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. Torrance
Transferred Accepted by This Court
After Opinion From the Western District

APPELLANT'S SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

This appeal primarily arises out of the Trial Court's grant of summary judgment. In reviewing an appeal from summary judgment, this Court is required to review, *de novo*, the record in the light most favorable to the party against whom judgment was entered. *Martin v. City of Washington*, 848 S.W.2d 498, 489 (Mo.banc 1993). In this case, in the light most favorable to Atain. Atain, as the non-movant, is accorded the benefit of all reasonable inferences from the record. *Id.* Plaintiff Allen's Statement of Facts sets forth a number of alleged facts that must be disregarded by this Court in light of the standard of review. Additionally, while citations to the legal file are included in Allen's Statement of Facts, the facts and citations to the legal file are not supported by admissible evidence proper for consideration by this Court (or any court) in reviewing or ruling on a motion for summary judgment.

REPLY ARGUMENT

Before addressing the individual arguments made by Allen, it should be noted that throughout his arguments Allen continually mixes the duty to defend with the duty indemnify. There can be no doubt under Missouri law that the duty to defend and the duty to indemnify are two completely distinct and separate duties under a policy of insurance.

The duty to defend is broader than the duty to indemnify. *American States Ins. Co. v. Kempker Const. Co., Inc.*, 71 S.W.3d 232 (Mo.App. 2002). "The duty to defend arises whenever there is potential or possible liability to pay [under the insurance contract] based on the facts [known] at the outset of the case and is not dependent on the probable liability to pay based on the facts ascertained through trial." *Id.* A liability insurer's duty to defend does not depend alone upon the allegations of the petition filed against the insured. *Travelers Ins. Co. v. Cole*, 631 S.W.2d 661, 665[6] (Mo.App.1982). The facts known or ascertainable control the obligation to defend. *Hawkeye–Security Ins. Co. v. Iowa National Mutual Ins. Co.*, 567 S.W.2d 719, 721[3] (Mo.App.1978). If additional facts are ascertained which show that the action is not within the coverage of the policy, the insurer is not obligated to afford a defense. *Travelers*, 631 S.W.2d at 665; see also *Travelers Ins. Co. v. Cole*, 631 S.W.2d 661, 665 (Mo.App. 1982) *Standard Artificial Limb, Inc. v. Allianz Ins. Co.*, 895 S.W.2d 805 (Mo.App. 1995). Actual facts are those facts which were known, or reasonably should have been apparent at the commencement of the suit and not the proof made therein or the final result reached. *Marshall's U.S. Auto Supply, Inc. v. Maryland Casualty Co.*, 354 Mo. 455, 189 S.W.2d 529, 531 (1945).

In contrast, the duty to indemnify is determined after the liability of the insured has been determined. Generally, indemnity obligations are determined by the facts as they are "established at trial or as they are finally determined by some other means[.]" *Lumber Mut. Ins. Co. v. Reload, Inc.*, 113 S.W.3d 250, 3253 (Mo.App. 2003). Every fact determined at the underlying trial against the torfeasor/insured is not necessarily controlling of the duty to indemnify. That is, while an insurer refusing to defend after having notice of AND an opportunity to defend the underlying tort action may be bound by the determination as to the liability of the insured and the award of damages (if determined without fraud and collusion[1]), findings of fact that are not necessary or essential to the judgment are not binding. *Assuarnce Co. of America v. Secura Ins. Co*., 384 S.W.3d 224 (Mo.App. 2012); *Sangamon Assoc., Ltd. V. Carpenter 1985 Family Partnership, Ltd*., 280 S.W.3d 737 (Mo.App. 2009). Moreover, an insurer has an absolute right to litigate facts relating to its coverage defenses where an inherent conflict of interest exists between the insured and insurer. *James v. Paul*, 49 S.W.3d 678 (Mo.banc 2001).

