SC97623

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. KEY INSURANCE COMPANY, Relator,

v.

THE HONORABLE MARCO A. ROLDAN, Respondent.

Proceeding in Prohibition from the Circuit Court of Jackson County, Missouri
Case No. 1816-CV12271

RELATOR'S REPLY BRIEF

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I. INTRODUCTION

Although the parties have raised numerous arguments, this proceeding in prohibition involves one core issue: whether a judgment creditor's and a purported insured's conclusory allegations that a foreign insurer breached its duties to defend and settle an underlying Missouri lawsuit are sufficient for the circuit court's exercise of specific personal jurisdiction over the insurer in a subsequently filed equitable garnishment and bad faith action when the insurer has submitted uncontroverted evidence that it owed no contractual obligations to the purported insured. The answer is no.

In their Respondent's Brief, Plaintiff Josiah Wright and Defendant Phillip Nash painstakingly avoid any substantive discussion of Relator Key Insurance Company's ("Key") uncontroverted evidence establishing it did not commit any acts sufficient to invoke personal jurisdiction under Missouri's long-arm statute or the Due Process Clause. Relying on (1) Key's investigation of Wright's claim, which they allege occurred in Missouri, (2) Key's alleged "unilateral and conscious business transaction to abandon" Nash "on the courthouse steps in Missouri," and (3) "unanimous" decisions upholding a court's exercise of personal jurisdiction over a foreign insurer in cases allegedly "indistinguishable from this case," Wright and Nash contend the circuit court has personal jurisdiction over Key because "they need only allege facts, which, if believed, establish personal jurisdiction for a recognized cause of action," "Nash has certainly alleged the elements of both a breach of contract and bad faith failure to settle claim," and "Wright and Nash have also alleged that Key waived its right to void the policy." (Respondent's Brief, pp. 17-18, 41, 58)

Rather than squarely address their continued failure to make the required prima facie showing of facts supporting the circuit court's exercise of personal jurisdiction, Wright and Nash base the vast majority of their arguments on what they wish the facts were, not on what the evidence actually shows. Wright and Nash, in effect, implore the Court to adopt and apply a liability insurer exception to a plaintiff's burden to make a prima facie showing of personal jurisdiction, whereby the mere allegation that a foreign

insurer failed to defend an insured in the forum state suffices. That is not the law in Missouri or any other jurisdiction.

The superficial appeal, if any, of Wright's and Nash's contention that, given the "overwhelming body of case law" holding "a court has specific jurisdiction over a non-resident insurance company when the insurance company fails to defend or settle a lawsuit filed in that state" (*id*., pp. 18-19), the recitation of the elements of their claims for relief against Key satisfies their burden to make a prima facie showing of personal jurisdiction does not withstand scrutiny under the specific facts of this case. Contrary to Wright's and Nash's conclusory allegations, the facts of this case are distinguishable from every single case cited in their Respondent's Brief. Because the underlying claims by Wright and Nash do not arise out of any contacts with Missouri created by Key or any actions by Key specifically directed or targeted at Missouri, Key is entitled to an order directing Respondent to dismiss the underlying claims for lack of specific personal jurisdiction.

II. ARGUMENT

A. Respondent Erred in Denying Key's Motion to Dismiss Because Wright and Nash Failed to Make the Required Prima Facie Showing of Specific Personal Jurisdiction.

In an effort to divert the Court's attention from their continued failure to make the required prima facie showing of specific personal jurisdiction, Wright and Nash mischaracterize Key's arguments, attack arguments Key never made, and ignore arguments Key actually made regarding their burden to make a prima facie showing that the circuit court may exercise personal jurisdiction over Key. According to Wright and Nash, Key "misunderstands what the court means by a *prima facie* showing of the validity of the claim" by arguing they "must prove the merits of their underlying claims." (Respondent's Brief, p. 38) They further assert that "even when the defendant uses affidavits, . . . the requirement that the plaintiff make a prima facie showing of the validity of the claim just requires that the plaintiff's allegation, if believed, state a

recognized cause of action." (*Id*., p. 39) Wright and Nash, not Key, misunderstand what is required to make a prima facie showing of specific personal jurisdiction.

As an initial matter, Key has never argued, as alleged by Wright and Nash, they must prove the merits of their claims to satisfy their burden to make the required prima facie showing. (*Id*., pp. 38-41) Nor has Key ever argued that Car Insurance Policy No. KKS4209179 ("2017 Policy") issued to Nash's adult daughter Takesha Nash ("Takesha") "was void due to material misrepresentations" or only a named insured can assert claims for breach of contract and bad faith against an insurer, as also alleged by Wright and Nash. (Respondent's Brief, pp. 35-36) The crux of Key's argument is, and has always been, the mere conclusory allegation that Key breached its duty to defend Nash against a Missouri lawsuit does not support the circuit court's exercise of specific personal jurisdiction in this case because Key has submitted uncontroverted evidence that it owed no contractual obligations to Nash pursuant to K.S.A. 40-2,118(f), which states "[a]n insurer shall not be required to provide coverage or pay any claim involving a fraudulent insurance act." (Relator's Brief, p. 22)

Though repeatedly ignored by Wright and Nash, they have the burden to "establish facts adequate to invoke Missouri's long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process." *Getz v. TM Salinas, Inc.*, 412 S.W.3d 441, 447 (Mo. App. 2013). When, as in this case, the defendant relies on supporting affidavits, "the burden shifts to the plaintiff to make a prima facie showing of jurisdiction by showing: (1) that the action arose out of an activity covered by the long-arm statute, section 506.500, and (2) that defendant had sufficient minimum contacts with the forum state to satisfy due process requirements." *Conway v. Royalite Plastics, Ltd*., 12 S.W.3d 314, 318 (Mo. 2000) (footnote omitted). "To demonstrate that the action arose out of an activity covered by this statute, *a plaintiff must make a prima facie showing of the validity of its claim*." *Id*. (emphasis added).

