IN THE MISSOURI SUPREME COURT

Appeal No. SC98650

State of Missouri ex rel. COUNTRY Mutual Insurance Company,

Relator,

vs.

The Honorable Brian H. May, Judge of The Missouri Circuit Court, Twenty-First Judicial Circuit (St. Louis County),

Respondent.

Original Proceeding in Prohibition

Brief of Relator COUNTRY Mutual Insurance Company

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JURISDICTIONAL STATEMENT

This action for a permanent Writ of Prohibition presents the question of whether Relator COUNTRY Mutual Insurance Company ("COUNTRY Mutual"), as an intervening party under Section 537.065 (Supp. 2017), is entitled to a change of judge and to substantively participate in the underlying matter.[1]

Article V, Section 4, of the Constitution of the State of Missouri and Supreme Court Rules 84 and 97 authorize this Court to issue and determine original remedial writs. A writ of prohibition is the appropriate remedy where a judge has improperly denied a timely-filed motion for change of judge. *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 221 (Mo. App. W.D. 2001); *State ex rel. Walters v. Schaeperkoetter*, 22 S.W.3d 740, 742 (Mo. App. E.D. 2000). Further, a writ is the proper remedy for curing discovery rulings that exceed a court's jurisdiction or constitute an abuse of the court's discretion. *State ex rel. White v. Gray*, 141 S.W.3d 460, 463 (Mo. App. W.D. 2004).

Here, a permanent Writ of Prohibition is necessary to enforce Relator's right to a change of judge and to substantively participate in the underlying action as a proper intervening party.

[1] Cause No. 15SL-CC03780, pending in the 21st Judicial Circuit, St. Louis County.

STATEMENT OF FACTS

A. Ithiwa Woodson and Robert Beene's Wrongful Death Action and Their Section 537.065 Agreement with Silver Franklin

On November 3, 2015, Plaintiffs Ithiwa Woodson and Robert Beene, the natural parents of decedent Donte Woodson, filed a wrongful death action alleging that on August 16, 2015, their son was shot by defendant Silver Franklin at a QuikTrip in St. Louis County. (Exh. A, Petition, ¶¶ 6-7).[2] In the original Petition, Plaintiffs alleged that, based on information and belief, Mr. Franklin serviced the ATMs at the QuikTrip and "was in the course and scope of his employment at the time of the incident." (*Id*. at ¶ 8). Plaintiffs sued Silver Franklin, his wife Marie Franklin, and Mr. Franklin's employer, Action ATM, Inc. (*Id.*, caption).

On June 27, 2016, Plaintiffs filed, with leave of court and after two other amendments to the Petition, their Third Amended Petition. (Exh. B). Naming Silver Franklin as the only defendant, the Third Amended Petition alleges Silver Franklin entered the QuikTrip "presumably to service the ATM machine located at that site." (*Id.* at ¶6). It further alleges that, while in the restroom, "Defendant Franklin and Woodson engaged in some sort of confrontation wherein Defendant Franklin negligently handled and discharged a firearm while near or in the vicinity of Woodson." (*Id*. at ¶8).

On November 19, 2019, Plaintiffs filed an "Agreement Pursuant to RSMO §537.065" whereby Plaintiffs and Silver Franklin purportedly agreed that in consideration

[2] All exhibit references are to the exhibits submitted with the Petition for Writ of Prohibition, which constitute a portion of the Record on Appeal pursuant to Missouri Supreme Court Rule 84.24(g), and are incorporated herein by reference.

for Defendant Franklin consenting to the Circuit Court entering judgment against him, any judgment entered would be satisfied solely from the proceeds of the COUNTRY Mutual insurance policy and the insurance policy of Franklin's employer, Action ATM. (Exh. C, p. 3). Franklin and the Plaintiffs fully executed the §537.065 Agreement as of November 6, 2019. (*Id*. at p. 6).

B. COUNTRY Mutual's Motion to Intervene in the Wrongful Death Action and to Stay Pending the Outcome of its Federal Court Declaratory Judgment Action

On November 13, 2019, Plaintiff's counsel notified COUNTRY Mutual that Silver Franklin had entered into a § 537.065 Agreement with Plaintiffs. (*See* Exh. 2 to Exh. D, Motion to Intervene and Stay Proceedings). On December 6, 2019, within 30 days of being so notified, COUNTRY Mutual timely filed a Motion to Intervene and Stay Proceedings pending the outcome of its declaratory judgment action, which is currently pending in the United States District Court for the Eastern District of Missouri, Cause No. 4:19-cv-02516. (Exh. D, ¶ 7). Alternatively, COUNTRY Mutual asserted intervention as a matter of right pursuant to Rule 52.12(a)(2). (*Id*. at ¶ 13).

COUNTRY Mutual filed its declaratory judgment action in the United States District Court for the Eastern District of Missouri on September 6, 2019, seeking a declaration from the federal court as to whether any insurance coverage is available to Defendant Silver Franklin resulting from the incident as alleged in the underlying action filed by Woodson and Beene. (Exh. 4 to Exh. F, *COUNTRY Mut. Ins. Co. v. Silver Franklin, Marie Franklin, Ithiwa Woodson, and Robert Beene*, Cause No. 4:199cv-02516).

On February 19, 2020, upon motion of Ithiwa Woodson, the federal district court stayed that action pending the outcome of the Missouri state court action, and it remains so stayed.

Plaintiff Woodson also opposed COUNTRY Mutual's Motion to Intervene and Stay asserting § 537.065 does not give COUNTRY Mutual a right to a stay, or any other substantive rights in the litigation. (Exh. E, ¶ 4). Plaintiff argued that the 2017 amendments to § 537.065 provide an insured only the "procedural rights of notice and to intervene." (*Id.*)

On December 17, 2019, after hearing arguments of counsel, the Honorable David Lee Vincent, III granted COUNTRY Mutual's Motion to Intervene and denied the Motion to Stay. (Exh. G). That same day, Plaintiff Woodson filed a Motion for Recusal based upon comments Judge Vincent made at the December 16 hearing indicating that he believed Plaintiffs should ask for recusal because of his knowledge about cases such as this. (Exh. H, ¶2). Judge Vincent entered an order of recusal on December 20, 2019. (Exh. I).