The two distinct duties under a policy of insurance and the differing standards governing each create a significant problem under Missouri law. That is, it is well recognized that the duty to defend is broader than the duty to indemnify. In other words, often times the duty to defend may exist where the duty to indemnify does not. However,

[1] *Drennen v. Wren*, 416 S.W.2d 229, 234 (Mo.App. 1967). In this case, Atain claims that the trial court's findings in the underlying tort action were the result of fraud and collusion, and therefore are not binding upon Atain.

the recent opinions of the Missouri courts essentially expand the duty to indemnify to parallel that of the duty to defend. This is because an insurer obligated to defend pursuant to the terms of the policy is often not permitted to provide a defense under a reservation of rights. Therefore, in cases where undoubtedly a duty to defend exists and an insured is unwilling to accept a defense under a reservation of rights, an insurer is forced to defend without a reservation thereby waiving its coverage defenses and having to accept the obligation to indemnify even if such duty would not otherwise exist in order to comply with its obligation to defend under the policy. The net result is that an insurer is often forced to indemnify simply because there was a possibility of coverage.

A. Standard of Review

There is no dispute that this Court's review of the Trial Court's Summary Judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo.banc 1993).

B. The Policy Does Not Provide Coverage and Atain Did Not Have a Duty to Defend

1. Duty to Defend

Allen claims that "the only claim alleged in [his] Petition for Damages was clearly within the coverage under the Policy, and Atain had a duty to defend." Allen supports this argument by ignoring the facts known or ascertainable at the time the lawsuit was filed. A liability insurer's duty to defend does not depend alone upon the allegations of the petition filed against the insured. *Travelers,* 631 S.W.2d at 665. Rather, the facts known or

ascertainable control the obligation to defend. *Hawkeye–Security,* 567 S.W.2d at 721 (Mo.App.1978). If additional facts are ascertained which show that the action is not within the coverage of the policy, the insurer is not obligated to afford a defense. *Travelers,* 631 S.W.2d at 665.

Allen's Petition alleges that Bryers was negligent in shooting Allen. In this regard, Allen's Petition alleges that he was shot as he was being escorted off and/or physically removed from the Sheridan Apartments. (*L.F.* 11). Allen's Petition further expressly acknowledges that he became "unruly as he was being escorted from and/or physically removed" from the apartment premises. (*L.F.* 12-13). The facts known, and reasonably ascertainable, within the days following the shooting further explain and shed light on Allen's unruly behavior that led to the shooting. In this regard, when questioned regarding the shooting, Bryers explained that he asked Allen to leave the apartments. (*L.F.* 457-471). Bryers and Allen then proceeded into a verbal argument. (*L.F.* 457-471). The verbal argument escalated to an assault and/or battery when Allen punched Bryers. (*L.F.* 457-471).

The statements of Bryers, Atain's alleged insured, were further supported by the witness statements contained in the police report. (*L.F.* 392-446). While Leslie Cole did not witness the shooting, she observed the escalating situation between Allen and Bryers. (*L.F.* 403). Ms. Cole told the police that she saw Allen and Bryers arguing, and observed Bryers pull his gun out of his pocket, holding it down at his side as the argument escalated.

(*L.F.* 403). Fearing what might ultimately come of the situation, Ms. Cole ran inside to get Bryers' uncle. (*L.F.* 403). The shooting occurred while she was inside. (*L.F.* 403).

Curtis Jones told the police that Allen and Bryers were arguing and that Allen punched Bryers in the face two times just before he was shot. (*L.F.* 256, 394, 406). Similarly, Ilene Starks told the officers that Allen struck Bryers causing Bryers to fall to the ground immediately prior to Allen being shot. (*L.F.* 256, 394). Oscar Ruff similarly described the events leading up to the shooting including that he observed Allen push Bryers to the ground and punch Bryers in the face just prior to the shooting. (*L.F.* 256, 395).

The facts alleged in the Petition, combined with the additional facts known and ascertainable, negate Atain's obligation to defend under the policy. The policy expressly excludes coverage for any injury resulting from an assault or battery, by any person, whether or not caused by or arising out of negligent, reckless or wanton conduct. (*L.F.* 266-267, 382). The Petition alleges that Allen was shot as he was being escorted and/or physically removed from the apartment premises. Allen became unruly, and as the statements of the witness confirm, began assaulting and/or battering Bryers. It was during this scuffle that Allen was shot. There can be no question that even if Bryers was negligent in shooting Allen, Allen's injury arose out of an assault or battery and therefore coverage does not exist under the policy. At a minimum, questions of fact exist as to Atain's duties under the policy, and therefore summary judgment was not proper.