None of the cases cited by Wright and Nash supports the proposition they "need only to allege facts, which if believed, establish personal jurisdiction for a recognized cause of action" when the defendant has submitted uncontroverted evidence that no

actions contemplated by Missouri's long-arm statute took place. (Respondent's Brief, p. 40) To the contrary, the lone case they cite for this proposition,[1] *Bryant v. Smith Interior Design Group, Inc*., 310 S.W.3d 227 (Mo. banc 2010), involved a motion to dismiss decided on the parties' allegations. *Id*. at 231 ("no affidavits were filed here"). As such, Wright's and Nash's reliance on the holding in *Bryant* that the plaintiff's allegations sufficed to make a prima facie showing of a valid misrepresentation claim is misplaced.[2]

Although Wright and Nash have proffered more evidentiary materials in connection with this proceeding in prohibition than they submitted to the circuit court, *see* Exhibits to Respondent's Answer to Key's Petition in Prohibition, these additional materials have no bearing on whether Key owed any contractual obligations to Nash under the 2017 Policy and, by extension, whether Key committed any acts enumerated in Missouri's long-arm statute or created any contacts with Missouri sufficient to satisfy due process. The new materials relate to Key's communications with Wright and others

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[1]To the extent they also rely on *Andra v. Left Gate Property Holding, Inc*., 453 S.W.3d 216 (Mo. banc 2015); *Angoff v. Marion A. Allen, Inc*., 39 S.W.3d 483 (Mo. banc 2001); and *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134 (Mo. banc 1987), the plaintiffs in these cases relied on more than bare allegations. *See Andra*, 453 S.W.3d at 223-24 (affidavit); *Angoff*, 39 S.W.3d at 486 (parties' contracts); *William Ranni Assocs.*, 742 S.W.2d at 136 (jurisdictional interrogatories).

[2]Their reliance on Key's failure to cite "cases in which a court evaluated the merits of a defendant's affirmative defense and then used that affirmative defense to establish that the defendant was not subject to personal jurisdiction" (Respondent's Brief, p. 40) is equally misplaced. Key has never argued Wright and Nash must disprove the merits of Key's affirmative defenses. (Relator's Brief, pp. 11-31) Key has, however, cited a number of cases in which the court evaluated whether the plaintiff made the required prima facie showing of the validity of its claim (*id*., pp. 14-15, 19-23, 26), none of which were acknowledged or addressed in the Respondent's Brief.

regarding Wright's claim and Nash's alleged residence when served with Wright's underlying lawsuit. (*Id*.) Wright and Nash have not proffered any evidentiary materials to controvert Key's evidence that: (1) in December 2016, Key sent Takesha a notice of cancellation of Car Insurance Policy No. KKS0976555, effective January 23, 2017, after learning of a December 17, 2016 accident involving Nash, who was operating a vehicle listed on Policy No. KKS0976555 but was not disclosed to Key as a driver; (2) in her January 20, 2017 application, Takesha failed to disclose that Nash owned the 2002 Kia Optima; (3) in her January 20, 2017 application, Takesha failed to disclose that Nash would be operating the 2002 Kia Optima; and (4) when Key issued the 2017 Policy and on the date of the accident, February 1, 2017, Nash's Kansas driver's license was "Susp / Rev / Denied." (R.[3] *at 21-26, 95, 98-99*)

Indeed, Wright's and Nash's only responses to Key's uncontroverted evidence that it owed no contractual obligations to Nash have been more conclusory allegations, deflection, and obfuscation. *See, e.g.*, Respondent's Brief, pp. 36-37 ("Thus, Key cannot seriously argue that Nash, merely because he was not the named insured, cannot maintain a claim for bad faith or breach of contract. . . . Key also concedes that Nash and Wright allege that Key waived its right to rescind coverage due to material misrepresentations."). Wright's and Nash's reliance on Key's "failure" to cite cases in support of and to explain arguments it has never made, in lieu of responding to the arguments actually made by Key, speaks volumes regarding the merits of their contention that they have satisfied their burden to make a prima facie showing of personal jurisdiction by simply alleging the elements of their claims and that Key "waived its right to void the [2017 Policy]." (Respondent's Brief, p. 41)

[3]"R. *at* ___" refers to the specific page number of the supporting exhibits (R. *1 - 133*) attached to Key's petition in prohibition that is the relevant portion of the record.

