IN THE
SUPREME COURT OF MISSOURI

No. SC98650

State of Missouri ex rel. Country Mutual Insurance Company,

Relator,

v.

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

Respondent.

Original Proceeding in Prohibition

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Article V, Section 4, of the Constitution of the State of Missouri authorizes this Court to issue and determine original remedial writs. The Court may grant a writ (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. *See State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 880 (Mo. 2009). Plaintiff Woodson denies that Respondent (1) lacked authority or jurisdiction to act, (2) acted in excess of its jurisdiction or authority or abused its discretion; or (3) that Relator will suffer irreparable harm if relief is not granted.

STATEMENT OF FACTS

Rule 84.04(c) provides that an appellant's statement of facts "shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument." Appellant's Statement of Facts omits critical facts supporting Respondent's rulings, which Respondent has therefore set forth below. These relevant facts include the following:

A. DEFENDANT SILVER FRANKLIN ADMITTEDLY CAUSED THE DEATH OF PLAINTIFFS' DECEDENT DONTE WOODSON BY NEGLIGENTLY DISCHARGING A FIREARM.

This suit was brought by Plaintiffs due to the admitted wrongful death of their son Donte Woodson as a result of the negligent handling of a firearm by Defendant Silver Franklin. On August 16, 2015, Donte was shot by Defendant Silver Franklin at a QuikTrip gas station located in St. Louis. Criminal charges were subsequently brought against Defendant Franklin in the Circuit Court of St. Louis County on September 30, 2015. *See State v. Franklin*, Cause No.15SL-CR05580-01.

On March 28, 2019, at the hearing on his guilty plea, Defendant Franklin admitted that he caused the death of Donte Woodson by negligently discharging his firearm:

> MR. FRISELLA: … If this matter had proceeded to trial, the State of Missouri would have proven beyond a reasonable doubt that … Silver Franklin entered the bathroom of the Quiktrip convenience store. While in the bathroom, Mr. Franklin negligently discharged a firearm, causing the death of Donte Woodson; and the defendant admitted he was the shooter.

Q. (By the Court) Mr. Franklin, you have heard the statements of the prosecutor. Are those statements substantially true and correct?

A. Yes.

Respondent's Ex. 1 at 007-008.

B. COUNTRY MUTUAL DENIED COVERAGE OR A DEFENSE TO DEFENDANT FRANKLIN.

As it has throughout this proceedings, as well as in the declaratory judgment action it filed in federal court, Country Mutual in its Brief continues to deny that demand for a defense and coverage have been made on it by its insured, Silver Franklin. *See Relator's Brief at 12.* To the contrary, demand has repeatedly been made and Country Mutual has denied coverage for these claims and refused to defend Defendant Franklin. Among other things, Defendant Franklin's counsel sent a letter to Country Mutual on September 7, 2016 which stated:

> Plaintiffs have demanded the policy limits of Mr. Franklin's coverage, which the policy details are $300,000.00. As of yet there has been no offer in settlement from Country in this matter.
>
> ….
>
> Please allow this letter to serve as notice that Defendant Franklin is demanding that Country make a good faith attempt to settle the Plaintiffs' claims against him within policy limits, up to and including an offer at the policy limits. We believe that failure to do so may, given the facts of this case and the potential for recovery by Plaintiffs, constitute bad faith on the part of Country as Mr. Franklin's

> employer's insurance carrier. We further believe that a failure to respond to Plaintiffs' demands would suggest that the insurance company is placing its interests above Mr. Franklin's and exposing him to what could be a devastating economic loss.
>
> ….
>
> Please advise as to Country's position relative to settlement and my client's demand that it offer to settle this matter at the policy limits or otherwise take steps to negotiate in good faith to obtain a settlement of this matter within policy limits.
>
> *Relator's Ex. O at 275-277.*

Country Mutual subsequently denied coverage, including by filing a declaratory judgment action in the United States District Court for the Eastern District of Missouri seeking to evade liability under the Policy. *See Country Mutual Ins. Co. v. Franklin, et al.*, Case No. 4:19-CV-02516-JCH. Country Mutual's prayer for relief in that action asks the court to:

> (2) declare that Defendants Ithiwa Woodson and Robert Beene are not entitled to recover under the Policy for their claims asserted against Silver Franklin in the Underlying Petition;
>
> (3) declare and enter judgment that Plaintiff COUNTRY Mutual Insurance Company has no duty to indemnify Defendants Silver Franklin and Marie Franklin for claims asserted by Defendants Ithiwa Woodson and Robert Beene[.]
>
> *Respondent's Ex. 2 at 030.*