Further, it should be noted that Allen repeatedly relies on the trial court's findings of fact in the underlying tort action to support its argument that Atain had a duty to defend. Given that the duty to defend must be determined at the time the suit is commenced, evidence and discovery adduced in the lawsuit, and certainly not factual conclusions made at trial, are not to be considered. *American States*, 71 S.W.3d at 232. For instance, in *EsiCorp., Inc. v. Liberty Mutual Ins. Co.*, 193 F.3d 966 (8th Cir. 1999), the 8th Circuit held that in determining whether an insurer owed a duty to defend, the court has to "ignore [the insured's] reliance on facts that emerged during discovery and focus on [the insurer's] provisions and the allegations in [the] complaint." *Id.* Accordingly, relying upon factual findings made following the trial of the underlying action ignores the standard for determining whether the duty to defend exists. This Court must disregard such factual determination in examining whether Atain had a duty to defend.

Additionally, it should be noted that throughout Allen's entire summary judgment motion, Allen never directly addressed the duty to defend. Rather, Allen simply makes fleeting conclusions that Atain refused to defend Bryers. Neither Allen's Motion for Summary Judgment, his Statement of Uncontroverted Material Facts, nor his supporting Memorandum assert necessary facts and address the issue of whether the duty to defend actually exists under the facts and circumstances of the present case.

In order to establish the duty to defend, Allen was required to set forth uncontroverted facts establishing the existence of the policy and that the facts of the loss fall within the coverage provisions of the policy. Not only does Allen's Motion for Summary Judgment not set forth any such facts, Atain's response to the Motion for

Summary Judgment sets forth a number of facts demonstrating disputed issues for trial including facts establishing that Allen's injuries arose from an assault and battery in that Bryers and Allen were arguing prior to the shooting (*L.F.* 256); Bryers started yelling at Allen (*L.F.* 256, 390-391); Bryers had a gun in his hand and at some point pushed Allen (*L.F.* 256, 390-391); a physical altercation occurred between Allen and Bryers (*L.F.* 256, 390-391); after Bryers pushed Allen, Allen swung and hit Bryers (*L.F.* 256, 390-391); Bryers then swung at Allen and hit Allen with the gun, knocking him to the ground, Bryers then stood over Allen and pulled the trigger, shooting Allen in the back as he lay on the ground (*L.F.* 256-257, 390-391); Bryers had time to think about what he was doing before shooting Allen (*L.F.* 257, 390-391); Bryers' gun did not accidentally discharge (*L.F.* 257, 390-391); Bryers intended to shoot Allen, tried to kill Allen and wanted Allen to die. (*L.F.* 256-257, 390-391). Allen did not respond to these facts and accordingly such facts are deemed admitted. At a very minimum these facts leave open questions of fact that preclude Allen's right to judgment with respect to the duty to defend.

2. No Breach of Duty to Defend

Moreover, even assuming for purposes of argument that the claim asserted in the Petition triggered a duty to defend under the policy, Atain did not breach the duty to defend. To begin, a defense from Atain was never requested. Allen offered absolutely no facts in the Summary Judgment briefings demonstrating or even suggesting Bryers requested a defense from Atain. (*L.F.* 162-166) Atain cannot be found to have breached the duty to defend if the defense was never requested. Accordingly, the absence of any evidence

establishing Bryers request for and willingness to accept a defense under the policy, negates Allen's claim that Atain breached a duty to defend.

Atain was never asked to defend, because Bryers did not want Atain to provide a defense. That is, Allen and Bryers entered into a §537.065 agreement before the tort action was ever filed, wherein Bryers agreed to consent to judgment on a negligence claim for purposes of attempting to create coverage where coverage would not otherwise exist. The duty to defend does not arise until the tort action is filed. *Aetna Casualty & Surety Co. v. General Dynamics Corp.*, 968 F. 2d 707 (8th Cir. 1992). By the time the tort action was filed, Allen and Bryers had already entered their §537.065 agreement wherein Bryers agreed to consent to judgment and not contest liability on a negligence claim or damages. (*L.F.* 58, SJ Ex. D1). Bryers' agreement to consent to judgment and not contest liability on a negligence claim or damages violated the terms of the Atain policy, and specifically the cooperation clause. Bryers' breach of the policy thereby negated Atain's obligation, if any, to defend.