B. Respondent Erred in Denying Key's Motion to Dismiss Because the Underlying Claims Do Not Arise from Key's Commission of an Act Enumerated in Missouri's Long-Arm Statute.

1. The Underlying Claims Do Not Arise From Key's Transaction of Business in Missouri.

Wright and Nash argue their claims arise from Key's transaction of business in Missouri because "Key investigated and adjusted the claim in Missouri" and § 375.786, R.S.Mo., "classifies that investigation and adjustment as the transaction of business" in Missouri. (Respondent's Brief, pp. 17-18) They further argue the nationwide coverage provision in the 2017 Policy "expressly contemplated that Key would transact business and perform contractual obligations in Missouri if its insured was involved in an accident in the state" and "the failure to perform a contractual obligation in Missouri can constitute the transaction of business for the purposes of the long-arm statute." (*Id.*, pp. 27, 34-35) In support of these arguments, Wright and Nash rely on Key's communications with persons in Missouri regarding Wright's claim, alleged "business decision to deny coverage to Nash," and alleged waiver of "its right to rescind coverage due to material misrepresentations." (*Id.*, pp. 24-27, 29, 37) None of Key's actions or alleged actions constitutes the transaction of business in Missouri for purposes of the long-arm statute.

a. Key's Investigation of Wright's Claim Did Not Constitute the Transaction of Business in Missouri.

Pursuant to § 375.786.2(6), "investigation or adjustment of claims or losses" "in this state effected by mail or otherwise by or on behalf of an unauthorized insurance company is deemed to constitute the transaction of an insurance business in this state." Section 375.786.2 further states "[t]he venue of an act committed by mail is at the point where the matter transmitted by mail is delivered and takes effect." Wright and Nash contend that § 375.786.2 establishes, as a matter of law, that Key transacted insurance business in Missouri by investigating Wright's claim. (Respondent's Brief, pp. 22-35) According to Wright and Nash, the definition of "the transaction of an insurance business

in this state" in § 375.786.2 trumps the countless decisions holding "use of the mail or telephone communications, without more, does not constitute the transaction of business for purposes of long-arm jurisdiction in Missouri." *See, e.g., Johnson Heater Corp. v. Deppe*, 86 S.W.3d 114, 120 (Mo. App. 2002).

Wright and Nash have cited no authority for this remarkable proposition, relying on "[t]he plain and ordinary language of section 375.786" and eight inapposite cases. (Respondent's Brief, pp. 23-35) The "plain and ordinary language of" § 375.786 demonstrates that this statute relates to the regulation of nonadmitted insurers unlawfully transacting insurance business in Missouri.[4] It has nothing to do with personal jurisdiction or Missouri's long-arm statute.

Five of the cases cited by Wright and Nash predate *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), which formally distinguished specific from general personal jurisdiction, and two of these five cases did not even discuss personal jurisdiction. *See Comm'l Mut. Acc. Co. v. Davis*, 213 U.S. 245, 255-56 (1909) (Missouri court had "jurisdiction" over Pennsylvania insurer because insurer "was doing business in Missouri" in that "it had other insurance policies outstanding in the state of Missouri" and sent agent to Missouri "to investigate the loss sued for in this case"); *McClanahan v. Trans-Am. Ins. Co.*, 307 P.2d 1023, 1025 (Cal. App. 1957) (Alabama insurer was "doing business" in California and subject to "local process" because insurer investigated and defended claims arising out of California accident); *Gov't Emps. Ins. Co. v. Grounds*, 332 So.2d 13 (Fla.1976) (no discussion of personal jurisdiction); *Bevins v. Comet Cas. Co.*, 390 N.E.2d 500, 504-05 (Ill. App. 1979) (personal jurisdiction proper under West

[4]Moreover, this statute expressly does not apply to any of Key's activities in connection with Wright's claim. *See* § 375.786.1(3) ("[T]his section shall not apply to . . . "[t]ransactions in this state involving a policy lawfully solicited, written and delivered outside of this state covering only subjects of insurance not resident, located or expressly to be performed in this state at the time of issuance, and which transactions are subsequent to the issuance of such policy.").

Virginia service of process statute for "any other transaction of business" based on nationwide coverage provision, West Virginia accident, and investigation of accident); *Isaac Fass, Inc. v. Pink*, 17 S.E.2d 379 (Va. 1941) (no discussion of personal jurisdiction).

The three post-*Helicopteros* cases are equally distinguishable. One did not include any discussion of the "transaction of business" because, in contrast to Missouri's long-arm statute, Connecticut's long-arm statute specifically includes the breach of any contract to be performed in that state as one of the enumerated acts. *Samelko v. Kingstone Ins. Co.*, 184 A.3d 741, 749 (Conn. 2018).[5] The second one skipped over the long-arm statute analysis, discussing "transaction of business" briefly in dicta. *Pace Commc'ns Servs. Corp. v. Express Prods., Inc.*, 945 N.E.2d 1217, 1222-23 (Ill. App. 2011). The third one, and only Missouri case cited in support of this argument, contains no discussion of the "transaction of business," addressing only whether the defendants' alleged fraudulent communications and other contacts fell within the long-arm statute as the commission of a tortious act in Missouri. *Bryant*, 310 S.W.3d at 232 (allegations that defendants sent "false and misleading documents" to Missouri were "sufficient to demonstrate the commission of a tortious act within this state" under the long-arm statute). *Bryant* did not hold, as Wright and Nash assert, "that a business can transact business in this state . . . by sending correspondence through the mail even if it does not physically step foot inside the state." (Respondent's Brief, p. 27) Missouri law is to the contrary, requiring more than the use of mail or telephone communications to qualify as

