of Execution was filed through the return date on the Summons, Atain had no obligation to pay Bryers, and undoubtedly had no obligation to pay Bryers $16 million. Certainly disputes existed regarding the rights and duties of the parties under the insurance contract, but even assuming those issues resolved in Bryers' favor, that resolution had not only not yet occurred, but more importantly such obligation to pay under the terms of the claimed contract is limited to the $1 million policy limit set forth in such contract. At no point prior to or during the "garnishment period" did Bryers (or Allen) file an independent action asserting tort claims or breach of contract claim necessary to expose Atain beyond the $1 million policy limit, much less had a resolution been reached on such claims triggering a present obligation of Atain to make payment to Bryers during the garnishment period.

As long ago as 1876, the Missouri Supreme Court said, in *Hearne et al. v. Keath et al.*, 63 Mo. 84, 89 that "[t]he debt for which an attachment may issue must possess an actual character and not be merely possible, and dependent upon a contingency which may never happen." Since that time, the Missouri Courts have consistently held that to be the subject of a garnishment the debt must be certain and not contingent. *Holker v. Hennessy*, 44 S.W. 794; *Potter v. Whitten*, 155 S.W. 80; *Raithel v. Hamilton-Schmidt Surgical Co*., 48 S.W.2d 79 (Mo. App 1932). The indebtedness must be absolutely due as a money demand to be

subject to garnishment. *Scales v. Southern Hotel Co*., 37 Mo. 520 (Mo. 1866); *Raithel, supra*; *Reinhart v. Empire Soap Co*., 33 Mo.App. 24 (1888). Thus it is a long established rule in this state that a mere liability of a garnishee to an action on the part of the defendant for damages not liquidated, either in tort or for breach of contract, is not subject to garnishment. *Ransom v. Hays*, 39 Mo. 445; *Peycke Bros. Commission Co. v. Sandstone Co-op. Co*., 191 S.W. 1088*; South Central Securities Co. v. Vernon*, 54 S.W.2d 416. Even more specifically, in *State ex rel. Gov't Employees Ins. Co. v. Lasky*, 454 S.W.2d 942 (Mo.App.1970), the court held that an insurer's obligations to defend and/or indemnify the defendant were not "debts" within the meaning of the garnishment statute. *Id*.

In this case, at the time Allen requested the writ of garnishment, Atain owed no debt to Bryers, the judgment creditor. Atain did not possess any property of Bryers "subject to garnishment." At best, Atain had once issued a policy of insurance to Frank, the owner of the apartments, which policy was void and rescinded based upon material misrepresentations and therefore not subject to garnishment. Even assuming such policy was "subject to garnishment", any garnishment under Rule 90 and Chapter 525 must be limited to the policy limits stated in the claimed insurance contract, $1 Million, subject to establishing that coverage under the claimed policy is triggered for the loss. Any "extra-contractual liability" based upon claims of tort or breach of contract liability is not subject to garnishment under Missouri law, and as such, the trial court lacked jurisdiction to enter Judgment in the amount of $16 Million against garnishee Atain.

In order for any possibility to exist to recover in excess of the $1 Million policy limit in any type of action, it must be established that Atain breached its contract for

insurance or committed some other tortious action, i.e. bad faith. Missouri law is clear that the confines of a garnishment action under Rule 90 or Chapter 525 do not allow for the litigation of such tort and contract claims in the garnishment proceeding. Rather, the statutory garnishment proceeding is limited to money or other property actually held, possessed and/or controlled by the garnishee. *Landmark Bank*, 680 S.W.2d 949. A separate and independent action for tort or breach of contract against a garnishee does not fall within the narrow confines of a garnishment in aid of execution. *Id*. The court lacks jurisdiction over any independent claims and cannot award the relief requested. *Id*.

In *Landmark Bank*, the garnishor attempted to litigate issues regarding an alleged breach of fiduciary duty on the part of the garnishee. *Id*. The *Landmark Bank* Court recognized that such allegations constituted a separate and independent action. *Id*. The court continued by noting that litigation of such claim requires a proceeding "more elastic and comprehensive than a garnishment." *Id*. The Court held that a garnishment under Rule 90 or Chapter 525 is purely an incidental remedy and does not allow for the litigation of separate claims for damages. *Id*. Like the *Landmark Bank* Court, the trial court lacked jurisdiction to litigate any issue outside of whether Atain as garnishee held, possessed, or controlled any property or money of Bryers. The trial court's Judgment finding alleged breaches by Atain and imposing liability beyond the four corners of the insurance policy exceeds the parameters of a statutory garnishment action and the jurisdiction of the court and must be vacated.

POINT V

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN IN THE AMOUNT OF $16 MILLION BECAUSE ATAIN'S EXPOSURE UNDER THE CONTRACT IS LIMITED TO THE POLICY LIMITS OF $1 MILLION ABSENT A SHOWING OF BAD FAITH IN THAT IN THE SUMMARY JUDGMENT BRIEFINGS ALLEN MADE NO SHOWING OF BAD FAITH AND TO THE EXTENT ANY SUCH SHOWING IS CLAIMED, THE DETERMINATIONS OF WHETHER BAD FAITH EXISTS ARE FACTUAL DETERMINATIONS THAT MUST BE RESOLVED BY THE JURY IN THIS MATTER.

To begin, as set forth in Point IV, it is improper for the Court to enter Judgment in the amount of $16 million given the limited jurisdiction of the Court in a garnishment proceeding. However, given the trial court's Judgment, in addition to Atain's argument under Point IV, Atain offers the following challenge to the trial court's Summary Judgment.

The trial court held that Atain is liable for the full amount of the $16 Million Judgment in the tort action, despite the $1 Million limit of liability in the policy at issue. In reaching such conclusion, the trial court erroneously interprets *Columbia Cas. Co. v. HIAR Holdings, LLC*, 411 S.W.3d 258 (Mo. Banc 2013) to stand for the proposition that an insurer that fails to defend its insured is automatically obligated to indemnify the insured for the full amount of the judgment. This interpretation is not in accord with Missouri law.

First, the duties to defend and indemnify are separate and distinct from one another. Simply because a policy obligates an insurer to provide a defense does not trigger the duty to indemnify. Rather, the duty to indemnify is determined separate and apart from the duty to defend. The duty to defend arises when there is a mere possibility of coverage under the policy, whereas the duty to indemnify is not triggered until it is established that there is actual coverage under the policy.

To begin, it should be noted that *HIAR* was a declaratory judgment action, not a statutory garnishment action like the present matter. Accordingly, because the present case is limited to the statutory confines of Chapter 525 and Rule 90 as discussed in Point IV, *HIAR* has no application to this case.