3. Opportunity to Defend

Further assuming for purposes of argument that the claim asserted in the Petition triggered a duty to defend under the policy, Atain did not have an opportunity to defend. Whether Atain had an opportunity to defend is a factual question. The trial court, in ruling on a summary judgment, is not tasked with making factual determinations, especially in the absence of any evidence to support such determination. Allen did not offer any facts in his summary judgment establishing Atain's opportunity to defend. The facts offered by Atain in the summary judgment record, however, establish that Atain was not provided an

opportunity to defend. The following chronology of facts plainly negates any argument that Atain had an opportunity to defend, and at a very minimum create a question of fact which cannot be resolved by summary judgment:

The shooting in this case occurred on June 10, 2012. (*L.F.* 396-398). On August 27, 2012, plaintiff's counsel sent correspondence to Atain's insured, John Frank, advising of the injuries sustained by his client and requesting that Mr. Frank refer the correspondence to his insurer. (*L.F.* 181). Atain received a copy of plaintiff's correspondence from its insured on September 10, 2012. (*L.F.* 188). Atain immediately acknowledged notice of the claim and sent correspondence to Wayne Bryers relating thereto on September 12, 2012. (*L.F.* 188-196). In this correspondence, Atain indicated that it was not aware of any settlement demand or lawsuit filed. (*L.F.* 188). Atain further explained that if a lawsuit is filed against Mr. Bryers, Atain would provide him a defense. (*L.F.* 195). The correspondence reminded Mr. 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).

On October 30, 2012, plaintiff's counsel sent correspondence to Atain demanding its policy limit. (SJ Ex. P1). On November 8, 2012, plaintiff's counsel withdrew the demand, indicating that Allen and Bryers had an agreement pursuant to §537.065. (SJ Ex. P1). Sometime prior to November 8, 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, SJ Ex. D1). The §537.065 agreement between Allen and

Bryers required Bryers to consent to entry of judgment against him in a personal injury action 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).

Allen filed his injury action against Bryers on December 4, 2012. (*L.F.* 8-9). Despite Bryers not sending a copy of the lawsuit to Atain, upon discovery of the lawsuit, Atain hired an attorney to defend Bryers. (*L.F.* 236-238, 498). Atain also sent additional correspondence to Bryers on December 14, 2012, supplementing the initial letter with additional facts that had been discovered and notifying Bryers that it had discovered the lawsuit filed by Allen. (*L.F.* 232-238, 498-500). This correspondence additionally reiterated Atain's agreement to provide a defense to Bryers in the lawsuit, specifically identifying counsel retained to defend Bryers. (*L.F.* 236, 498). The correspondence made clear that Atain was not denying coverage. (*L.F.* 236, 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). Bryers, however, refused to cooperate with the attorney. (*L.F.* 501, SJ Ex. P2 and 3). 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).

These facts plainly demonstrate that Allen and Bryers entered into a §537.065 agreement requiring Bryers to consent to entry of judgment prior to the filing of the underlying personal injury action. Bryers did not tender the subject lawsuit to Atain. Despite Bryers' refusal to cooperate, Atain attempted to provide a defense to Bryers. However, Bryers refused the defense.

The opportunity to provide a defense does not arise until the lawsuit is filed. At the time that the lawsuit was filed in this matter, Bryers had already entered into a §537.065 agreement agreeing to consent to judgment against him and was unwilling to allow Atain to provide a defense. As such, Atain was deprived of any opportunity to defend Bryers. The absence of an opportunity to defend negates Allen's claim.

C. Atain Not Bound by Amended Judgment Findings

Relying on *Columbia Cas. Co. v. HIAR Holdings, LLC*, 411 S.W.3d 258 (Mo.banc 2013), Allen claims that Atain is not entitled to relitigate any facts determined in the underlying tort judgment. To begin, *HIAR* does not stand for this proposition. Rather, *HIAR* acknowledged the insurer's right to litigate facts and issues relating to coverage under the policy, even in the face of a refusal to defend. *Id.* In fact, a substantial portion of this Court's opinion in *HIAR* analyses the coverage issues based on the evidence

presented in the coverage action. *See Id.* Admittedly, this Court recognized that an insurer, provided with an opportunity to defend, is not entitled to a second hearing on the reasonableness of the amount of a settlement that was approved as reasonable by the trial court. *Id.* Atain does not dispute such holding and is not seeking an opportunity to relitigate the amount of the judgment. Rather, Atain seeks an opportunity to litigate the facts and issues relating to coverage under the policy, which the *HIAR* Court specifically recognized.