[5]Unlike some states' long-arm statutes, § 506.500 does not include the failure to perform a contract in Missouri as an enumerated act. *Compare, e.g.*, Conn. Gen. Stat. § 33-929(f)(1) ("Every foreign corporation shall be subject to suit in this state, . . . on any cause of action arising . . . [o]ut of any contract . . . to be performed in this state."); Fla. Stat. § 48.193(1)(a)(7) ("A person . . . submits . . . to the jurisdiction of the courts of this state for any cause of action arising from . . . [b]reaching a contract in this state by failing to perform acts required by the contract to be performed in this state.").

the transaction of business. *See, e.g., Johnson Heater*, 86 S.W.3d at 120 ("use of the mail or telephone communications, without more, does not constitute the transaction of business for purposes of long-arm jurisdiction in Missouri").

Neither the plain language of § 375.786, nor the eight cases cited by Wright and Nash, support their contention that Key's communications with persons in Missouri in connection with its investigation of Wright's claim and denial of coverage constitute the transaction of business in Missouri for purposes of § 506.500.

b. Key's Alleged Breach of Its Duties to Defend and Settle Wright's Lawsuit Against Nash Did Not Constitute the Transaction of Business in Missouri.

Wright and Nash also assert "Key's own insurance policy required it to transact additional business in Missouri" because, "[i]n exchange for a premium, Key's promises to defend and indemnify its insured apply to any location within its selected coverage territory." (Respondent's Brief, p. 27) Therefore, Wright and Nash assert, the 2017 Policy "expressly contemplated that Key would transact business and perform contractual obligations in Missouri if its insured was involved in an accident in the state." (*Id.*) As discussed herein and in Key's Relator's Brief, pp. 14-18, Key made no promises whatsoever in the 2017 Policy to Nash, an unlicensed and undisclosed owner and driver of the 2002 Kia Optima.[6] Key's failure to perform a nonexistent contractual obligation in Missouri does not constitute the transaction of business under Missouri's long-arm statute.

In a further effort to avoid their burden to make a prima facie showing, Wright and Nash also suggest the Court should conflate the analysis of whether Key's alleged

[6]For this same reason, Wright's and Nash's reliance on decisions discussing an insurer's place of performance of its duties to defend and indemnify is misplaced. (Respondent's Brief, p. 28) These cases involved claims against persons whose status as insureds was not in question. *Samelko*, 184 A.3d at 747; *Gov't Emps. Ins. Co. v. Grounds*, 311 So.2d 164, 169 (Fla. Dist. Ct. App. 1975), *cert. discharged*, 332 So.2d 13 (Fla.1976).

conduct falls within Missouri's long-arm statute with the analysis of whether Key has sufficient minimum contacts with Missouri to satisfy due process. (Respondent's Brief, pp. 33-34) Specifically, Wright and Nash assert "[a]lthough Missouri court cases often analyze the long-arm statute and the minimum contacts separately, this court construes both the long arm statute and the transaction of business provision as extending the jurisdiction of this court to the fullest extent permissible under the due process clause" and "dozens of states have concluded that due process allows a state to maintain jurisdiction over a foreign insurance company for its failure to defend an insured in that state" and, "[t]hus, these courts have implicitly found that an insurance company's denial of a defense and denial of coverage constitutes the transaction of business in their state." (*Id*.) They make the related argument that because Missouri "modeled its long-arm statute after the Illinois statute," "[t]his court should follow Illinois's lead by holding that an insurance company transacts business for the purposes of the long-arm statute when it denies coverage and a defense to an insured." (*Id*., p. 32) Wright's and Nash's entreaty to be excused from their burden to make a prima facie showing of a valid claim arising out of Key's alleged transaction of business in Missouri should be denied for several reasons.

First, separate analysis of the two prongs of Missouri's test to determine if personal jurisdiction exists over a nonresident defendant is not optional, as Wright and Nash imply. *State ex rel. PPG Indus., Inc. v. McShane*, 560 S.W.3d 888, 891 (Mo. banc 2018). Second, while "the ultimate objective of [Missouri's long-arm statute] was to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause," this "means the 'extent permissible' for the act or conduct set forth in the statute, and *does not refer to the limits which might be permissible for other conduct not specified in the statute*." *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 85 (Mo. App. 1980) (emphasis added) (internal quotation omitted). Third, many of the "unanimous" cases that Wright and Nash allege are "indistinguishable from this case" involved the application of the significantly less

demanding "but for" test.[7] *E.g.*, *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455-56 (6th Cir. 1993); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co*., 907 F.2d 911, 914-15 (9th Cir. 1990).