C. COUNTRY Mutual's Procedural Request for a Change of Judge

On December 23, 2019, the presiding judge for the Circuit Court reassigned this case to Division 1, the Honorable Brian H. May, for hearing and determination. (Exh. J). On January 16, 2020, within 30 days of intervention and within 30 days of designation of the trial judge, COUNTRY Mutual timely asked for a change of judge pursuant to Rule 51.05(a) and (b). (Exh. K). No party asserted the request for change of judge was untimely. Rather, Plaintiffs argued the change of judge should be denied because COUNTRY Mutual is not a typical intervenor with full rights of a party to the litigation. (Exh. L, ¶ 4) Specifically, Plaintiff argued that "Country Mutual has no right to interfere in the litigation

or the defense of the suit in any way, because it has waived any such right by refusing to defend without reservation." (*Id.*) COUNTRY Mutual replied that Rule 51.05 is mandatory, automatic, and provides a virtually unfettered right to disqualification of a judge without cause on one occasion if timely filed. (Exh. M, ¶ 2). No distinction is made under the rule or the statute between an intervenor pursuant to §537.065 and other intervenors as contended by Plaintiff. (*Id*. at ¶ 5).

On February 11, 2020, Respondent heard arguments on the Motion for Change of Judge and noted that on such motions "…I always tell folks my job is basically, typically to see whether it's timely filed." (Exh. N, February 11, 2020 Hearing Transcript, 28:22-24; A37). Respondent affirmatively noted that "yours [COUNTRY Mutual's] was timely filed." (*Id*., 29:22-23; A38).

Nevertheless, on February 19, 2020, Respondent entered an "Order and Judgment" denying COUNTRY Mutual's Motion for Change of Judge. (Exh. Q; A1). Therein, Respondent acknowledged that the 2017 amendments to §537.065 for the first time granted intervention as a matter of right for insurers. (*Id*. at p. 1). Respondent found, however, that the 2017 amendments did not abrogate prior caselaw purportedly holding that "an insurer could not interfere in the litigation once it declined to accept the defense without reservations. [That] decision was a forfeiture of the right to participate in the litigation and to control the lawsuit." (*Id*. citing *Bogard v. Integrated National Life Ins. Co.*, 954 S.W.2d 532, 535 (Mo. App. E.D. 1997)).

D. COUNTRY Mutual's Attempts to Participate in Discovery

On March 10, 2020, COUNTRY Mutual served a Notice of Video Deposition on all counsel for the deposition of its insured, Silver Franklin. (Exh. S). Silver Franklin moved to quash the deposition, citing the Court's February 19, 2020 Order and Judgment "which recognized that Country Mutual's refusal to defend or indemnify Silver Franklin was cause enough for it to be disallowed from interfering in this litigation." (Exh. T, ¶ 1). Franklin argued COUNTRY Mutual "does not have a right to substantively intervene in this case, and that means it cannot take Silver Franklin's deposition, nor examine any witnesses at the hearing in this matter to establish damages pursuant to the previously entered, and enforceable 537.065 agreement." (*Id*. at ¶ 8).

In opposition, COUNTRY Mutual argued that, even assuming Franklin demanded defense and indemnity from COUNTRY Mutual and COUNTRY Mutual refused the same, both of which COUNTRY Mutual disputes and denies, it does not follow that COUNTRY Mutual is precluded from deposing Mr. Franklin or substantively participating in the case. (Exh. U). COUNTRY Mutual asserted intervention under §537.065 carries none of the limitations Franklin now seeks to impose upon COUNTRY Mutual. (*Id*.)

On April 9, 2020, Respondent heard oral arguments on Silver Franklin's Motion to Quash. (Exh. V, April 9, 2020 Hearing Transcript; A41). COUNTRY Mutual noted during argument that even after COUNTRY Mutual's intervention in the case, Franklin and Woodson were engaging in discovery. Specifically, Woodson served upon Franklin, and Franklin responded to, Requests for Admissions. (Exh. V, p. 18:22-19:5; 20:9-15; A58-60).

After hearing arguments, Respondent clarified that "[T]he reasoning [in the February 19, 2020 Order and Judgment] as to the intervention was not specific to a change of judge request. It was more about participation in the litigation, and what that scope of participation may be pursuant to the statute." (*Id*. at 21:16-20; A61). Respondent further found that "the [2017] amendment didn't abrogate the prior case law" (*Id*. at 21:22-23; A61), "[s]o the reasoning of the court was not specific to a change of judge. It was about intervention – the scope of the intervention once, you know, they were allowed to intervene pursuant to the statute." (*Id*. at 22:8-11; A62).

On April 9, 2020, Respondent quashed COUNTRY Mutual's notice of deposition of Silver Franklin. (Exh. W; A5).

On June 12, 2020, Relator filed a Petition for Writ of Prohibition or Mandamus in the Missouri Court of Appeals for the Eastern District. (ED108970). The Court entered a Preliminary Order on June 15, 2020, but ultimately denied the Petition for Writ on June 29, 2020. (*Id.*)

POINTS RELIED ON

I. Relator is entitled to an order prohibiting the Respondent from denying COUNTRY Mutual a change of judge, because upon a timely request pursuant to Rule 51.05, Respondent had no discretion to act besides granting the requested change, in that COUNTRY Mutual, as a proper intervening party in this action, timely filed its Rule 51.05 request within 30 days of both intervention and designation of the trial judge.

Missouri Rule of Civil Procedure 51.05

Section 537.065 (Supp. 2017)

State ex rel. Heistand v. McGuire, 701 S.W.2d 419 (Mo. banc 1985)

State ex rel. Horton v. House, 646 S.W.2d 91 (Mo. banc 1983)

State ex rel. Cohen v. Riley, 994 S.W.2d 546 (Mo. banc 1999)

State ex rel. Manion v. Elliott, 305 S.W.3d 462 (Mo. banc 2010)

II. Relator is entitled to an order prohibiting Respondent from denying COUNTRY Mutual the ability to substantively participate in this action, because Section 537.060 makes no distinction between the rights of an intervenor under that section and the rights of any other intervenor under Missouri law, in that Relator is a proper intervening party under Section 537.065 and, therefore, has all rights of any existing party as of the time of its intervention.