Furthermore, the holdings in *HIAR* and every other case relied upon by Allen or existing under Missouri law, recognizes that an insurer is not bound by determination in the underlying tort action where it was not provided an opportunity to defend the underlying action. In this case, the summary judgment record created by Allen does not contain a single fact demonstrating that Atain was provided an opportunity to defend Bryers in the underlying the tort action. Instead, the uncontroverted facts negate any such claim. See argument above regarding opportunity to defend at page 9, *supra*.

Allen continually claims that Atain refused to defend Bryers. Atain did not refuse to defend Bryers. Atain was not given an opportunity to defend. Allen appears to claim that because Atain offered Bryers a defense under a reservation of rights, Atain refused to defend. While an insured cannot be compelled to accept a defense under a reservation of rights, an offer of a defense under a reservation of rights does not amount to a refusal to defend or denial of coverage. *Pink v. Knoche*, 103 S.W.2d 221 (Mo.App. 2003); *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64 (Mo.App. 2005). The insured has the option of either accepting the insurer's defense under a reservation of rights or refusing

such defense. *Safeco Ins. Co. of Am. v. Rogers*, 968 S.W.2d 256 (Mo.App. 1998). *Truck Ins.*, 162 S.W.3d at 88. If a fully-notified insured accepts liability insurer's defense under a reservation of rights, the defense will not be considered a denial of coverage. *Truck Ins.*, 162 S.W.3d at 88. If the insured rejects defense under reservation of rights, the insurer then has three options: (1) it may represent the insured without a reservation of rights defense (foregoing its coverage defenses); (2) it may withdraw from representing the insured altogether; or (3) it may withdraw from the defense of the insured and file a declaratory judgment action to determine the scope of coverage. *Id.*

In this case, Bryers never allowed Atain to elect between the three options outlined above. Instead, Bryers simply advised the lawyer retained to represent him by Atain that he was not willing to accept the defense, instructed the lawyer to withdraw and further advised that he had already entered a §537.065 agreement with Allen and would be consenting to judgment in accord with that agreement. (SJ Ex. P2). Within 4 business days of advising the lawyer retained by Atain to withdraw, Bryers filed a consent to judgment in accord with the §537.065 agreement. (*L.F.* 56-58). These facts demonstrate that even if Atain would have elected to defend without reservations, Bryers was not interested in such defense as he agreed to consent to judgment even before the tort action was filed. (*L.F.* 58, SJ Ex. D1). Moreover, if Atain would have been permitted to defend at that point (or at any time after the tort action was filed), the defense would have been futile as Bryers had already agreed to consent to judgment.

Furthermore, even assuming Atain had an opportunity to select from the three options outlined above and routinely discussed throughout Missouri law, none of the

options provide Atain with an opportunity to litigate facts relating to coverage.

First, if Atain defended without reservation of rights, Atain could not have taken the position that Bryers conduct was intentional, arose out of an assault or battery or that he was not in the course and scope of his employment as such position(s) would have been in direct conflict with the interest of Bryers. Moreover, if Atain undertook the defense without a reservation of rights, Atain would have waived all coverage defenses to indemnification under the policy thereby again negating any opportunity to litigate the facts regarding coverage issues. The result is Atain would be obligated to indemnify regardless of exclusions or limitations in the policy.

The second option is simply to deny coverages and not defend. Allen claims that is what Atain has done in the present case. If this Court finds that Atain is bound by the factual determinations in the underlying litigation, such finding deprives Atain of the opportunity to litigate the facts relating to its coverage defenses. The result is that Allen and Bryers are permitted to stipulate to facts necessary to create coverage under the policy (despite overwhelming evidence to the contrary) thereby obligating Atain to indemnify under the policy. Depriving Atain of any opportunity to litigate facts relating to coverage under the policy ultimately renders the exclusions or limitations therein meaningless.