Moreover, *HIAR* does not hold that the mere failure to defend under the policy triggers and insurer's obligation to indemnify for the full amount of the judgment despite its policy limits. A plain reading of the holding in *HIAR* demonstrates that its finding of liability in excess of the policy limits was based upon an underlying finding of bad faith that was not challenged in the appeal. Particularly, in the summary judgment at the trial court level, the trial court found that the insurer acted in bad faith in refusing to settle within the policy limits. (See *HIAR* Summary Judgment Order included in Appellants Appendix). This finding was not challenged on appeal and formed the basis of this Court's affirmance of the trial court's award of damages in excess of the policy limits. In particular, the *HIAR* Court explained that "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." This

finding of bad faith is often overlooked in *HIAR*. It is the finding of bad faith that exposes the insurer to tort liability beyond the limits set forth in the contract. *See Id.*

It has long been the law in Missouri that in cases where an insurer breaches the duty to defend, the insurer is liable to its insured to pay any judgment recovered against him up to the limits of the policy, plus attorney fees, costs, interest and any other expenses incurred by the insured in conducting the defense of the suit which it was the obligation of the company to perform under its contract. *Landie v. Century Indem. Co.*, 390 S.W.2d 558 (Mo. App. 1965); *Miller v. Secura Ins. And Mut. Co. of Wisconsin*, 53 S.W.3d 152 (Mo. App. 2001). Accordingly, while Atain denies any breach of the duty to defend as previously set forth in this brief, under Missouri law, any recovery against Atain for a breach of the duty to defend on the underlying tort judgment is limited to the policy limits, plus attorneys fees, costs, interest and other expenses incurred. Atain cannot be liable for the full amount of the underlying tort judgment in excess of the $1 Million policy limit based upon an alleged breach of contractual duty to defend.

In this case, Allen made no showing of "bad faith" on the part of Atain. While Allen alleged that Atain was obligated to defend and refused to do so (which is denied by Atain), Allen offered no evidence establishing "bad faith" on the part of Atain. The trial court also did not find any bad faith, but rather as indicated above determined that Atain was obligated to pay the full amount of the judgment based upon its refusal to defend. Moreover, to the extent the trial court's Judgment could be construed to make any such finding on the tort of bad faith (which as previously argued is not properly decided in this action), such finding invades the province of the jury as disputed issues of fact exist as to the rights and

obligations of the parties under the contract, and the conduct of the parties following the alleged loss. These disputed issues of fact include the opportunity and obligation to defend under the contract, Bryers failure to cooperate under the policy, the obligation to indemnify under the contract, and any alleged tortious conduct in refusing to settle or otherwise act in bad faith. Atain is entitled to have these factual issues determined by a jury. Accordingly, the trial court's summary judgment must be reversed.

POINT VI

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ALLEN BECAUSE SUMMARY JUDGMENT IS ONLY PERMITTED WHERE THERE ARE NOT GENUINE ISSUES AS THE MATERIAL FACTS IN THAT THE SUMMARY JUDGMENT RECORD WAS BASED DEMONSTRATES THAT MATERIAL QUESTIONS OF FACT EXIST AS TO: (1) THE EXISTENCE OF THE POLICY; (2) COVERAGE FOR THE CLAIMED LOSS UNDER SAID POLICY; (3) ATAIN'S "OPPORTUNITY" TO DEFEND THE UNDERLYING TORT ACTION; AND (4) ATAIN'S AFFIRMATIVE DEFENSES INCLUDING FRAUD COLLUSION AND THE INSURED'S VIOLATION OF THE COOPERATION CLAUSE.

In granting summary judgment, the trial court made "findings of fact." The fact that the trial court is making "findings of fact" on summary judgment negates Allen's right to judgment as a matter of law. "Findings of Fact … are not necessary or proper on the granting of a Motion for Summary Judgment." *Fauvergve v. Garrett*, 597 S.W. 2d, 252, 263 (Mo. App. 1980). Only undisputed facts can serve as the basis for summary judgment. Rule 74.04(c)(6). *Id*. The findings of fact made by the trial court were not undisputed. In fact, many of the trial court's findings of fact are are not supported by the summary judgment record.

The summary judgment record in this matter is limited to Allen's Motion for Summary Judgment, his Suggestions in Support of such Motion and accompanying

exhibits and Atain's Suggestions in Opposition to Allen's Motion and accompanying exhibits. Allen's Motion for Summary Judgment set forth 26 statements of alleged uncontroverted facts.[4] Three of Allen's alleged statement of uncontroverted facts, specifically, paragraphs 17, 13 and 22 are not supported by any citation to the record or other evidence and therefore must be disregarded.

Additionally, Allen supports another 4 of his alleged statement of uncontroverted facts by unauthenticated letters written by his counsel. Missouri courts have long held that unauthenticated letters offered as exhibits are inadmissible as hearsay. *Strable v. Union Pacific Railroad Co.*, 396 S.W.3d 417, 425 (Mo. App. 2015). In *Strable*, the non-movant attempted to oppose a motion for summary judgment by producing unsworn letters in support of his response to opposition. The court held that such evidence was insufficient and non-compliant with the requirements of Rule 74.04, stating: "[non-movant] presented no affidavit or admissible evidence to rebut [movant's] evidence. He presented no personal affidavit to explain his own conduct but only unsworn letters from the bankruptcy attorney and the bankruptcy trustee. As such, [non-movant] did not take even basic steps to sufficiently oppose summary judgment." *Id*. at 424 (bracketed material substituted for clarity). By attempting to use these unsworn letters, the *Strable* court indicated that the non-movant had failed to support his denials with specific references as required to

[4] While on its face Allen's Motion for Summary Judgment appears to set forth 27 individually numbered paragraphs, it should be noted that there is no paragraph 6 in the statement of alleged uncontroverted facts.

establish genuine issues for trial, and instead only provided "inadmissible hearsay that was not sworn, that was not an affidavit, that was not authenticated, and did not constitute legal authority of any kind." *Id.* at 425.

The unauthenticated letters written by Allen's counsel do not comply with and are wholly deficient of the requirements of Rule 74.04(c). The letters are inadmissible, invalid hearsay that is not sworn, not an affidavit, not authenticated and do not constitute legal authority of any kind to support the alleged statements of fact. These exhibits fail to comply with the mandatory requirements for supporting statements of uncontroverted fact as set forth in Rule 74.04(c), which requires that each statement of uncontroverted material fact must be supported with "specific references to the pleadings, discovery, exhibits or affidavits that demonstrate a lack of a genuine issue as to such facts" and attached to such statement of facts shall be a copy of all discovery, exhibits or affidavits on which the motion relies. Nowhere in Allen's attorney's letters attached as Exhibits 1, 5, 7 and 11 do they indicate that they are authenticated nor do they comply with the requirements of a signed sworn statement or affidavit under Rule 74.04(e), which requires that "[s]upporting an opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

In the immediate case, just like in *Strable*, Allen is attempting to use inadmissible hearsay evidence to support his statement of claimed uncontroverted fact in his Motion for Summary Judgment. However, Allen failed to support his statement of uncontroverted facts with references to specific admissible evidence or affidavits, and instead disregards

and attempts to evade the mandatory requirements of Rule 74.04 of Missouri law by producing an unsworn, unauthenticated letter in support of his alleged statements. As such, the inadmissible exhibits must be struck and the alleged statement of uncontroverted facts relying thereon must be disregarded considering Allen's Motion for Summary Judgment.