Section 537.065 (Supp. 2017)

Knight by and through Knight v. Knight, WD82860, 2020 Mo.App. LEXIS 881 (Mo. App. W.D., July 14, 2020)

Martin v. Busch, 360 S.W.3d 854 (Mo. App. E.D. 2011)

ARGUMENT

Respondent exceed his jurisdiction in denying a timely-filed Motion for Change of Judge and then continued to act in excess of his jurisdiction in quashing intervenor COUNTRY Mutual's efforts to engage in discovery or to otherwise substantively participate in this litigation. Respondent's Orders and Judgments in this regard are fatally flawed and must be reversed for the following reasons: (1) upon a timely-filed Motion for Change of Judge under Rule 51.05, Respondent had no jurisdiction to take any action besides granting the requested change, yet failed to do so; then (2) Respondent continued to exceed his jurisdiction by using the same faulty and erroneous reasoning to deny intervenor COUNTRY Mutual the right to conduct discovery in this case, while simultaneously ruling that COUNTRY Mutual would not be allowed to partake in the matter in *any* substantive way. Respondent's exceeding of his jurisdictional authority must be terminated, the matter reassigned, and COUNTRY Mutual must be allowed to engage in the litigation as any other party would at this stage of the proceedings.

I. Relator is entitled to an order prohibiting the Respondent from denying COUNTRY Mutual a change of judge, because upon a timely request pursuant to Rule 51.05, Respondent had no discretion to act besides granting the requested change, in that COUNTRY Mutual, as a proper intervening party in this action, timely filed its Rule 51.05 request within 30 days of both intervention and designation of the trial judge.

A. Standard of Review

A writ of prohibition is the appropriate remedy where a judge has improperly denied

a timely-filed motion for change of judge. *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 221 (Mo. App. W.D. 2001); *State ex rel. Walters v. Schaeperkoetter*, 22 S.W.3d 740, 742 (Mo. App. E.D. 2000).

B. Respondent acted beyond his jurisdiction in denying intervenor COUNTRY Mutual's timely-filed Request for a Change of Judge.

There is no dispute that COUNTRY Mutual timely-filed its Motion for Change of Judge in this case. Once a motion for change of judge is timely-filed, a trial judge does not have jurisdiction to deny the request. *State ex rel. Cohen v. Riley*, 994 S.W.2d 546, 547 (Mo. banc 1999)(holding upon the filing of a proper, timely application under Rule 51.05, the court has no jurisdiction to do anything other than to grant the application and transfer the cause); *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 943 (Mo. banc 1986)(a judge is without jurisdiction and a writ of prohibition lies if, upon proper application for disqualification, a judge fails to disqualify himself); *State ex rel. Anderson v. Frawley*, 923 S.W.2d 960, 961 (Mo. App. E.D. 1996)(filing of a timely application for change of judge deprives the court of further jurisdiction to do anything in the case except grant the application); *State ex rel. Walters*, 22 S.W.3d at 743.

A trial judge loses jurisdiction upon a proper, timely-filed motion for change of judge in order to protect one of the keystone rights given to litigants: the right of a litigant to unilaterally disqualify a judge without having to disclose its reasons for doing so. *State ex rel. Heistand v. McGuire*, 701 S.W.2d 419, 420 (Mo. banc 1985); *State ex rel. Horton v. House*, 646 S.W.2d 91, 93 (Mo. banc 1983). To protect this important right, Missouri courts follow a liberal rule construing the right to a change of judge. *State ex rel. Horton*,

646 S.W.2d at 93. It is also why a civil litigant has a virtually unfettered right to disqualify a judge without cause on one occasion. *State ex rel. Heistand*, 701 S.W.2d at 420; *State ex rel. Stubblefield v. Bader*, 66 S.W.3d 741, 742 (Mo. banc 2002).

Allowing a judge discretion in ruling upon a proper, timely-filed Rule 51.05 request for a change of judge allows the judge to prevent his own disqualification, which deprives intervenors, like COUNTRY Mutual, and other parties, of their meaningful right to disqualify. Such a result undermines the public confidence in the courts and the fundamental fairness which the legislature sought to promote in establishing the right to disqualify in the first place. *See State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 943 (Mo. banc 1986).

1. COUNTRY Mutual timely-filed its Motion for Change of Judge

Missouri Rule of Civil Procedure 51.05(a) provides that a change of judge shall be ordered in any civil action upon the timely filing of a written application therefore by a party. *See also State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 463 (Mo. banc 2010). In the case of intervenors, the application must be filed within 30 days of intervention or designation of the trial judge, whichever time is later. *See* Rule 51.05(b).

The Honorable David L. Vincent, to whom this matter was originally assigned, allowed COUNTRY Mutual to intervene in this action on December 17, 2019. (Exh. G). Upon Plaintiff's Motion for Recusal, Judge Vincent recused himself on December 20, 2019. (Exh. H and I). The presiding judge reassigned this case to Respondent May on December 23, 2019. (Exh. J). On January 16, 2020, well-within the 30 days provided for under Rule 51.05, COUNTRY Mutual moved for a change of judge. (Exh. K).

It is significant, and indeed dispositive, that neither Plaintiffs Woodson or Beene, nor Respondent May, have argued or found COUNTRY Mutual's Motion for Change of Judge untimely or otherwise improperly submitted pursuant to the requirements of Rule 51.05. When Respondent heard arguments on the Motion for Change of Judge on February 11, 2020, he noted "…I always tell folks my job is basically, typically to see whether it's timely filed." (Exh. N, February 11, 2020 Hearing Transcript, 28:22-24; A37). Respondent affirmatively expressed that "yours [COUNTRY Mutual's] was timely filed." (*Id*., 29:22-23; A38). Thus, once COUNTRY Mutual timely-filed the Rule 51.05 Motion, Respondent lost all jurisdiction to do anything other than grant the change. At that point, the change itself should have become simply a ministerial duty to effectuate the purpose of the rule.