The third option results in the same scenario as option two. Under both scenarios, the insurer is not defending, allowing the plaintiff and tortfeasor to stipulate to whatever facts necessary to create coverage under the policy. As such, regardless of the insurer's right to file a declaratory judgment action, the insurer (having had an opportunity to defend – even though it could not have asserted its positions on the coverage issues as part of the

defense of the insured) loses out on the opportunity to litigate facts relating to its coverage defenses if those facts are determined in the underlying action.

The facts of this case and a finding that Atain is bound by the facts relating to coverage found in the underlying tort action places Atain in an untenable situation as it does not provide a fair opportunity and access to the Court to litigate coverage under its policy. This is the exact scenario the *James* and *Cox* Courts recognized thereby holding that the insurer is not bound by the facts relating to coverage from the underlying judgment and must be permitted to litigate such facts in the subsequent action on the policy.

In this case, Bryers never notified Atain of the underlying tort action or requested a defense. Regardless, Atain offered Bryers a defense pursuant to reservation of rights. While Bryers cannot be compelled to accept the defense under reservation, if he rejects the defense under a reservation of rights, at a minimum Atain must be provided an opportunity to elect between the three options recognized by Missouri law. In this case, Atain was not even provided with that opportunity, not only because Bryers consented to judgment 4 business days later, but also because Bryers had agreed to consent to judgment before the tort action was even filed.

Even assuming Atain was given an opportunity to defend, Missouri Supreme Court precedent recognizes that the findings of fact contained in the underlying judgment relating to the coverage issues are not binding upon Atain under the facts and circumstances of this case. The doctrine of collateral estoppel does not apply where its application in inequitable. *James*, 49 S.W.3d at 682. In *James*, this Court recognized that in a situation such as the present case, both the plaintiff and insured/tortfeasor have identical interests in having the

tortfeasor's conduct declared unintentional so as to shift the obligation of paying damages to the insurer. *Id.* Therefore, because the insurer's interest in relying on facts contrary to the plaintiff and insured/tortfeasor's interests necessary to trigger the policy's exclusions is not aligned with the plaintiff or insured/tortfeasor, the privity necessary to impose collateral estoppel does not exist. *Id.* Additionally, the *James* Court acknowledged the inherent conflict between the insurer and the insured/tortfeasor and thus recognized the insurer's right to litigate the facts regarding its policy defenses in a subsequent coverage action, even in the face of specific findings on those facts in the underlying tort action. *Id.* See also *Lodigensky v. American States Preferred Ins. Co*., 898 S.W.2d 661 (Mo.App. 1995); *Cox v. Steck*, 992 S.W.2d 221 (Mo.App. 1999); *Fostill Lake Builders, LLC v. Tudor Ins. Co*., 338 S.W.3d 386 (Mo.App. 2011).

Allen attempts to argue that no conflict existed between Bryers and Atain. In support of this argument, Allen claims that Atain created the conflict by raising its coverage issues. Allen explains that Atain could have avoided the conflict if it had just accepted coverage under the policy. This argument is nonsensical. Atain has a right to assert its coverage defenses, and electing to do so is not what creates the conflict. The conflict is created where the actions surrounding the claim give rise to application of the provisions and exclusions in the policy. Contrary to Allen's argument, if Atain had "admitted coverage for the claim asserted in the Petition for Damages" it very well could have been obligated to pay damages not covered by the policy. For instance, if the court (or jury) ultimately determined that Bryers was not in the course and scope of employment with the Sheridan Apartments, Allen could still prevail on his negligence claim, but the policy

would not provide coverage for such claim. Similarly, if, as the facts demonstrate, Allen's injuries arose out of his assault or battery of Bryers, coverage does not exist but yet Allen could have still prevailed on his claim of negligence against Bryers.

Moreover, the findings in the in the underlying tort (negligence) action were not material or essential to the judgment. 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. Certainly a finding that at no time did *Allen* intentionally assault, strike or batter Bryers is not in any way material or essential to Allen's negligence claim against Bryers. 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".