In opposing Allen's Motion for Summary Judgment, Atain controverted the vast majority of Allen's alleged statement of uncontroverted facts, including the facts not supported by any evidence or supported only by inadmissible evidence. In controverting each of these facts, Atain set forth extensive evidence, including deposition testimony of the parties, affidavits from eyewitnesses and other authenticated and certified documentation supporting the dispute regarding Allen's alleged uncontroverted facts. Additionally, in its response to Allen's Motion for Summary Judgment, Atain set forth an additional 33 statements of fact which created disputed issues precluding Allen from its right to judgment as a matter of law. Allen never responded to Atain's statement of additional disputed facts.

In examining the summary judgment pleadings, it is clear that questions of fact exist. These questions of fact relate to the existence of the subject policy including the claim for rescission or void policy, coverage for the claimed loss under said policy, Atain's opportunity to defend the underlying tort action and Atain's affirmative defenses including fraud, collusion and the insured's violation of the cooperation clause.

A. Policy void or rescinded

The facts set forth in the summary judgment briefings indicate that at a minimum a question of fact exists as to whether the subject policy upon which Allen's Writ of

Garnishment in Aid of Execution is void or has been rescinded. In this regard, the subject insurance policy was issued to John Frank d/b/a The Sheridan Apartments. (*L.F.* 333-390). Frank made false representations to Atain in applying for such policy of insurance. (*L.F.* 235, 268, 445, 524-527). The subject policy was issued based upon the false information supplied by Frank in the application. (*L.F.* 268, 653-655, 657). The policy provided that in the event that the information submitted in the application is not true, the policy may be voided and/or coverage denied. Likewise, the policy can be rescinded under Missouri law. (*L.F.* 267, 341).

The uncontroverted facts on summary judgment established John Frank submitted false information to Atain resulting in the policy being void and/or rescinded. Frank represented that the Apartments did not have employees performing security, armed or unarmed. (*L.F.* 268, 529-534, 635-655, 657). Allen and Bryers claim that in Bryers alleged employment with the apartments, he was required to provide security and in doing so was required to carry a gun for that purpose. (*L.F.* 10, 13-15, 267-268, 516-523). Atain learned of this fact when Allen made such allegation in the underlying tort action, which allegation was admitted by Bryers. Upon learning of this information, Atain declared the policy void and further sought to rescind the subject policy based on the material misrepresentations made by Frank in the application for insurance. At a minimum, questions of fact exist as to whether such policy is void or has been rescinded. These disputed and open questions of fact precluded Allen's right to judgment as a matter of law.

B. Question of fact relating to shooting

Similarly, numerous questions of fact exist as to the facts regarding the shooting which give rise to potential coverage defenses under the policy. In this regard, while Allen claims that the shooting was a simple act of negligence, and did not involve any assault, battery, or intentional act, a review of the summary judgment pleadings plainly demonstrates the numerous questions of fact exist as to the conduct giving rise to Allen's claimed injuries. An eyewitness to the shooting has attested, under oath, to facts establishing that the shooting arose out of an assault and battery between Allen and Bryers. The eyewitnesses observed a physical altercation between Allen and Bryers, wherein Bryers pushed Allen. (*L.F.* 256-258, 309). Allen then swung and hit Bryers. (*L.F.* 256-285, 309). Bryers then hit Allen with the gun, and Allen fell to the ground. (*L.F.* 256-258, 309). Bryers stood over Allen and pulled the trigger, shooting Allen in the back as he lay on the ground. (*L.F.* 256-258, 309). According to the eyewitness, Bryers had time to think about what he was doing before shooting Allen. (*L.F.* 256-258, 309). The gun did not accidentally discharge, but instead fired when Bryers pulled the trigger as he was pointing the gun at Allen. (*L.F.* 256-258, 309). The eyewitnesses attested that it appeared that Bryers intended to shoot Allen, tried to kill Allen, and wanted Allen to die. (*L.F.* 256-258, 309).

In addition to the eyewitness, Bryers testimony (or lack thereof) further supports a finding that the policy does not provide coverage, or at a minimum factual questions remain that will control the application of the policy. That is, Bryers was deposed in this matter. He refused to answer questions regarding the incident, pleading the Fifth Amendment.

Based upon Bryers pleading the Fifth, this Court can infer that Bryers pulled a gun with the intent to injure Allen (*L.F.* 303); had a physical altercation with Allen (*L.F.* 297); Bryers threatened Allen with a gun (*L.F.* 297); and that Bryers hit Allen with the gun, knocked him to the ground, and while he was down on the ground, shot him in the back (*L.F.* 297).

C. Coverage Questions

Further, with respect to coverage questions under the policy, questions of fact exist as to whether Bryers was in the course and scope of his employment with the apartments at the time of the shooting. While Allen alleged in the underlying tort action that Bryers was in the course and scope of his employment with the apartment complex, which fact Bryers admitted, the apartment complex and the owner of the same were not parties to the lawsuit. (*L.F.* 9-16). In fact, the owner of the apartment complex expressly denies that Bryers was in the course and scope of his employment with the apartment complex at the time of the shooting. (*L.F.* 235 and 331). At a minimum, Atain has presented evidence sufficient to create a disputed issue of fact on this, which disputed fact, along with all the other disputed facts regarding the underlying incident, precludes Allen's right to judgment as a matter of law.

These questions of fact preclude Allen's right to summary judgment. Therefore, the trial court erred in granting Allen's Motion for Summary Judgment as several questions of material facts exist which facts preclude Allen's right to summary judgment. Accordingly, this Court must reverse the trial court's ruling of summary judgment in favor of Allen.

POINT VII

THE TRIAL COURT ERRED IN DENYING ATAIN'S MOTION TO SET ASIDE THE UNDERLYING TORT JUDGMENT BECAUSE THE JUDGMENT WAS THE RESULT OF FRAUD, COLLUSION AND MISREPRESENTATION TO THE COURT IN THAT ALLEN AND BRYERS ENTERED A §537.065 AGREEMENT REQUIRING BRYERS TO CONSENT TO JUDGMENT, ALLEN AND BRYERS STIPULATED TO UNTRUE FACTS AND PRESENTED SUCH STIPULATION AND ADMISSIONS TO THE COURT WITH THE INTENT SUCH STIPULATIONS AND ADMISSIONS TO THE COURT WITH THE INTENT THAT THE COURT RELY ON SUCH REPRESENTATION TO FORECLOSE ATAIN FROM OPPORTUNITY TO LITIGATE THE FACTS RELATING TO ITS COVERAGE ISSUES UNDER THE SUBJECT POLICY.