Rule 51.05, which by its terms applies to intervenors, is ***mandatory*** and ***automatic***: "A change of judge ***shall be ordered*** in any civil action upon the timely filing of a written application therefor by a party." (Emphasis added). "The judge promptly ***shall sustain*** a timely application for change of judge upon its presentation." Rule 51.05(e) (emphasis added); *see also Joshi v. Ries*, 330 S.W.3d 512, 515 (Mo. App. E.D. 2010). "The filing of a timely application for change of judge deprives the court of further authority to do anything in the case other than grant the application." *State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 463 (Mo. banc 2010). The timeliness of COUNTRY Mutual's application for a change of judge is undisputed, and Respondent had no jurisdiction to do anything other than order the requested change.

2. There is no exception to Respondent's mandatory duty to order the change of judge as requested.

As noted above, Rule 51.05 specifically gives intervenors the right to a change of judge. Rule 51.05(b). There is no distinction made under the Rule or Section 537.065 between an intervenor pursuant to that statute and other intervenors. The 2017 Amendments to Section 537.065 now provide COUNTRY Mutual, as the insurer where its insured has entered into an agreement with the Plaintiff pursuant to the statue, the absolute right to intervene, and Rule 51.05 provides for one thing that an intervenor, once a party, may do, i.e., timely move for a change of judge. There are no exceptions provided, and no other logical conclusion can be reached reading the statute and the rule together. There is no support for the argument that Respondent, upon COUNTRY Mutual's timely Motion for Change of Judge, retained jurisdiction to do anything other than order and allow such change as is mandated by Rule 51.05.

a. Missouri's rules of statutory construction prohibit reading into an unambiguous statute limitations and exceptions not within the plain meaning of that statute.

Missouri's primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used in a statute, to give effect to that intent, if possible, and to consider the words of a statute in their plain and ordinary meaning. *In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005). If statutory language is not expressly defined, then it is to be given its plain and ordinary meaning as typically would be found in the dictionary. *Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. banc 2009). Thus, when the words of a statute are clear, there is nothing to interpret or construe beyond

applying the plain meaning of the statute. *State ex rel. Valentine v. Orr*, 366 s.W.3d 534, 540 (Mo. banc 2012). Courts may look beyond the plain meaning of the statute *only* when the statutory language is ambiguous (i.e., when the plain language does not answer the current dispute as to its meaning) or would lead to an absurd or illogical result. *In re DeBrodie*, 400 S.W.3d 881, 884 (Mo. App. W.D. 2013).

Missouri's bedrock principles of statutory construction include that a court may not incorporate unwritten conditions, exceptions or limitations into a statute's otherwise unambiguous command. *J.L.H. v. J.L.H.*, 488 S.W.3d 689 (Mo. App. W.D. 2016). This Court has emphasized that a "Court may not engraft upon [a] statute provisions which do not appear in explicit words or by implication from othe[r] words in [a] statute." *State v. Collins*, 328 S.W.3d 705, 709, n. 6 (Mo. banc 2011). Significantly, courts "cannot supply what the legislature has omitted from controlling statutes," and must instead enforce statutes as written, not as they might have been written. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010). In other words, it is fundamental that "[w]here no exceptions are made in terms, none will be made by mere implication or construction." *J.L.H.*, 488 S.W.3d at 696 (quoting *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 455 (Mo. App. S.D. 2010).

Missouri law mandates a presumption that the legislature intended to change the law when it amends a statute. *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 607 (Mo. banc 2017). In construing a statute, the court must presume that the legislature was aware of the state of the law at the time of its enactment. *Sullivan v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000).

b. Rule 51.05 and Section 537.065 are unambiguous and do not provide for the limitations and exceptions Respondent engrafts upon them.

Section 537.065 provides that "[b]efore a judgment may be entered against any tort-feasor after such tort-feasor has entered into a contract under this section, the insurer or insurers shall be provided with written notice of the execution of the contract and shall have thirty days after receipt of such notice to intervene as a matter of right in any pending lawsuit involving the claim for damages." § 537.065 RSMo. (Supp. 2017). The terms are unambiguous and provide no limitations, exclusions, or exceptions. Upon written notice, the insurer *shall have a right to intervene*. Beyond that absolute right, the statute provides no limitations as to what "intervention" means in this context, leading to the inescapable conclusion that intervention means here what it means in every other context under Missouri law.

Nevertheless, Respondent found that COUNTRY Mutual does not have a right to *substantively* intervene in this case – and hence no right to a change of judge or to discovery or to examine witnesses – because, based upon case law predating the 2017 amendments, "an insurer could not interfere in the litigation once it declined to accept the [insured's] defense without reservations" as "[t]he decision was a forfeiture of the right to participate in the litigation and to control the lawsuit." (Exh. Q, p. 1). There is no support in § 537.065 or the general intervention rule, Rule 52.12, both of which are clear and unambiguous, for the notion that if an insurer has denied its insured a defense or indemnity, then the "right" to intervene pursuant to § 537.065.2 as amended is non-substantive only. Respondent's reading into § 537.065 of a limitation on the rights of an intervenor, including the right to

a change of judge upon timely application, even where defense or indemnity has been denied, is exactly the type of extra-statutory interpretation forbidden by the Missouri rules of statutory construction cited above. It directly contradicts the specific right afforded to intervenors under Section 537.065 pursuant to the 2017 amendments and the rights afforded under Rule 51.05.