D. Atain Did Not Deny Coverage and Refuse to Defend.

As stated above, Atain did not refuse to defend. Atain was never asked to defend. Atain was never provided an opportunity to defend. As such, Allen's claim that Atain refused to defend ignores these conditions precedent to a "refusal" to defend. Allen claims that Atain repeatedly and wrongfully denied coverage. The facts in Allen's summary judgment record do not support such a claim. Allen repeatedly attempts to take an isolated statement in Atain's initial "Reservation of Rights" letter to Bryers out of context. When read in its entirety, Atain's initial ROR letter plainly states that while a tort action had not

yet been filed, if such action is filed in the future, Atain will provide Bryers with a defense. To read the letter as a denial of the duty to defend ignores the express language in the letter.

Allen additionally attempts to argue that Atain's filing of the declaratory judgment action constituted a denial of coverage. This claim is not supported by Missouri law. Rather, Allen attempts to take various statement of the law out of context. Specifically, in relying on the language routinely set forth in Missouri coverage cases regarding an insurer's options when the insured rejects a defense under a reservation of rights, Allen ignores the context of the statement of the law. That is, while the Missouri courts recognize that the decision to proceed with a declaratory judgment action is "treated as a refusal to defend an insured," the decision is only treated as a refusal where the insured rejects the reservation of rights offered and the insurer files or continues with prosecution of a declaratory judgment action. See *Ballmer v. Ballmer*, 923 S.W.2d 365 (Mo.App. 1996). There are countless cases in Missouri where the insurer defends under a reservation of rights and proceeds with the filing of a declaratory judgment action. The filing of a declaratory judgment action in and of itself does not constitute a denial of coverage.

E. Atain Is Not Liable for the Entire Amount of the Underlying Judgment

As discussed in Point IV of Atain's Substitute Appellant's Brief, the present action is limited to a Rule 90 statutory garnishment action and recovery under such a claim is limited to the amount of the policy. A statutory garnishment proceeding is limited to money or other property actually held, possessed and/or controlled by the garnishee. *Landmark Bank of Ladue v. General Grocer Co.*, 680 S.W.2d 949 (Mo.App. 1984). 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.*

Allen claims that because the statute defines property subject to garnishment as including "choses in action," Allen is entitled to recover the full amount of the underlying judgment as damages for Atain's alleged breach of the duty to defend. Allen's argument ignores the Missouri cases interpreting the statute and expressly rejecting the argument that a garnishor is entitled to litigate claims the debtor may have against the garnishee in a Rule 90 garnishment action. 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.* 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 assuming that recovery beyond the terms of the policy were permitted in this limited Rule 90 action, the facts in the summary judgment record negate Allen's claim that

Atain breached the duty to defend as discussed above. Moreover, damages resulting from the alleged breach are a question of fact that should not be determined by the Court as a matter of law, not by the trial court on summary judgment. The purpose of damages awarded in a contract action is to restore the plaintiff to the position he or she would have been in if the defendant had not breached the contract. *Williams v. Williams*, 99 S.W.3d 552, 558 (Mo.App. 2003). In other words, "the goal 'is to award a sum that will put the non-breaching party in as good a position as he would have been had the contract been performed.'" *Id.*; see also *McLane v. Wal–Mart Stores, Inc.*, 10 S.W.3d 602, 605 (Mo.App. 2000) (quoting *Hernandez v. Westoak Realty & Inv., Inc.*, 771 S.W.2d 876, 880 (Mo.App. 1989)). The purpose is not to put a plaintiff in a better position than if the contract had been performed. *Lipton Realty, Inc.v.. St. Louis Hous. Auth.*, 705 S.W.2d 565, 569 (Mo.App. 1086). Allowing Allen to recover the full amount of the judgment as damages for Atain's alleged breach of the duty to defend Bryers puts Bryers/Allen in a better position than if Atain had provided a full defense under the policy without reservation, foregoing any opportunity to litigate coverage. That is, if Atain had been given an opportunity and elected to defend the underlying tort action against Bryers, Atain would have been responsible for the defense costs, and obligated to indemnify up to its $1 million policy limit, not the full amount of the $16 million judgment. Now requiring Atain to cover the entire $16 million judgment when its policy only obligates indemnification up to $1 million is unjust and results in a windfall to Allen, and Bryers.