Fourth, Missouri cannot "follow Illinois's lead" because Illinois courts consider only whether the exercise of personal jurisdiction would satisfy due process requirements and do "not consider whether the defendant performed any of the acts enumerated in the long-arm statute." *Pace*, 945 N.E.2d at 1222. Fifth, neither of the two Illinois decisions cited by Wright and Nash held "that an insurance company transacts business for the purposes of the long-arm statute when it denies coverage and a defense to an insured and refuses to settle his or her claim," as they contend. *See id*. at 1223 (discussing "transaction of business" in dicta); *Bevins*, 390 N.E.2d at 504-05 (personal jurisdiction based on nationwide coverage provision, West Virginia accident, and investigation of accident).

The only business Key transacted was in Kansas, i.e., the issuance of the 2017 Policy to a Kansas resident to insure vehicles Takesha represented as owned by her, driven by her, and principally garaged in Kansas. (R. *at 21-26, 100-120*) Key's "use of the mail or telephone communications" with Wright and Nash in the investigation and denial of Wright's claim, "without more, does not constitute the transaction of business for purposes of long arm jurisdiction." *Capitol Indem. Corp. v. Citizens Nat'l Bank of Fort Scott, N.A.*, 8 S.W.3d 893, 904 n.8 (Mo. App. 2000) (distinguishing cases in which "the defendant obtained direct financial benefit from activities in the state of Missouri").

As discussed above, Wright and Nash have proffered nothing but bald allegations in response to Key's uncontroverted evidence that Takesha's material misrepresentations

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[7]In Missouri, "[t]o demonstrate that the action *arose out of* an activity covered by this statute, a plaintiff *must make a prima facie showing of the validity of its claim*." *Conway*, 12 S.W.3d at 318 (emphasis added). "The but-for test is significantly less demanding." *See, e.g., Lynch v. Olympus Am., Inc.*, No. 18-CV-00512, 2019 WL 2372841, at *8 (D. Colo. June 5, 2019).

vitiated coverage as a matter of Kansas law. *See* K.S.A. 40-2,118(f) ("An insurer shall not be required to provide coverage or pay any claim involving a fraudulent insurance act."). Contrary to Wright's and Nash's bald allegations, Key did not owe Nash any contractual obligations under the 2017 Policy. Key's alleged failure to defend a noninsured, Nash, and settle Wright's noncovered claims did not constitute the transaction of business in Missouri for purposes of specific personal jurisdiction.

Even if Key had owed a contractual obligation, which it did not, the authorities relied upon by Wright and Nash would not support specific personal jurisdiction based on the transaction of business in Missouri. The *Bevins* case, first cited in the Respondent's Brief, is the only case they have cited in which the court analyzed a foreign insurer's "transaction of business" in the forum state for purposes of personal jurisdiction. 390 N.E.2d at 504-05. The holding in *Bevins* was not based on the insurer's alleged breach of the duty to defend by failing to retain defense counsel in the forum state. *Id*. at 505. Rather, it was based on the insurer's "agree[ment] to insure [the driver] against all liability regarding personal injury and property damage as a result of the use of the automobile in any state without limitation" and "perform[ance of] a number of acts within the State of West Virginia" "effected by mail or otherwise."[8] *Id*. at 504-05. In addition, as discussed above, *Bevins* predates *Helicopteros*, and its holding that communications with persons in the forum state constitute the transaction of business is contrary to Missouri law. As such, Wright's and Nash's reliance on *Bevins* is misplaced.

The circuit court's reliance on Wright's and Nash's mere allegations that Key failed to perform a contractual obligation in Missouri to conclude Key transacted business in Missouri was in error. And, even if Key had owed a contractual obligation to Nash, its denial of coverage still would not be sufficient because Key committed no act that constituted the transaction of business in Missouri.

[8]Unlike the insurer in *Bevins*, Key did not agree to insure Nash, an unlicensed and undisclosed driver, for any liability as a result of his use of the 2002 Kia Optima.

2. Key Did Not Commit a Tortious Act in Missouri.

Conspicuously absent from Wright's and Nash's Respondent's Brief is any discussion of *facts* or *evidentiary materials* satisfying their burden to make a prima facie showing of the validity of Nash's purported tort claim against Key. Despite the fact their burden to make a prima facie showing of a valid claim requires more than just pleading sufficient facts to survive a motion to dismiss for failure to state a claim, *Capitol*, 8 S.W.3d at 901 n.6, they have done nothing more than allege Key "waived" the right "void" or "rescind" the 2017 Policy. (Respondent's Brief, pp. 37-38, 41) Their remaining arguments devoted to Key's alleged erroneous assumption that Kansas law applies to Nash's purported bad faith claim against Key (*id.*, pp. 41-45) also miss the mark. As explained in Key's Relator's Brief, even if Missouri law does apply to Nash's purported tort claim against Key, and even if Wright and Nash could rely on their bald allegations of waiver, these allegations are irrelevant to Key's denial of coverage based on K.S.A. 40-2,118(f), which is not contingent upon the 2017 Policy being voided or rescinded.