That an intervenor under § 537.065 is afforded all rights under Missouri law as any other intervenor or party is bolstered by the fact that the General Assembly has tried to amend Section 537.065 on several occasions since 2017, although unsuccessfully, to clarify what is meant by the right to intervene provided for in Section 537.065. For example, 2019 House Bill 120 would have added to the language of 537.065.2 that upon intervention, "the intervenor shall have all rights afforded to defendants under the Missouri Rules of Civil Procedure including, but not limited to, the right to conduct discovery, the right to engage in motion practice, and the right to a trial by jury. The intervenor shall also have the right to assert any rights or raise any defenses available to the tort-feasor and to assert any rights or raise any defenses that would have been available to the tort-feasor in the absence of the contract entered into under this section or other agreement between the parties to that contract." 2019 Bill Text MO H.B. 120; *see also* 2020 Bill Text MO H.B. 2049 with the same proposed language in subsection (4). This would not have been a change to existing law, but rather a clarification defining what it means to "intervene" under Section 537.065. *See Webster County Abstract Co. v. Atkison*, 328 S.W.3d 434, 443 (Mo. App. S.D. 2010). This is support for the notion that the right to intervene provided for in the statute confers *all* the rights afforded to defendants under Missouri's civil

procedure rules. Any other reading would render the 2017 Amendment allowing intervention as a matter of right meaningless.

Thus, § 537.065, as amended in 2017, merely provides COUNTRY Mutual may "intervene as a matter of right in any pending lawsuit involving the claim for damages." Section 537.065.2. While it is silent as to specifically what an intervenor under the statute may then do or not do in the litigation in terms of requesting a change of judge, discovery, or anything else, it is unreasonable to read into it the limitations engrafted by Respondent. Doing so would lead to the untenable conclusion that the 2017 amendments mean nothing.

3. The cases Respondent relied upon in denying COUNTRY Mutual's Motion for Change of Judge and, later, in depriving it of the right to engage in discovery, do not support a denial of procedural or substantive rights of an intervenor under Section 537.065.

Respondent's February 19, 2020 Order and Judgment[3] denying COUNTRY Mutual's Motion for Change of Judge looked outside the unambiguous terms of Section 537.065 in contravention of Missouri's statutory construction rules. Specifically, Respondent relied upon *Bogard v. Integrated National Life Ins. Co.*, 954 S.W.2d 532, 535 (Mo. App. E.D. 1997) and *Aguilar v. GEICO Casualty Co.*, 588 S.W.3d 195 (Mo. App. W.D. 2019) to deny COUNTRY Mutual's Motion for Change of Judge and, ultimately, the right to engage in discovery or participate substantively in the litigation, because "an insurer [can] not interfere in the litigation once it declined to accept the defense without reservations" and that such a decision by an insurer is "a forfeiture of the right to participate

[3] The February 19, 2020, Order and Judgment was subsequently amended by the Court on February 24, 2020, to reflect the correct case caption. The remainder of the Order and Judgment remained the same.

in the litigation and to control the lawsuit." (Exh. Q, p. 1). Although COUNTRY Mutual has and continues to deny that it was asked to and declined to accept Franklin's defense, even if this were true, neither case so holds. In fact, neither case addresses or reaches the issue of what a party can or cannot do once it has intervened under § 537.065 because the courts in both of those cases denied intervention under the statute.

Bogard predates the 2017 amendments to § 537.065, which now provides insurers an absolute right to intervene upon timely motion. The insurer in *Bogard* moved to intervene as a matter of right under Rule 52.12(a), the general intervention rule, three separate times, but was denied. 954 S.W.2d at 534. The trial court denied two of the motions to intervene on the basis that the insurer had no direct and immediate interest in the underlying actions until a judgement was entered and a party actually asked the insurer to pay the settlement reached with the insureds. *Id.* The insurer moved for a third time to intervene *after* the court entered judgment and *after* a demand had been made upon it to pay the settlement reached with the insureds. *Id.* At that point, the insurer asserted that it now had a direct and immediate interest in contesting the amount of damages sought since the plaintiff made demand upon the insurer to pay those damages. *Id.* The trial court denied the third Motion to Intervene finding that the insurers' potential liability for damages as an indemnitor did not constitute a direct interest implicating an absolute right to intervene under Rule 52.12(a). *Id.*

While the action in the circuit court proceeded and the insurer took efforts to intervene, the insurer also filed and prosecuted a declaratory judgment action. In that action, the trial court sustained the insurer's Motion for Summary Judgment, holding that

the policy at issue afforded no coverage for the claims against the insureds. *Id*. The insureds appealed and the appellate court affirmed. *Id*. However, due to a split between the appellate districts on whether "bodily injury" as defined in the policy was ambiguous and included mental suffering, the case was transferred to the Missouri Supreme Court and remained pending at the time of the *Bogard* opinion as to the denial of the insurer's Motions to Intervene. *Id*.

In the February 19, 2020 "Order and Judgment," Respondent cites to *Bogard* for the assertion that an insurer cannot "interfere" in litigation once it declines to accept the defense without reservation as such a decision by the insurer is a "forfeiture of the right to participate in the litigation and to control the lawsuit." (Exhibit Q, p. 1). This notion does not appear, however, anywhere in the *Bogard* opinion.

In a section of the opinion labeled "II. The Underlying Actions," the appellate court in *Bogard* discussed the propriety of the insureds' refusal to allow the insurer to defend under a reservation of rights. Within that discussion, this Court notes, "[The insurer] had an opportunity to control the litigation by accepting the defense without reservation. By electing some other course it forfeited its right to participate in the litigation and control the lawsuit." This discussion is ***not*** in the context of intervention and in no way addresses what a party who has been allowed to intervene (and the insurer in *Bogard* was ***not*** allowed to intervene) may or may not do once granted intervention.

Rather, intervention is discussed in a completely separate section of the *Bogard* opinion labelled "III. Intervention as a Matter of Right" Therein, the appellate court discusses the alleged trial court error in denying intervention, but not in the context of §

537.065 (which at that time did not provide for intervention as a matter of right), but rather pursuant to the three criteria of Rule 52.12(a)(2).

On appeal of the denial of the Motion to Intervene, the insurer argued its right of intervention accrued once it became subject to a demand to render immediate payment to plaintiff pursuant to plaintiff's §537.065 agreement with the insured. *Id*. The court then analyzed whether the insured should have been allowed to intervene as a matter of right pursuant to the three criteria for intervention as a matter of right under Rule 52.12(a)(2). *Id*. at 535. Again, the absolute right to intervene under Section 537.065 was not yet a part of the statute at the time of the *Bogard* opinion.