Allen additionally claims that because the underlying trial court made a finding that Bryers conduct was negligent, the assault and battery exclusion cannot apply. While, the

Missouri cases recognize that negligent and deliberate injuries cannot co-exist and that theories of negligent and intentional conduct are contradictory and mutually exclusive, it is equally recognized that although injuries may have been caused by a negligent act, that does not necessarily mean that they did not arise out of an assault and/or battery. See *Capitol Indem. Corp v. Callis*, 963 S.W.2d 247 (Mo.App. 1997): *Acceptance Insurance Company v. Winning Concepts of Westport, Inc.* 842 S.W.2d 206 (Mo.App. 1992); *Penn-America Ins. Co. v. The Bar, Inc.*, 201 S.W.3d 91 (Mo.App. 2006). In this case, at a minimum, the summary judgment record demonstrates open questions of fact as to whether Allen's injuries arose of an assault or battery. Summary judgment, therefore, was not proper.

F. Affirmative Defenses Preclude Summary Judgment

As demonstrated in Atain's Opposition to Allen's Motion for Summary Judgment, and outlined in Point II of Atain's Substitute Appellant's brief, Allen failed to negate each of Atain's affirmative defenses. Now, for the first time in the entirety of this case Allen claims that Atain did not sufficiently plead its affirmative defenses. This is simply not true. Atain sufficiently plead each of its affirmative defenses. Until now, Allen never questioned the sufficiency of Atain's pleadings. Allen never made a request for a more definite statement of Atain's affirmative defenses. Allen never moved to strike the affirmative defenses. Allen did not even address the affirmative defenses in his summary judgment. Now, after recognizing his failure to negate Atain's affirmative defenses to prevail on summary judgment, Allen attempts to find some technical deficiency to avoid addressing

the merits of Atain's argument that Allen did not negate the affirmative defenses as required to prevail on summary judgment. The affirmative defenses are sufficiently plead. Further, the affirmative defenses are supported by voluminous facts in the summary judgment record. Allen failed to negate these affirmative defense and therefore is not entitled to summary judgment.

G. Right to Intervene and Set Aside Judgment

Allen claims that because Atain did not appeal from the trial court's denial of Atain's first Motion to Intervene filed before the trial court entered judgment in the underlying tort claim, Atain cannot claim error with respect to the denial of its subsequent Motion to Intervene. While the Motions to Intervene were very similar, the important fact to note is that the denial of the second Motion to Intervene occurred after the judgment in the underlying tort action and after Atain was called upon to indemnify Bryers. This fact is significant as insurer's "interest", for purposes of intervening, in the underlying action does not ripen until the insurer is called upon to indemnify against the judgment. *Ballmer*, 923 S.W.2d at 369. *Kollmeyer v. Willis*, 408 S.W.2d 370 (Mo.App. 1966), recognizes that an indemnitor, such as Atain, who may have been a "stranger" to the record at the time the judgment was entered, is entitled to intervene and be heard upon a motion to set aside the judgment. *Id.* at 378-79. The trial court accordingly erred in refusing to allow Atain to intervene and attack the underlying judgment based upon fraud and collusion.

H. Atain's Constitutional Arguments Preserved

Atain's Answer asserted various constitutional provisions and facts supporting its claims. These facts were additionally set forth in Atain's summary judgment briefing and further reiterated in Atain's Motion to Reconsider the Court's Summary Judgment. Atain not only identified the specific constitutional provisions but asserted facts supporting such claims. By entering Judgment requiring Atain to pay $16 Million dollars in this limited Chapter 525 garnishment action based upon a policy with a $1 Million limit of liability, precluding Atain from litigating facts relating to coverage under the policy and not allowing Atain its day in court with respect to these claims and its affirmative defenses including fraud and collusion, unconstitutional deprives Atain of its property and rights to due process, equal protection, access to the courts, and imposing unconstitutional fines and punishment upon Atain.

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CERTIFICATE OF SERVICE

I certify that copies of this Appellant's Reply Brief were served this 29th day of April, 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 Reply Brief contains the information required by Rule 55.03. Additionally, this Reply Brief complies with the limitations contained in Rule 84.06(b), in that it contains 6938 words counted using Microsoft Word.

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