Wright and Nash have not cited a single authority supporting their apparent contention that Key somehow waived the right to deny coverage based on K.S.A. 40-2,118(f), or that some Kansas or Missouri law precludes from Key from denying coverage based on K.S.A. 40-2,118(f). Key, in contrast, has cited ample authority under both Kansas and Missouri law supporting its position that it owed no contractual obligations to Nash based on the uncontroverted evidence submitted to the circuit court. (Relator's Brief, pp. 20-23) As discussed above and in Key's Relator's Brief, Wright's and Nash's theory of personal jurisdiction that the mere allegation that a nonresident insurer breached its duty to defend a lawsuit in the forum state is sufficient for the exercise of personal jurisdiction is contrary to well-established case law requiring the plaintiff to "make a prima facie showing of the validity of his claim." *Capitol*, 8 S.W.3d at 899. Wright's and Nash's repeated and entirely unsupported allegations that "Key's policy required it to defend and indemnify Nash," "Key abandoned Nash and left him standing alone on the courthouse steps in Missouri," and "Key committed a tort in

Missouri" (e.g., R. *at 38, 42, 51*) are not "a prima facie showing of the validity" of any tort claim. The circuit court's reliance on Wright's and Nash's mere allegations that "Key committed a tort in Missouri" was in error.

3. Key Did Not Contract to Insure Any Risk in Missouri.

Wright and Nash continue to assert, without citation to a single legal authority, that Key contracted to insure a risk in Missouri, at the time of contracting, by issuing the 2017 Policy to Takesha in an adjacent state. (Respondent's Brief, pp. 49-50) Their assertions in this regard are especially disingenuous given their failure to acknowledge, much less address, the holding in *State ex rel. Illinois Farmers Insurance Co. v. Koehr*, 834 S.W.2d 233, 234-35 (Mo. App. 1992), that a foreign insurer who issued an auto policy to insureds in an adjacent state did not "contract[] to insure any person, property or risk located within this state at the time of contracting" with respect to an accident that occurred in Missouri. As discussed in Key's Relator's Brief, pp. 23-24, under the holding in *Illinois Farmers*, Key did not contract to insure a risk in Missouri at the time of contracting by merely issuing an automobile insurance policy to a resident of an adjacent state. The circuit court's conclusion that Key contracted to insure a risk in Missouri at the time of contracting was in error.

C. Respondent Erred in Denying Key's Motion to Dismiss Because the Circuit Court's Exercise of Personal Jurisdiction Does Not Comport With Due Process.

Like their arguments regarding Missouri's long-arm statute, Wright's and Nash's arguments regarding due process revolve around their unsupported allegations that Key failed to defend and settle a lawsuit filed against Nash in Missouri and Key waived the right to void or rescind the 2017 Policy. (Respondent's Brief, pages 50-74) Although Wright and Nash accuse Key of failing to explain why "this court should go against th[e] overwhelming body of case law" in which other "courts have universally held that a court's exercise of jurisdiction over an insurance company under these circumstances is consistent with due process" (*id.*, pp. 52 and 74), as repeatedly explained by Key, these cases predate several United States Supreme Court's including *Walden v. Fiore*, 571 U.S.

277 (2014),[9] as well as involved markedly dissimilar facts and inapplicable legal standards. While the cases cited by Wright and Nash may, at first blush, appear to support their due process argument, as discussed in Key's Relator's Brief, pp. 24-30, these cases are all distinguishable upon closer examination.[10]

[9]Wright's and Nash's complaints that "Key does not explain how any of these cases affect this overwhelming body of law" or "how any principle in those opinions is relevant to this issue of specific jurisdiction," "[o]ne would think that if these cases were so 'sea changing' to affect the outcome of this case then Key would explain that in its suggestions," and "[n]or does Key even cite any other case claiming that these Supreme Court cases changed the law regarding specific jurisdiction over an insurance company" (Respondent's Brief, pp. 65-65) ring hollow. The import of these cases is both self-evident and beyond dispute. *See, e.g.*, Samuel P. Jordan, *Hybrid Removal*, 104 Iowa L. Rev. 793, 794 (2019) ("Now, roughly 70 years after *International Shoe*, a second personal jurisdiction revolution is underway. . . . [T]here can be little doubt that the Court's recent cases have articulated narrowing principles that mark a substantial shift in both doctrine and tone.").

[10]Despite Wright's and Nash's reliance on the distinction between first-party and third-party claims (Respondent's Brief, pp. 66-71), several cases they cite involved first-party claims, which makes these cases contrary to *Illinois Farmers*. *McGow v. McCurry*, 412 F.3d 1207, 1210 (11th Cir. 2005); *Melvin v. Farm Bur. Prop. & Cas. Ins. Co.*, No. CIV-14-927, 2014 WL 12730319, at *2 (W.D. Okla. Nov. 5, 2014); *Verri v. State Auto. Mut. Ins. Co.*, 583 F. Supp. 302, 303 (D. R.I. 1984); *Bahn v. Chicago Motor Club Ins. Co.*, 634 A.2d 63, 65 (Md. 1993); *Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 134 P.3d 710, 711 (Nev. 2006). Another decision they cite was effectively withdrawn pending the insurer's motion for reconsideration. *Maldonado v. Safeway Ins. Co.*, No. CV15-01, 2015 WL 12734159 (D. Mont. Sept. 3, 2015), *leave to move for reconsideration,* 2016 WL 6652745, at *1 (D. Mont. June 15, 2016).