Nevertheless, applying the three criteria, the court found no absolute right to intervene under Rule 52.12(a)(2)'s third criteria: "the applicant's interests are not adequately represented by the existing parties," and noted that an insurer has an interest implicating Rule 52.12 only when it is called upon to make indemnity as to a judgment. *Id*. Nowhere within the *Bogard* opinion's consideration of the alleged trial court error in denying intervention is there a discussion of what an intervening party may or may not do if defense and indemnity has been denied, but intervention has been permitted. Thus, *Bogard* does not address in anyway what rights an insurer has upon a proper intervention.

The second case Respondent relied upon is *Aguilar v. GEICO Casualty Co.*, which is similarly inapposite. There, the insurer offered to defend the insured under a reservation of rights in a suit brought by plaintiff Aguilar. 588 S.W.3d 195, 201 (Mo. App. W.D. 2019). Like in *Bogard*, the insured rejected the proffered defense and later notified the insurer that she and Aguilar had entered into a 537.065 agreement. *Id*. at 197. The insurer timely filed

a Motion to Intervene under both 537.065 (which now included an absolute right to intervene for the insured) and Rule 52.12(a). *Id.* Aguilar voluntarily dismissed his personal injury action eight days later before any ruling on the Motion to Intervene. *Id.*

Following the voluntary dismissal, Aguilar and the insured submitted their dispute to binding arbitration and the arbitrator awarded Aguilar $35,000,000. *Id.* Aguilar then filed an action in the circuit court to confirm the arbitration award, and the insurer filed a Motion to Intervene and an Amended Motion to Intervene, again citing Section 537.065 and Rule 52.12(a) and (b). *Id.* Both the Motion and Amended Motion were denied. *Id.*

On appeal, the Western District separately considered whether the insurer should have been allowed to intervene under Section 537.065 and/or Rule 52.12. The appellate court found no circuit court error in denying intervention under § 537.065 in that the Motion to Intervene filed in the circuit court action to confirm the arbitration award was untimely. *Id.* at 198-199. The insured had timely filed a motion to intervene in the underlying personal injury action, but that action was dismissed. *Id.* at 199. The later-filed action to confirm the arbitration award was filed far outside Section 537.065's 30-day window, such that the insurer's Motion to Intervene and Amended Motion to Intervene were untimely. *Id.* Thus, the insurer was not allowed to intervene under Section 537.065, and the opinion provides no insight into what the insurer may or may not have been allowed to do or partake in if it had timely intervened under Section 537.065.

The insurer in *Aguilar* also argued that it had a right to intervene under Rule 52.12(a)(2) in that it had shown a direct and immediate interest in the arbitration proceedings and its interests were not represented. *Id.* at 200. The appellate court disagreed

holding the Motion to Intervene and Amended Motion to Intervene were properly denied under Rule 52.12(a)(2) because the insurer failed to show a direct interest in the action under that rule. *Id*. at 200-201. It is within the context of the appellate court's discussion of what it means to have a "direct interest" in the litigation under Rule 52.12(a)(2) that the court explained that,

> To the extent that [the insurer] claims it should have been able to litigate "any of the purported facts and conclusions of law in the Arbitration Award absent the Trial Court's Judgment and denial of the Motions to Intervene being vacated and [the insurer] being permitted to intervene to challenge the Arbitration Award," we would note that it had every opportunity to enter a defense of [the insured] without reservation and thus to litigate such matters, but chose not to do so.

Id. at 201.

In other words, in *Aguilar*, the insurer argued it should have been allowed to litigate the facts and law *even though it was not permitted to intervene* to challenge the Arbitration Award. *Id*. The appellate court disagreed because, *absent intervention*, the insurer's opportunity to litigate the facts and law was to do so by defending its insured without reservation. In other words, if the insurer had been allowed to intervene, then it *would have had the opportunity* to litigate the facts and law. The *Aguilar* opinion does not stand for the proposition that an intervening insurer, which has denied defense and indemnify (which, again, COUNTRY Mutual disputes occurred here), may not substantively participate in the litigation once made a party under Section 537.065.

In his Return filed in this Court, p. 16, Respondent points out that the *Aguilar* court cited to and relied upon another Western District case, *Britt v. Otto*, 577 S.W.3d 133 (Mo. App. W.D. 2019). *Britt v. Otto*, however, similarly fails to support Respondent's rulings

herein. In that case, the insurer appealed the trial court's denial of its Motion to Intervene. *Id*. at 136. Plaintiff Britt suffered injuries in a motor vehicle accident with the insured, defendant Otto, who was insured by American Family Insurance. *Id*. Britt demanded, and American Family agreed to pay, policy limits, but the parties disagreed as what the limits of the policy were. *Id*.

American Family filed a declaratory judgment action in federal court to enforce the settlement. *Id*. at 137. On March 7, 2018, while the declaratory judgment action was pending, Otto sent notice to American Family that he had entered into a 537.065 agreement with Britt and had agreed to a binding arbitration. *Id*. at 137. The parties arbitrated on March 22, 2018, and the award was issued on April 6, 2018. *Id*. at 138. At no point before the arbitration or issuance of the award did American Family seek to intervene in the arbitration proceedings. On April 13, 2018, Britt filed with the Circuit Court an application to confirm the arbitration award. *Id*. On April 19, 2018, American Family filed its Motion to Intervene in the Circuit Court action to confirm the arbitration award. *Id*. On appeal, the Western District found no error in denying the Motion to Intervene because (1) it was filed more than 30-days after American Family received notice of the § 537.065 agreement and was therefore untimely under that section; (2) American Family had not made the required showing under Rule 52.12(a)(2) that it had the requisite interest relating to the property or transaction which was the subject of the action at issue to confirm the arbitration award; and (3) there was no abuse of discretion in denying permissive intervention under Rule 52.12(b)(2) because the Circuit Court's authority in a confirmation proceeding is limited by statute and would not have extended to permitting American Family to litigate whether

it was liable to pay the arbitration award even if it had been allowed to intervene and the court was entitled to consider that American Family declined to participate in the arbitration proceeding. *Id*. at 140-41, 142, 145. Thus, *Britt*, upon which *Aguilar* relies, does not stand for the proposition that an intervening insurer, which has allegedly denied defense and indemnify, may not participate in the litigation once granted intervention under Section 537.065.