Rule 74.06 (b) provides as follows:

> (b) **Excusable Negligent – Fraud – Irregular, Void, or Satisfied Judgment**. 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: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; … or it is no longer equitable that the judgment remain in force.

Clearly Rule 74.06(b) allows a trial court to set aside a judgment based on a finding of fraud. Under Missouri law, a party or representative seeking to have a judgment set aside for fraud may proceed in one of two ways: 1) If not more than one year has elapsed since

the judgment or order has been entered, the party may file a motion to set aside the judgment under Rule 74.06(b) for intrinsic fraud (which pertains to the merits of the cause) or extrinsic fraud (which is collateral to the merits of the cause); or 2) If more than one year has lapsed since the judgment or order has been entered, the party must bring an independent action alleging only intrinsic fraud in accordance with Rule 74.06(b). *Hewlett v. Hewlett*, 845 S. 2d 717, 719 (Mo. App. 1993) (*citing, McKarnin v. McKarin*, 795 S.W.2d 436, 539 (Mo. App. 1990)).

In asserting a claim of fraud, the following elements must be proven: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity (or the speaker's awareness that he or she lacks knowledge of its truth or falsity); (5) the speaker's intent that the statement be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) right to rely thereon; and (9) injury. *Hewlett*, 845 S.W.2d at 719; *State ex rel. Souri-Nebraska Express, Inc. v. Jackson*, 876 S.W.2d 730, 735 (Mo. App. 1994) (*citing, Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. *banc* 1988)).

In this case, Allen and Bryers made false representations to the trial court in the underlying tort action relating to the facts and circumstances of the incident that Plaintiff claims resulted in his injuries. These false misrepresentations were material in that it was the only evidence presented to the trial court on the issue. In presenting such false testimony, stipulations, admissions, evidence and proposed false judgment to the trial court, Bryers undoubtedly knew such information was false, and Allen either knew such

information was false or at a minimum lacked knowledge of its truth or falsity. In presenting the false evidence and proposed judgment relating thereto to the trial court, Allen and Bryers intended that such testimony, stipulations and admissions be utilized by the trial court in its Entry of Judgment in the personal injury action. Undoubtedly, this trial court had no idea or reason to believe the evidence presented by Allen and Bryers at the trial was false or fraudulent. The trial court unfortunately relied upon such false evidence and the fraudulent judgment proposed in entering Judgment in the tort action. The trial court, as the trier of fact in the tort action, had the right to rely on evidence presented believing it to be true and the proposed fraudulent judgment proffered. Finally, as a result of such false representations and fraudulent evidence, the trial court entered Judgment in the amount of $16 million on the basis of a negligence claim and made 18 separate Findings of Fact (as proposed by Allen and Bryers) in reliance upon such false and fraudulent evidence and representations. The fact the trial court's Judgment is based on false evidence and fraudulent conduct, clearly resulted in injury to the integrity of the court and the overall justice system and certainly impedes the court's pursuit of the truth and justice for all. Allen and Bryers further seek to rely upon such fraudulent Judgment to deprive Atain of its constitutional rights of due process and a fair trial, including an opportunity to litigate the facts relating to its coverage defenses.

There are numerous examples of false evidence, testimony and stipulations presented to the trial court that resulted in the $16 million Judgment that Allen seeks to collect from Atain and further that Allen and Bryers rely upon to prevent Atain from litigating the facts relating to the coverage issues in this matter. At the trial on the tort

claim, Allen's evidence consisted of his deposition testimony and that of his girlfriend (only as it related to Plaintiff's claimed injuries), and his doctor (again only as it related to Plaintiff's claimed injuries), as well as stipulations between Allen and Bryers and Bryers' "responses" to Allen's requests for admissions. The testimony, stipulations and admissions regarding the incident that resulted in Allen's alleged injuries were false and fraudulently presented to the trial court in an attempt to create coverage under a policy of insurance that expressly excludes coverage for Allen's injuries. Based upon the false testimony, stipulations and admissions, the trial court adopted the 18 "Findings of Fact" proposed by the parties, on the tort claim and entered judgment in accordance therewith.

Bryers' testimony during his deposition in this matter where he exercised his Fifth Amendment rights to each of the following questions puts things in context in terms of the fraud that has been committed on this Court. Specifically, Bryers asserted his Fifth Amendment privilege when asked each of the following questions:

- And Mr. Allen filed a lawsuit against you because of the fact that you had shot him in the back causing him to be paralyzed, isn't that correct?
- And the purpose of his lawsuit filed against you was so that he could recover money from you, correct?
- In terms of that lawsuit that was filed against you by Mr. Allen, you did not ever tender or give that lawsuit to your insurance company, did you?
- You never gave Atain Insurance Company notice that a suit had been filed against you, did you?

- In fact, you didn't give Atain Insurance Company an opportunity to defend you in that lawsuit, did you?
- Rather than allowing Atain Insurance Company to defend you in that case, you entered into an agreement with Mr. Allen -- rather than giving notice and an opportunity to Atain Insurance Company to defend you in that personal injury action, you entered into an agreement with Mr. Allen to protect yourself, isn't that correct?
- You would agree with me that you entered into the agreement with Mr. Allen without giving any notice to your insurance company not only of the lawsuit, but also of your intent to enter into such agreement, isn't that correct?
- And you did that with the intent to -- or you did that with the understanding that only certain evidence would be presented to the Court instead of presenting all of the evidence to the Court, isn't that correct?
- In terms of the evidence that was going to be presented to the Court, it was simply going to be evidence to establish a claim of negligence rather than the intentional conduct that actually gave rise to this injury, isn't that correct?
- And it was the intentional conduct and the assault and battery that you committed on Mr. Allen that you and Mr. Allen stipulated to would not be a part of that underlying case, isn't that correct?
- The terms of your agreement with Mr. Allen resulted in only certain evidence being presented to the trial Court, isn't that correct?

- And the evidence that was presented to the trial Court wasn't true evidence, isn't that correct?
- In other words, it was evidence that was simply stipulated to between you and Mr. Allen, despite the fact that it wasn't true, correct?
- And that evidence misrepresented the true actions that took place on June 9 and June 10, 2012, isn't that correct?
- And you did that and made those representations to the Court knowing that the Court would rely on those representations, correct?
- And that those representations would be material to the Court in formulating any opinions or judgments in the matter, correct?
- And the Court did in fact rely on those misrepresentations made by you in formulating its judgment, isn't that correct?

(*L.F.* 256-268, 306-307).

- In addition to these admissions that you made that we just talked about, you additionally made stipulations or entered into stipulations with Mr. Allen prior to a trial in the underlying personal injury action, isn't that correct?
- And those stipulations that you entered into you entered into for purposes of perpetrating a fraud upon the Court, correct?
- You made those stipulations for purposes of ensuring that the Court was not presented with the true facts and circumstances surrounding the incident that resulted in Mr. Allen's injuries, correct?

- You made those stipulations knowing that the stipulations were in fact not true, correct?
- You made those stipulations knowing that the stipulated facts were false, correct?