Most of these cases jumped to the due process analysis, resulting in the application of a less exacting standard than the prima facie showing required under Missouri law.[11] Several cases, including *Farmers* and *Payne*, involved the application of a "but for" test, resulting in the application of an even less exacting standard than the cases in which the courts limited their inquiries to due process.[12] Not one of these cases involved a

[11]*McGow*, 412 F.3d at 1214; *Ferrell v. W. Bend Mut. Ins. Co.*, 393 F.3d 786, 790 (8th Cir. 2005); *Payne*, 4 F.3d at 455; *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 286 n.1 (4th Cir. 1987); *Leech v. Nat'l Interstate Ins. Co.*, No. 2:17-CV-0508, 2018 WL 3737926, at *4-8 (S.D. Ind. Aug. 7, 2018), *report and recommendation adopted*, 2018 WL 4003628 (S.D. Ind. Aug. 22, 2018); *Hawthorne v. Mid-Continent Cas. Co.*, No. C16-1948, 2017 WL 1233116, at *3 (W.D. Wash. Apr. 4, 2017); *Melvin*, 2014 WL 12730319, at *1; *Evanston Ins. Co. v. W. Cmty. Ins. Co.*, 13 F. Supp.3d 1064, 1068 (D. Nev. 2014); *Wells Cargo, Inc. v. Transp. Ins. Co.*, 676 F. Supp.2d 1114, 1119 (D. Idaho 2009); *Robinson Corp. v. Auto-Owners Ins. Co.*, 304 F. Supp.2d 1232, 1236 (D. Haw. 2003); *Louis Dreyfus Corp. v. McShares, Inc.*, No. CIV.A. 88-5489, 1989 WL 147535, at *1 (E.D. La. Nov. 22, 1989); *Verri*, 583 F. Supp. at 303; *Wash. Ins. Guar. Ass'n v. Ramsey*, 922 P.2d 237, 240 (Alaska 1996); *Se. Express Sys. v. S. Guar. Ins. Co.*, 34 Cal. App.4th 1, 5 (1995); *Pace*, 945 N.E.2d at 1222-23; *Auto Owners Ins. Co. v. Consumers Ins. USA, Inc.*, 323 S.W.3d 781, 784-86 (Ky. App. 2010); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1995); *Arbella*, 134 P.3d at 712; *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins. Co.*, 600 A.2d 1243, 1245 (N.J. Super. Ch. Div. 1991); *Labruzzo v. State Wide Ins. Co.*, 353 N.Y.S.2d 98, 101 (Sup. Ct. 1974); *Leggett v. Smith*, 686 S.E.2d 699, 704 (S.C. App. 2009).

[12]*Payne*, 4 F.3d at 455-56; *Farmers*, 907 F.2d at 914-15; *Hawthorne*, 2017 WL 1233116, at *4; *Evanston*, 13 F. Supp.3d at 1069; *Robinson*, 304 F. Supp.2d at 1239.

purported insured's breach of contract and bad faith claims in the face of uncontroverted evidence of material misrepresentations in the policy application.[13]

Despite this Court's admonishment "that a personal jurisdiction inquiry must not be mechanical" and "[m]inimum contacts are evaluated on a case-by-case basis," *Andra*, 453 S.W.3d at 226, 226 n.9, Wright's and Nash's entire theory of personal jurisdiction in this case is based on such a mechanical inquiry revolving around Key's status as a liability insurer and their conclusory allegations that Key breached its duty to defend Nash. Indeed, they admit they "base their assertion of personal jurisdiction on Key's unilateral response to the underlying collision and Wright's claim." (Respondent's Brief, pp. 50-51) Their "analysis" of "Key's unilateral response" and Key's contacts with Missouri continues to be perfunctory at best, based on what they wish the facts were, not on what the evidence actually shows. Wright and Nash paint with a broad brush in urging the Court to follow the "unanimous" decisions from other jurisdictions, without

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[13]*McGow*, 412 F.3d at 1211; *Ferrell*, 393 F.3d at 789; *Payne*, 4 F.3d at 453; *Farmers*, 907 F.2d at 912; *Rossman*, 832 F.2d at 286; *Am. & Foreign Ins. Ass'n v. Comm'l Ins. Co.*, 575 F.2d 980, 982 (1st Cir. 1978); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 713 (D.C. Cir. 1986); *Leech*, 2018 WL 3737926, at *1; *Camico Mut. Ins. Co. v. J.D. Rosen C.P.A., P.A.*, No. 17-2228, 2017 WL 3839412, at *1 (D. Kan. Sept. 1, 2017); *Hawthorne*, 2017 WL 1233116, at *1; *Melvin*, 2014 WL 12730319, at *3; *Evanston*, 13 F. Supp.3d at 1067; *Forshaw Indus., Inc. v. Insurco, Ltd.*, 2 F. Supp.3d 772, 782 (W.D.N.C. 2014); *Wells Cargo*, 676 F. Supp.2d at 1119; *Robinson*, 304 F. Supp.2d at 1235; *Louis Dreyfus Corp.*, 1989 WL 147535, at *1; *Verri*, 583 F. Supp. at 303; *Wash. Ins. Guar. Ass'n*, 922 P.2d at 239; *Se. Express*, 34 Cal. App.4th at 3; *Samelko*, 184 A.3d at 745; *Pace*, 945 N.E.2d at 1220; *Auto Owners*, 323 S.W.3d at 782; *Bahn*, 634 A.2d at 64; *Domtar*, 533 N.W.2d at 28; *Arbella*, 134 P.3d at 711; *N.J. Auto.*, 600 A.2d at 1244; *Labruzzo*, 353 N.Y.S.2d at 100; *Sparks v. First Miami Ins. Co.*, No. L-91-222, 1992 WL 105021, at *1 (Ohio App. May 15, 1992), *cause dismissed*, 607 N.E.2d 9 (Ohio 1993); *Leggett*, 686 S.E.2d at 703.