Respondent had no valid support under Missouri law for denying COUNTRY Mutual's request for change of judge. This Court should make its Preliminary Order in Prohibition absolute and command Respondent to take no further action except to grant the requested change.

II. Relator is entitled to an order prohibiting Respondent from denying COUNTRY Mutual the ability to substantively participate in this action, because Section 537.060 makes no distinction between the rights of an intervenor under that section and the rights of any other intervenor under Missouri law, in that Relator is a proper intervening party under Section 537.065 and has all rights of any existing party as of the time of its intervention.

A. Standard of Review

A writ of prohibition or mandamus is the proper remedy for curing discovery rulings that exceed a court's jurisdiction or constitute an abuse of the court's discretion. *State ex rel. White v. Gray*, 141 S.W.3d 460, 463 (Mo. App. W.D. 2004). Mandamus lies to require the disclosure of information during discovery when the information is relevant to the lawsuit or reasonably calculated to lead to the discovery of admissible evidence. *Id*. (citing

State ex rel. Rowland v. O'Toole, 884 S.W.2d 100, 102 (Mo. App. E.D. 1994)(holding trial court had no discretion to deny discovery of matters which are relevant to the lawsuit and are reasonably calculated to lead to the discovery of admissible evidence when the matters are neither work product nor privileged)).

B. Relator is a proper intervening party under Section 537.065 and has all rights of any party existing as of the time of its intervention.

Having improperly denied COUNTRY Mutual its virtually unfettered right to a change of judge, Respondent then compounded the error by, on the basis of the same inapposite cases, denying COUNTRY Mutual the right to meaningfully and substantively participate as an intervenor, whether through the requested video deposition of Silver Franklin or otherwise. At the hearing on April 9, 2020 on Silver Franklin's Motion to Quash COUNTRY Mutual's video deposition notice, Respondent "clarified" that he intended his February 19, 2020 Order and Judgement denying COUNTRY Mutual's request for a change of judge under Rule 51.05 to apply not only to the procedural question before him at the time, but also to any substantive rights to participate in discovery or at the hearing of this matter. (Exh. V, 21:16-23; 22:8-11). In other words, according to Respondent, COUNTRY Mutual has intervened, as permitted under § 537.065, but can now only sit and observe the remaining issues to be decided and the proceedings taking place in his court. In this way, Respondent has rendered the right to intervene under § 537.065 meaningless.

Section 537.065 agreements are authorized by Missouri law only when the "tort-feasor's insurer or indemnitor has the opportunity to defend the tort-feasor without

reservation but refuses to do so." Section 537.065.1. Respondent's view is that, while the insurer now (under the 2017 Amendments) has a right to notice of the § 537.065 agreement and right to intervene, all that is provided to the insurer is the right to be in the room with no voice in the proceedings. However, this is essentially no different than not having a right to intervene at all, which was the state of the law before the 2017 Amendments, and renders the 2017 changes meaningless. And again, Respondent has done so on the basis of two cases, *Bogard* and *Aguilar*, as discussed *supra* in Section I.B, that do not support the conclusion Respondent reaches.

COUNTRY Mutual is now a party, and a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. (Rule 56.01(b)(1)). Respondent, however, has deprived COUNTRY Mutual of the right to conduct *any* discovery herein, and has clearly indicated that he intends to not allow COUNTRY Mutual to participate in any way in the eventual hearing in this case. Notably, Plaintiff Ithiwa Woodson and Silver Franklin *have engaged in discovery* since COUNTRY Mutual's intervention, while the same right has been denied to COUNTRY Mutual. (Exh. V, p. 18:22-19:5; 20:9-15).

A very recent case from the Western District, cited by Respondent in his July 31, 2020 Return, illustrates why Respondent's ruling in this regard is in error. *Knight by and through Knight v. Knight*, WD82860, 2020 Mo.App. LEXIS 881 (Mo. App. W.D. July 15, 2020), like *Aguilar*, *supra*, supports Relator's position herein. In *Knight*, the defendants' minor grandson sued his grandparents for injuries resulting from a watercraft accident

while under their supervision. *Id*. at *1. State Farm insured the grandparents and denied a defense and indemnity pursuant to a policy exclusion. *Id*. In November 2018, the grandparents and their minor grandson entered into a § 537.065 agreement wherein it was agreed that grandson would seek recovery solely from the grandparents' insurance and that grandson's claims, at his option, would be resolved by binding arbitration. *Id*. at *1-2. The 537.065 agreement also provided that the grandparents would notify State Farm of the agreement "no sooner than thirty days before judgment is entered in the lawsuit." *Id*. at *6.

The parties conducted the agreed-to arbitration on January 10, 2019, and grandparents notified State Farm of the § 537.065 agreement on January 23, 2019. *Id*. at *6-7. Within 30-days of receiving notice, State Farm moved to intervene in the circuit court action wherein the parties sought to confirm the arbitration award and, on February 25, 2019, the circuit court allowed it to do so. *Id*. at *7. Some two months thereafter, on April 22, 2019, the circuit court entered judgment confirming the arbitration award. *Id*.

The point addressed by the appellate court, as expressly phrased and explained by the Western District, was the contention that "when the General Assembly enacted § 537.065.2, and granted insurers the right to intervene in litigation against their insureds, it necessarily gave insurers the right *to contest the insured's liability, and the claimant's damages, on the merits*, whatever the status of the litigation at the time of the insured's intervention." *Id*. at *13 (emphasis in original). The Western District held that it does not believe the 2017 Amendments can be interpreted so expansively. *Id*. It found that § 537.065 simply gives an insurer the right to written notice and an opportunity to intervene, and that the revisions "*do not give an insurer any rights beyond what any intervenor would have*."

Id. at 21(emphasis added)(citing the dissent of Justice Laura Denvir Stith in *Desai v. Seneca Specialty Ins. Co.*, 581 S.W.3d 596, 606-607 (Mo. banc 2019)). In other words, a § 537.065 intervenor has no more rights than another intervenor, but it also has no less rights. "We recognize that, after being allowed to intervene, State Farm became a 'party' to the lawsuit with the same rights of any other party." *Id*. at *21.