(*L.F.* 256-268, 317)

Allen testified in his deposition that he was shot in the back and does not know how or why it occurred. (*L.F.* 637-640).

Allen clearly does not know how or why he was shot. He only knows he was shot in the back by Bryers as Bryers was following him, arguing with him, and yelling at him. As such, he cannot say whether it was accidental or intentional. Bryers cannot provide any facts about the incident because his testimony would only serve to incriminate himself and negate any claimed coverage under the Atain insurance policy, however, to the extent he gave a statement to the police before asserting his Fifth Amendment rights at his deposition, Bryers established that the shooting arose out of an assault or battery between Bryers and Allen. Despite the fact that neither Allen or Bryers can provide any facts relating to the alleged incident, Allen and Bryers, conspired and colluded to present false evidence, stipulation and admissions to the Court relating to the alleged incident to secure a Judgment with Findings of Fact in an attempt to create coverage under a policy where no such coverage exists.

The trial court made its factual findings in the tort action based on false testimony, admissions, and stipulations. The following are examples of the factual findings made by this Court based upon the false evidence. The factual findings are followed by the true

evidence clearly demonstrating the falsity of the evidence and the fraud that has been committed on the Court:

A. Course and Scope of Employment

The trial court made numerous factual findings regarding Bryers' employment and that his conduct in shooting Allen was in the course and scope of his employment with the apartments based upon stipulations and admissions entered between Bryers and Allen.

Bryers' deposition testimony demonstrates the falsity of the admissions and stipulations and fraudulent conduct that led to the entry of such findings. In this regard, Wayne Bryers asserted his Fifth Amendment rights to the following questions:

- Were you employed at the Sheridan Apartments?
- You were not authorized to conceal and carry a gun in June of 2012; true?
- You purchased the gun before June 10 of 2012; true?
- The purpose in purchasing the gun was to protect yourself, correct?
- John Frank did not tell you to purchase the gun, isn't that true?
- You purchased it on your own, correct?
- And you paid for that gun?
- John Frank didn't know you had that gun at the property, isn't that true?
- John Frank and anyone at the Sheridan apartment complex didn't authorize you to use the gun, isn't that true?
- You weren't authorized to be providing security at the Sheridan apartment complex, correct?

- Certainly you weren't authorized to use a gun to shoot people that came on to the property; true?
- If someone was on the property that was not supposed to be there, your only authority -- and when I say "property", I'm talking about the Sheridan apartment complex -- your only authority was to call the police, correct?
- You were not working for the Sheridan Apartments on that day, June 9, 2012, correct?
- In fact, on June 10, 2012, you were not working for the benefit or subject to the control or under the supervision of Mr. Frank at the time you shot Mr. Allen, correct?
- You did so and misrepresented to the Court the nature and extent of your employment with the Sheridan Apartments for purposes of ensuring that the Court didn't learn of the true facts and circumstances surrounding your employment, correct?

(*L.F.* 232-235, 289-292, 311).

Bryers further asserted his rights under the Fifth Amendment when asked if he made each of these admissions knowing they were not true and did so for purposes of committing fraud on the court. *Id.* Bryers' alleged employer, John Frank, who does business as the Sheridan Apartments, denied that he, at any time, requested, instructed, or required Bryers to carry a firearm while performing his duties at the Sheridan Apartments or that Bryers was ever a "security guard" at the Sheridan Apartments. (*L.F.* 235-331). The Sheridan

Apartments did not have employees performing security, armed or unarmed. (*L.F.* 232-235, 268).

B. "Admissions" of Negligence

The trial court made a factual finding that Bryers admitted that Allen was injured by Bryers' negligence.

Bryers' deposition testimony again demonstrates the falsity of the admissions and stipulations and fraudulent conduct that led to the entry of such finding. In this regard, Bryers asserted his Fifth Amendment privilege to the following questions:

- In the underlying personal injury action you made an admission that you admitted that as a direct result of your negligence and/or improper handling of the handgun, Mr. Allen was injured by a gunshot from your gun, isn't that correct?
- You made that admission knowing that that admission wasn't true, correct?
- But that statement is actually false, isn't that right?
- And that is because your actions were not negligent on June 9 or June 10, 2012, correct?
- In other words, your actions on June 9 and June 10, 2012, were intentional, correct?
- It wasn't an accident that Mr. Allen was shot, correct?
- You made that admission for purposes of perpetrating a fraud upon the Court, isn't that correct?

- And you did so for purposes of concealing the true facts and circumstances from the Court surrounding the incident on June 9 or June 10, 2012, correct?

(*L.F.* 256-268, 313-315)

C. **Intentions in Discharging Gun and Injuring Allen**

The trial court made a factual finding regarding Bryers' intentions in discharging the gun and injuring Allen. This finding was based upon the stipulations between Allen and Bryers. However, Bryers' deposition testimony demonstrates the falsity of the admissions and stipulations and fraudulent conduct that led to the entry of such finding. Particularly Bryers asserted his Fifth Amendment privilege to the following questions:

- In the personal injury action filed by Mr. Allen, you admitted that prior to June 10, 2012, and including the time period in which the handgun that you owned discharged, you did not formulate any intent to harm or injure Mr. Allen. You admitted that; true?
- While you admitted it in the personal injury action, it wasn't true, isn't that correct?
- In fact, you made all of these admissions for purposes of perpetrating a fraud on the Court, isn't that correct?
- You admitted that prior to June 10, 2012, and including the time period in which the handgun that you owned discharged, you did not formulate any intent to shoot or injure Mr. Allen, you were making that admission?
- And you made that admission despite the fact that it was true, correct?

- And the purpose of making that admission was to perpetrate fraud on the Court and make sure that the Court -- to perpetrate fraud on the Court, correct?
- An additional purpose for that was to make sure that the Court didn't learn of the true facts and circumstances surrounding the incident, isn't that correct?
- Because if the true facts and circumstances surrounding the incident, the shooting, would come to light to the Court, they would have found that your actions were intentional, isn't that correct?
- And that they resulted from an assault and battery that you committed upon Mr. Allen, isn't that correct?
- You admitted in the underlying personal injury action that the discharge of the handgun that you acquired at the direction of Mr. Frank was unintentional, accidental, negligent and/or reckless and the discharge was caused by the escorting off and/or act of physically removing Mr. Allen; true?
- And you made that admission despite the fact that that statement is false, correct?
- And you did so for purposes of perpetrating a fraud, correct?
- In the underlying action you made an admission that at no time during your attempt to escort off and/or to physically remove Mr. Allen from the apartment premises on or about the evening of June 10, 2012, did you intend to discharge the handgun that discharged and injured Mr. Allen, correct?
- You made that admission despite the fact that that statement is not true, correct?
- You made that admission for purposes of perpetrating a fraud, correct?