ever discussing the specific facts (not allegations) of their claims against Key as required by *Andra*. Nor do Wright and Nash address any of the arguments that Key has raised in the circuit court and in this proceeding regarding their misplaced reliance on those cases.

With respect to Wright's and Nash's assertion that the cases cited by Key involved "first-party" claims and, therefore, should be disregarded because this case involves a "third-party" claim (Respondent's Brief, pp. 66-71), the distinction between first-party and third-party claims improperly expands the scope of specific personal jurisdiction for "indemnity" claims compared to "duty to defend only" claims based on the very same alleged underlying conduct by the insurer. For example, in *Scott, Blane & Darren Recovery LLC v. Auto-Owners Insurance Co*., No. 2:14-CV-03675, 2014 WL 4258280, at *2 (C.D. Cal. Aug. 27, 2014), the insured sued its liability insurer for breach of contract and bad faith failure to defend. Because the insured prevailed in the underlying lawsuit, the court granted the insurer's motion to dismiss based on lack of personal jurisdiction. *Id*. at *4-5.

While Key agrees with the result in *Scott*, the result in *Scott* exemplifies the unsoundness of the distinction between first-party and third-party claims. As emphasized by the United States Supreme Court in *Walden*, and recently re-affirmed by this Court in *PPG Industries*, the focus of a personal jurisdiction inquiry is the defendant's contacts with the forum and the litigation. The unilateral actions of the plaintiff and the defendant's insured are irrelevant; "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Walden*, 571 U.S. at 285. Like the insurer in *Scott*, which "ha[d] absolutely no connection with California," Key's contacts with Missouri "are quite simply nonexistent." The fact that the insured prevailed and avoided the entry of an adverse judgment should not be the dispositive factor for the exercise specific personal jurisdiction when the insurer's underlying conduct (the denial of coverage) is the same.

In other words, whether an *insured* loses, wins, or settles an underlying lawsuit should not determine whether its liability insurer purposefully availed itself of the

privilege of conducting activities within the forum and undertook actions that resulted in contacts creating a substantial connection to the forum. *See Andra*, 453 S.W.3d at 226. Tellingly, Wright and Nash have not explained how, under the facts of *this* case, Key created any contacts with Missouri or had any reason to foresee Nash, an unlicensed and undisclosed driver, would operate the 2002 Kia Optima in Missouri and become involved in the February 1, 2017 accident.[14]

Wright's and Nash's unsupported allegations regarding Key's failure to defend a noninsured, Nash, and to settle Wright's noncovered claims do not satisfy their burden to make a prima facie showing that the circuit court's exercise of specific personal jurisdiction over Key comports with due process. *Cf. Allegis Inv. Servs., LLC v. Arthur J. Gallagher & Co.*, No. 2:17CV515, 2017 WL 6512240, at *3 (D. Utah Dec. 19, 2017) (rejecting plaintiff's citation to cases with "insurance policies with territory-of-coverage clauses and duty to defend clauses that courts have found established jurisdiction" as "inapposite because they involve the actual insurer"). For this additional reason, the circuit court's denial of Key's motion to dismiss was in error.

III. CONCLUSION

The circuit court's usurpation of jurisdiction in denying Key's motion to dismiss for lack of personal jurisdiction is clearly evident from Key's uncontroverted affidavits demonstrating it did not commit any acts sufficient to invoke personal jurisdiction under Missouri's long-arm statute or the Due Process Clause. Because the circuit court lacks personal jurisdiction over Key, the preliminary writ of prohibition should be made permanent directing Respondent to dismiss the underlying claims filed by Wright and Nash against Key.

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[14]Wright and Nash can pursue their claims against Key in a court where the exercise of personal jurisdiction over Key comports with due process. In that regard, Key has filed an action in the United States District Court for the District of Kansas, Case No. 2:19-cv-02296, seeking a judgment declaring Wright's judgment against Nash is outside the coverage afforded by the 2017 Policy.

Dated this 13th day of June, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The filing attorney certifies that this brief includes the information required by Rule 55.03 and complies with the requirement of Rule 84.06, including the limitation stated in Rule 84.06(c). This brief contains 7733 words (excluding the cover, signature block, and the certificates) as determined by the software application for Microsoft Word. The typeface is 13 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that, in conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that on June 13, 2019, the foregoing was electronically filed through the Missouri Courts eFiling System and a true and accurate copy was served by U.S. Mail to:

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