This meant State Farm, as the insurer, had no greater rights than the insured grandparents had at the time of the intervention. *Id*. at *22. "By the time of State Farm's intervention, [the grandfather] no longer had the right to contest his liability to [grandson], or the amount of [grandson's] damages." *Id*. The merits had already been determined at the arbitration and before State Farm's intervention; the circuit court proceeding into which State Farm intervened was *only* to confirm the award pursuant to statute. *Id*. at *24. At the time of intervention, State Farm could not reopen and litigate on the merits because that had already been done *before* it intervened. *Id*. at *29.

The posture of the current case at the time of COUNTRY Mutual's intervention was very different than that in the *Knight* case at the time of State Farm's intervention. In this case, the § 537.065 agreement had been executed, but no hearing had been conducted. Unlike in *Knight*, there had been no determination on the merits of Franklin's liability or Woodson and Beene's damages. While in *Knight* the only pending question at the time of State Farm's intervention was whether the arbitration award should be confirmed or whether it was instead subject to vacation, COUNTRY Mutual stepped into the current case at a time when liability and damages issues remained open and, thus, it is completely within its rights as an intervenor to protect its own interests.

The action as COUNTRY Mutual found it was that a § 537.065 agreement had already been reached, but no hearing had been had, discovery among Plaintiffs and Silver Franklin was continuing, and the trial judge had just been assigned after Judge Vincent's recusal. Like any other intervenor, COUNTRY Mutual has a right to participate as a party in the open issues in this case, including whatever rights were available under Rule 51.05, in discovery, and in any hearing on the matter.

The parties' execution of the § 537.065 Agreement does not mean all issues are conclusively decided. The Agreement provides that Defendant Franklin agrees that the trial court may enter a consent judgment on liability for wrongful death against him and that it remains up to the court to determine the alleged "monetary damages in an amount the Court finds to be fair and reasonable as a result of the Defendant's [alleged] negligence." (Exh. C, p. 1-2). This is consistent with § 537.065 itself, which provides any person having an unliquidated claim for damages against a tort-feasor on account of personal injuries, bodily injuries, or death may enter into a contract with the tort-feasor whereby the person asserting the claim agrees that in the event of a judgment against the tort-feasor, such person will not execute except as against the specific assets listed in the agreement, which may include an insurance policy. Section 537.065.1.

Thus, boiled down, § 537.065 allows a plaintiff and defendant to agree that in exchange for the defendant not contesting liability and allowing a consent judgment to be entered against him, the plaintiff will not execute on said consent judgment except as to specified assets, such as an insurance policy. The fact remains, however, that the trial court must still make findings of liability, causation, and damages, and then enter a judgment

accordingly. Therefore, in this case, those are still open, relevant issues, even if Silver Franklin has agreed to not put up a defense and will simply allow whatever evidence Plaintiffs present to stand unrebutted.

That COUNTRY Mutual, as an intervenor, has a right to participate in the open issues in the case is consistent with intervention in other contexts and under other statues. In *Martin v. Busch*, 360 S.W.3d 854, 857 (Mo. App. E.D. 2011), the issue was whether the wrongful death statute, § 537.080, provided an unconditional right to intervene to all persons in the class defined by subsection one of section one of the statute. There, the court stated, "While it is true that an intervenor must accept the action pending as he finds it at the time of intervention, *his rights thereafter are as broad as those of any other parties to the action*." *Id*. at 858, n. 5 (emphasis added). The court noted that, having been permitted to become a party in order to better protect his interests, an intervenor is allowed to set up his own affirmative cause or defense appropriate to the case and his intervention. *Id*. The intervenor is not bound by the same position of those already in the suit. *Id*; *see also Beard v. Jackson*, 502 S.W.2d 416, 419 (Mo. App. E.D. 1973).

If one accepts Respondent's view of § 537.065, the 2017 Amendment providing for an absolute right to intervene allows for nothing more than the right to watch court proceedings with no right to meaningfully participate, procedurally or substantively, after intervention. Even after entry of a § 537.065 Agreement, issues remain for determination by the court and it is nonsensical to hold that a party may intervene, but may not participate in any way in the court's proceedings and determination of those issues. There is simply no support for reading into § 537.065 a limitation on COUNTRY Mutual's right to

participate meaningfully in the litigation, including but not limited to engaging in discovery, such as the requested video deposition of Silver Franklin, and substantive participation at the ultimate hearing on the issues still to be determined by Respondent.

CONCLUSION

For all the reasons set forth hereinabove and in the Petition for Writ of Prohibition or Mandamus, Respondent May, upon COUNTRY Mutual's timely Motion for Change of Judge, lacked jurisdiction and authority to take any action except to grant the change. Respondent then compounded the error by denying COUNTRY Mutual, a proper intervening party, the right to participate substantively in the matter through discovery or otherwise. Relator prays this Court issue a Writ of Prohibition or Mandamus ordering Respondent Brian May to take no further action other than a transfer of this matter to another judge of the 21st Judicial Circuit as required by Rule 51.05, further allow Relator's substantive participation in discovery and any hearing or trial in this matter, as afforded to any other properly joined party, and for such other and further relief as this Court deems just and proper.

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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Supreme Court Rule 84.06(c), that the foregoing Relator's Brief contains 10,066 words, exclusive of the Appendix, and that counsel relied on the word count of Microsoft Word for Windows, which was used to prepare the Brief. Further, counsel certifies that the electronic copies of the foregoing Brief have been scanned for viruses and are virus free.

By *__/s/ Richard Woolf__*

PROOF OF SERVICE

I hereby certify that on August 28, 2020, I electronically filed the foregoing with the Clerk of the Court using the Missouri Courts electronic filing system, which sent notification of such filing to all counsel of record. Additionally, I certify that a copy of the foregoing has been sent via U.S. Mail, postage prepaid only to Respondent below, and that a copy has been sent via email only to attorneys for plaintiff and defendant in the underlying matter. I further certify that I signed, or caused my electronic signature to be placed upon the original of the foregoing document.

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