- In the underlying action you made an admission that at no time during -- in the underlying personal injury action you made an admission that at no time during your attempt to escort off and/or physically remove Mr. Allen from the Sheridan apartment premises on or about the evening of June 10, 2012, did you intend any act that could foreseeably cause injury to Mr. Allen, correct?
- And you made that admission, and that statement is actually false, correct?
- And you made that admission knowing that the statement was false; true?
- The statement was false because you did intend that your actions or you did intend your actions and you knew they could foreseeably cause injury to Mr. Allen, correct?
- You made the admission for purposes of perpetrating a fraud, correct?

(*L.F.* 256-268, 309-310, 312-315).

Further, the testimony of Ilene Starks, an eye witness to the incident further establishes that the stipulations and admissions of Bryers regarding Bryers' intentions were false. In this regard, Sparks has attested to the following:

i. Wayne Bryers hit Franklin Allen with the gun when he swung at him.

ii. Franklin Allen fell to the ground as a result of being hit by Wayne Bryers.

iii. As Franklin Allen was laying on the ground, Wayne Bryers stood over Franklin Allen, and shot him in the back.

iv. It appeared to me that Wayne Bryers knew exactly what he was doing.

v. Wayne Bryers stood over Franklin Allen as Franklin Allen laid on the ground.

vi. As Wayne Bryers stood over Franklin Allen, Wayne Bryers pointed the gun at Franklin Allen's back and pulled the trigger.

vii. Wayne Bryers had time to think about what he was doing before shooting Franklin Allen.

viii. The gun did not accidentally discharge.

ix. The gun fired when Wayne Bryers pulled the trigger as he was pointing the gun at Franklin Allen.

x. It appeared that Wayne Bryers intended to shoot Franklin Allen.

(*L.F.* 256-257, 390-391)

D. Admissions Relating to Negligence and Intentions and Expectations for Injury

The trial court made several factual findings regarding Bryers' negligence and his intentions and expectations to injure Allen. Bryers' deposition testimony demonstrates that these conclusions and findings by the court resulted from Allen and Bryers' false and fraudulent stipulations and admissions. Particularly, Bryers asserted his Fifth Amendment privilege to the following questions.

- In the underlying personal injury action filed by Mr. Allen you made an admission that your actions that resulted from the discharge of the handgun that injured Mr. Allen were negligent and that you were not intending or expecting to injure Mr. Allen, correct?
- You made that admission despite the fact that that statement is false, correct?
- And that statement is false because you were in fact intending and expecting to injure Mr. Allen when you discharged the handgun, correct?

- You made the admission for purposes of perpetrating a fraud, correct?
- In the underlying personal injury action filed by Mr. Allen you made an admission that your actions that resulted in the discharge of the handgun that injured Mr. Allen did not involve an assault, a battery, or any intentional act, correct?
- You made that admission knowing that that statement was in fact false, correct?
- You made the admission for purposes of perpetrating a fraud upon the Court, correct?
- That statement was false, because your actions did involve an assault, battery, and an intentional act, correct?

(*L.F.* 256-268, 315).

Additionally, Ilene Starks, the eyewitness' statement further established that the admissions and stipulations to the court for this issue were false. Specifically, Starks has attested that:

i. Wayne Bryers hit Franklin Allen with the gun when he swung at him.

ii. Franklin Allen fell to the ground as a result of being hit by Wayne Bryers.

iii. As Franklin Allen was laying on the ground, Wayne Bryers stood over Franklin Allen, and shot him in the back.

iv. It appeared to me that Wayne Bryers knew exactly what he was doing.

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vii. Wayne Bryers had time to think about what he was doing before shooting Franklin Allen.

viii. The gun did not accidentally discharge.

ix. The gun fired when Wayne Bryers pulled the trigger as he was pointing the gun at Franklin Allen.

x. It appeared that Wayne Bryers intended to shoot Franklin Allen.

(*L.F.* 256-257, 390-391)

E. Amount of Force

The trial court made a factual finding that Bryers used only the amount of force necessary to defend himself. This finding was also based on the false stipulations and admissions of Bryers. Particularly, Bryers asserted his Fifth Amendment privilege when asked the following questions during his deposition:

- In the underlying personal injury action filed by Mr. Allen against you, you admitted that to the extent, and if you used force in attempting to escort off and/or physically remove Mr. Allen from the apartment complex on or about the evening of June 10, 2012, you used only that amount of force that was reasonably necessary to protect persons and property located in or around the Sheridan apartment premises, correct?
- I'm sorry. You made that statement despite the fact -- you made that admission despite the fact that that statement is false, correct?

- You made that admission for purposes of perpetrating a fraud upon the Court, correct?
- Because the amount of force that was reasonably necessary to protect any persons or property on June 10, 2012, would not include the use of force of a deadly weapon, correct?
- In the underlying action you made an admission that to the extent and if you used force in attempting to escort off and/or physically remove Mr. Allen from the apartment complex, you used only that amount of force that was reasonably necessary for the purpose of defending yourself while escorting off and/or physically removing Allen from the Sheridan apartment premises, correct?
- And you made that admission knowing that that statement was in fact false, correct?
- The statement was false because the amount of force that you used was not reasonably necessary for purposes of defending yourself, correct?

(*L.F.* 256-258, 315)

Franklin Allen's deposition testimony further demonstrates that the stipulations and admissions presented to the court were false. In this regard, Allen testified as follows:

Q. Do you believe that Mr. Bryers needed a gun to defend himself on June 10, 2012?

A. No.

Q. You weren't threatening him at all?

A. No.

Q. So his gun, he didn't need that?

A. No, I don't think so.

(*L.F.* 645)

F. **Assault and Battery**

The trial court made a factual finding that at no time on June 10, 2012 did Plaintiff Franklin Allen intentionally assault, strike or batter Defendant Wayne Bryers. This finding was based on the false stipulations and admissions of Allen and Bryers. Bryers' statement to the police following the accident demonstrates the falsity of this statement.

Particularly, after the incident, while in custody, Bryers admitted that Allen confronted Bryers from behind and jumped down on him, and hit him. (*L.F.* 447-473).

The entirety of the evidence presented by Allen and Bryers relating to the incident was false and fabricated. The deposition testimony of Allen, the statement of Bryers, the Affidavit of Ilene Starks and the police report plainly establish the falsity of the representations and evidence presented to the Court. The deposition testimony of Wayne Bryers further supports the fraud that has been committed upon this Court. Not only does Bryers take the Fifth Amendment to avoid discussing his intentional criminal actions that resulted in the injuries to Allen, but also Bryers asserted his Fifth Amendment rights when questioned about the falsity of the testimony of fraud upon the Court to avoid additional criminal penalties and incrimination for perjury.

Missouri law is clear that an individual may invoke his Fifth Amendment privilege during a deposition. *Johnson v. Missouri Bd. Of Nursing Adm'rs*, 137 S.W.3d 619, 628 (Mo. App. 2004). The party making the choice to take the Fifth must weigh "the advantage

of the privilege against self incrimination against the advantage of putting forth his version of the facts." *Id* (*citing*, *Brown v. US*, 356 U.S. 148, 155 (1958). While the normal rule in a criminal case is that no negative inference can be made from a defendant's assertion of his Fifth Amendment rights, "the courts have never held that a Fifth Amendment claimant in a civil proceeding must be shielded from all possible negative consequences that may attempt his invocation of the privilege." *Johnson*, 130 S.W.3d at 628 (*quoting*, *In Re Moses*, 792 F. Supp. 529, 536 (E.D. Mich. 1992)). In fact, the Missouri Courts have recognized that civil claimants have been denied certain benefits and exposed to negative consequences as a result of having invoked the privilege in a civil case. *Id*.

One of the negative consequences that may result from the invocation of a person's Fifth Amendment privilege was discussed by the United States Supreme Court in *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), which held that reliance on the Fifth Amendment in civil cases may give rise to an adverse inference against the party claiming its benefit. *Id*. In this regard, the *Baxter* Court recognized that "the prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence against them: the amendment "does not preclude the inference where the privilege is claimed by a party to a civil cause."" *Baxter*, 425 U.S. at 318. It has long been recognized under Missouri law that an individual's refusal to answer questions on Fifth Amendment grounds justifies, in the context of a civil case, a court inferring that (1) if he answers truthfully, the answers would have been unfavorable to the individual; and (2) the answers would have corroborated testimony given by other witnesses. *Johnson*, 130 S.W.3d at 631. Applying the principles discussed in the *Johnson*

case to the instant case, Bryers' refusal to answer questions on Fifth Amendment grounds justify an inference that: (a) if he had answered truthfully, the answers would have been unfavorable to him (i.e. that his conduct was intentional and did amount to an assault and battery and further that he perjured himself and committed fraud upon the Court to avoid criminal responsibility for his actions); or (b) would have corroborated testimony given by other witnesses on the subject matter (i.e. the eye witness, Ilene Starks, that recounts the assault and battery committed by both Allen and Bryers and intentional nature of Bryers' conduct).

Based upon Bryers pleading the Fifth, this Court can infer that Bryers was not acting in the course and scope of his employment (*L.F.* 583-585, 604-606)) pulled a gun with the intent to injure Allen (*L.F.* 596); had a physical altercation with Allen (*L.F.* 590); Bryers threatened Allen with a gun (*L.F.* 590); that Bryers hit Allen with the gun, knocked him to the ground, and while he was down on the ground, intentionally shot him in the back (*L.F.* 591) and that Bryers committed perjury and perpetrated fraud on the court by presenting false evidence, testimony, stipulations, and admissions to the Court to avoid criminal responsibility and create coverage under the Atain policy where no such coverage exists. (*L.F.* 599-601, 610). These conclusions are not only derived from the negative inferences drawn from Bryers' testimony, but additionally supported by other evidence and witnesses.

Atain cannot be bound by these fraudulently obtained judicial determinations in Allen's personal injury action against Bryers, specifically that the injury sustained by Allen was caused by an unintentional accidental discharge of Bryers' weapon, resulted from the

negligence of Bryers, did not arise from an assault and battery, Bryers' force was reasonable or that Bryers was in the course and scope of his employment.

An insurer is specifically permitted to avoid the effect of a judgment which is the result of fraud and collusion between the insured and the injured party. *Mitchell v. Farmers Ins. Exchange*, 396 S.W.2d 647, 652 (Mo. 1965). The judgment in this personal injury action was the result of fraud and collusion. Bryers and Allen entered into a 537.065 agreement, and Bryers consented to have a judgment entered against him. Bryers' consent was given in order to protect his own interests, and specifically to avoid potential criminal charges against him. Bryers and Allen agreed to present the trial court with false, manufactured evidence in order to support their ultimate goal, i.e., Bryers avoiding criminal charges, and Allen seeking recovery under the Atain policy. The trial court therefore erred in failing to set aside the tort judgment based on fraud. The trial court's decision must be revered. These issues were not "fully and fairly litigated."

POINT VIII

THE TRIAL COURT ERRED IN DENYING ATAIN'S MOTION TO INTERVENE BECAUSE ATAIN HAD AN ABSOLUTE RIGHT TO INTERVENE IN THAT ATAIN HAD AN INTEREST IN THE UNDERLYING TORT PROCEEDINGS GIVEN BRYERS' ENTRY INTO A §537.065 AGREEMENT AND CONSENT TO JUDGMENT AND ATAIN, AS THE ALLEGED INSURER, WAS SO SITUATED AS NOW DETERMINED BY THE TRIAL COURT THAT THE FACTUAL DETERMINATIONS IN THE UNDERLYING ACTION IMPAIRED OR IMPEDED ATAIN'S ABILITY TO PROTECT ITS INTERESTS AS IT HAS NOT BEEN ALLOWED AN OPPORTUNITY TO LITIGATE THE FACTS RELATING TO COVERAGE UNDER THE SUBJECT POLICY.

Rule 52.12(a) states as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 52.12 sets forth two avenues permitting intervention as a matter of right: (1) by statute, and (2) to protect an interest not adequately protected. Atain should have been entitled to intervene as a matter of right to protect its interests under the subject policy arising out of Allen's claims against Bryers. Pursuant to Rule 52.12(a), to intervene as a

matter of right, Atain must show: (1) an interest in the subject matter; (2) disposition of the action may impede its ability to protect that interest; and (3) that its interest is not adequately represented by the existing parties. Because Atain, as the intervenor, met all the statutory requirements for intervention as a matter of right, the right to intervene was absolute. *See In re Clarkson Kehrs Mill Transp. Dev. Dist*., 308 S.W.3d 748 (Mo. App. 2010). Missouri courts have previously held "that intervention should be allowed with considerable liberality." *Frost v. White*, 778 S.W.2d 670, 674 (Mo. App. 1989).

In this case, Atain established the three elements required for intervention. First, as Allen and Bryers both contended in the collateral declaratory judgment actions and this subsequently filed garnishment action that Atain's policy insures Bryers and that Atain should be precluded from litigating the determinations made by the Court in the underlying tort case (which determinations were based on fraud and collusion), Atain has an interest relating to the transaction which was the subject of the underlying tort action. Second, because Allen and Bryers' insisted that Atain is precluded in the declaratory judgment and subsequent garnishment from litigating the determinations of the trial court in the underlying tort case, Atain's ability to protect that interest is understandably impeded. Third, it is clear that the existing parties (Allen and Bryers) inadequately protected Atain's interest in the underlying tort case, as the parties colluded and conspired to present false evidence and testimony.

POINT IX

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF BECAUSE AWARDING PLAINTIFF $16 MILLION IN THIS WRIT OF GARNISHMENT IN AID OF EXECUTION HAS DEPRIVED ATAIN OF ITS CONSTITUTIONAL RIGHTS OF DUE PROCESS UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS IN THAT THE TRIAL COURT'S SUMMARY JUDGMENT REQUIRES ATAIN TO PAY $16 MILLION IN A GARNISHMENT PROCEEDING BASED UPON A POLICY WHICH AT BEST ONLY CONTAINS INDEMNITY PROVISIONS UP TO THE $1 MILLION POLICY LIMIT AND SUCH SUMMARY JUDGMENT WAS ENTERED WITHOUT PROVIDING ATAIN ANY OPPORTUNITY TO LITIGATE THE FACTS CONTROLLING THE OBLIGATIONS OF THE PARTIES UNDER THE SUBJECT INSURANCE POLICY.

The constitutions of the United States and Missouri guarantee that no person will be deprived of "life, liberty, or property without due process of law." U.S. Const. Amend. XIV, section 1; Mo. Const. art. I, sec. 10; *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. 2014). Both the federal and Missouri constitutions impose the fundamental requirement of due process, which includes providing notice reasonably calculated to apprise the parties of the pendency of the action and afford them an opportunity to present their objections "at a meaningful time and in a meaningful manner." *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008) (*quoting Jamison v. Dept. of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007)); *see also Belton v. Bd. of Police Comm'rs*

of Kansas City, 708 S.W.2d 131, 137 (Mo. banc 1986). "The fundamental requisite of due process of law is the opportunity to be heard." *Kerth v. Polestar Entertainment*, 325 S.W.3d 373, 379 (Mo. App. E.D. 2010), quoting *Mullane v. Central Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Due process does not mean that the same type of process is required in every instance; rather, "[d]ue process is flexible and calls for such procedural requirements as the particular situation demands." *Mathews*, 424 U.S. at 333, 96 S.Ct. 893. "To determine what process is due in a particular case, a court determines whether the plaintiff was deprived of a property or liberty interest and, if so, whether the procedures followed were sufficient to satisfy constitutional due process requirements." *Peterson*, 253 S.W.3d at 82. In doing so, we must balance the competing interests at stake: "[F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Belton*, 708 S.W.2d at 137 (*quoting Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)).

Here, Atain's private interest affected is profound, as the collusive settlement entered into by Allen and Bryers and resulting Judgment in the underlying tort action upon

which Allen claims Atain is precluded from litigating any facts found therein has unconstitutionally resulted in depriving Atain of $16 million, (16 times the policy limits potentially available under the subject policy) without providing Atain a fair and full opportunity to litigate facts relating to coverage under the policy, its affirmative defenses or claim for rescission. That this deprivation is erroneous is equally beyond question, as there have been no procedures or safeguards available to Atain whatsoever. As set forth in the briefs and arguments before the trial court, Atain has numerous legitimate coverage defenses to the underlying claim that have not been addressed by the trial court and Atain had no opportunity to litigate the facts defeating coverage. The Court's entry of summary judgment against Atain in the amount of $16 million based on the "pleadings" and summary judgment briefings in this matter supplied Atain with no notice as to the potential repercussions, thereby denying defendants due process. The "additional or substitute procedural requirements" sought by Atain are not burdensome whatsoever: Atain simply requests its proverbial day in court. Atain was not provided with any opportunity to litigate the subject policy, its rights and obligations under the policy, its interpretation, the facts applied thereto, or the affirmative defenses set forth in its Answer.

Affirming the trial court's award of summary judgment in this case will deprive Atain of its opportunity to litigate coverage issues and related questions of fact. The significance of such a holding has the effect of exposing insurers to unlimited risk under an insurance policy. If an insurer is not provided an avenue outside of the tort action to litigate facts relating to coverage under an insurance policy, the parties to the tort action (whose interests are plainly contrary to those of the insurer) can litigate the tort action in

such a manner to create insurance coverage under a policy where coverage would not otherwise exist. This injustice is best demonstrated by a plain and simple example:

> *A steals B's car and gets in an accident with C. C files a lawsuit against A seeking recovery for his injuries. A seeks coverage under B's insurance policy on the car. The insurance company denies coverage on the basis that A did not have permission to use the car. C and A enter a 537.065 agreement and stipulate that A had permission to use B's car. Following the "trial," the court makes findings based on A and C's stipulation that A had permission to use B's car.*

Affirming the trial court's summary judgment in this case is the equivalent of collaterally estopping the insurer in the example above from arguing that A was not a permissive user of the vehicle and therefore negating the insurer's opportunity to argue coverage under the policy. This has the effect of allowing the injured party and tortfeasor to create coverage under a policy of insurance where no coverage exists … even under a policy to which neither were a party.

This is exactly what has happened to Atain in this case. The result to Atain is a complete injustice and deprives Atain of its due process rights. This situation is not unique to Atain but rather encountered by all insurers doing business in Missouri. The impact that this case will have on the viability of insurance companies in the state of Missouri is enormous. Essentially, the this Court's decision has the potential to effectively negate all provisions contained within an insurance policy, including the exclusions limiting, restricting, or negating coverage, because these provisions become meaningless when the insurance company is deprived of an opportunity to establish or litigate facts relating to the

application of such provisions. The result will be the imposition of unlimited risk (even beyond policy limits) to an insurance company under each and every insurance policy issued in this state. Obviously, the effect of unlimited risk to an insurance company will not only significantly increase the cost of insurance, but will ultimately drive insurance companies out of the state of Missouri. The trial court's Summary Judgment in this matter imposing significant liability upon Atain where Atain has had no opportunity to litigate the coverage issues under its policy has rendered all terms within the policy meaningless. As such, the trial court's summary judgment must be reversed.

Moreover, a Judgment in the amount of $16 million on the facts of this case constitutes a grossly excessive award. A grossly excessive award violates a party's substantive right of due process in that "it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 372 (Mo. 2012), quoting *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct 1513 (2003). Such is the case here. To begin, the present action is a statutory garnishment action. As such, recovery must be limited to the property of Bryers that Atain, as Garnishee, holds, possesses or controls. There has been no showing that Atain has ever held, possessed or controlled any property of Bryers, much less $16 million. Instead, due to the collusive and fraudulent settlement entered into between Allen and Bryers, Atain is being subjected to a $16 million award, which is 16 times the $1 million policy limits potentially applicable to this claim. The trial court's award of summary judgment for $16,000,000 on a Writ of Garnishment exposes Atain to multiple liabilities and potentially multiple punishments denying Atain due process under

the Fifth, Sixth, Eighth and Fourteenth Amendment of the United States Constitution and under the Missouri Constitution Article 1, §§ 10, 18A, 19, 21 and 22A. Therefore, the trial court's summary judgment must be reversed to allow Atain the protection provided by the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and under Missouri Constitution Article 1, §§10, 18A, 19, 21 and 22A.

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CERTIFICATE OF SERVICE

I certify that copies of this Appellant's Brief and the Appendix to the Appellant's Brief were served this 23rd day of March, 2016, through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

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RULE 84.06(c) CERTIFICATION

Undersigned counsel for Appellant hereby certifies that this Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 30,272 words counted using Microsoft Word.

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