C. PLAINTIFFS AND DEFENDANT WOODSON'S § 537.065 RSMO. AGREEMENT.

Given Country Mutual's denial of coverage, Plaintiffs and Defendant Franklin subsequently negotiated and entered into an agreement on November 6, 2019 limiting any recovery in this action to the proceeds of Defendant's insurance policies, including the Country Mutual policy, as specifically authorized by § 537.065 RSMo. *Relator's Ex. C.*

The § 537.065 RSMo. Agreement reflected that the Agreement was being entered into, in part, because "Country [Mutual] has denied coverage under the Country Policy and refused to defend and is actively pursuing a declaratory judgment action against Silver L. Franklin and his wife Marie A. Franklin in the United States District Court for the Eastern District of Missouri[.]" *Relator's Exhibit C at 012.* In light of Defendant Franklin's admission in the criminal proceeding that he negligently caused the death of Donte, the § 537.065 RSMo. Agreement specifically provided that Defendant Franklin would not contest liability in the wrongful death action: "Defendant consents to entry of a judgment against Defendant on the Plaintiffs' Petition with regard to liability, and in an amount of damages to be determined by the Court to be fair and reasonable in accordance with Missouri law." *Relator's Exhibit C at 014.*

Counsel for Plaintiff Woodson then provided timely written notice of the agreement to Country Mutual and a copy of the agreement in accordance with § 537.065 RSMo. on November 13, 2019. *Relator's Ex. D at 068.*

D. COUNTRY MUTUAL'S INTERVENTION AND INTERFERENCE IN THE PARTIES' AGREEMENT AND DEFENDANT FRANKLIN'S DEFENSE OF THIS ACTION.

Despite the fact that it was already pursuing a declaratory judgment in the federal action, Country Mutual then filed its Motion to Intervene in this action on December 6, 2019. At the time of Country Mutual's intervention, a hearing had previously been set for December 20, 2019 regarding Plaintiff Woodson and Defendant Franklin's § 537.065 RSMo. Agreement and Plaintiff's damages. The trial court granted Country Mutual's motion to intervene on December 17, 2019. *Relator's Ex. G.*

Since intervening, Country Mutual has sought (1) a complete stay of this action pending the resolution of its declaratory judgment action in federal court (*Relator's Ex. D*); (2) a change of judge (*Relator's Ex. K*), and has repeatedly attempted to depose its own insured, Silver Franklin (*Relator's Ex. S, Ex. T*).

ARGUMENT

I. RESPONSE TO RELATOR'S FIRST POINT RELIED ON.

A. STANDARD OF REVIEW.

"The standard of review for writs of mandamus and prohibition ... is abuse of discretion." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. Banc 2007). This Court has also stated that "the extraordinary remedy of a writ of prohibition is available: (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 880 (Mo. 2009), citing *State ex rel. T.W. v. Ohmer,* 133 S.W.3d 41, 43 (Mo. 2004). The writ of mandamus is issued to prevent the exercise of powers exceeding judicial jurisdiction or to correct an abuse of judicial discretion. *State v. Saffaf,* 81 S.W.3d 526, 528 (Mo. banc 2002).

The Court begins with the presumption that the actions taken by the trial judge were proper. *State ex rel. Jackson County Prosecuting Atty. v. Moorhouse*, 70 S.W.3d 552, 554 (Mo. App. W.D. 2002); *see also Hill v. Kendrick*, 192 S.W.3d 719, 720 (Mo. App. E.D. 2006) ("The burden is on the petitioning party … and that burden includes overcoming the presumption in favor of the trial court's ruling.") (cit. om.).

B. RESPONDENT DID NOT ACT BEYOND HIS JURISDICTION OR ABUSE HIS DISCRETION IN DENYING INTERVENOR COUNTRY MUTUAL'S REQUEST FOR A CHANGE OF JUDGE, BECAUSE COUNTRY MUTUAL HAS WAIVED ANY RIGHT TO CONTROL OR INTERFERE IN ITS INSURED'S DEFENSE OF THIS SUIT BY DENYING COVERAGE AND REFUSING TO INDEMNIFY ITS INSURED.

Country Mutual relies on language in Rule 51.05 permitting "intervenors" to file an application for change of judge as a matter of right. Country Mutual further argues that its application for change of judge was timely and that this alone is determinative. However, Country Mutual is not a typical "intervenor" with the full rights of a party in this litigation because of its own affirmative choice not to defend or indemnify its insured. While Country Mutual relies on prior cases holding that the right to a change of judge is automatic under Rule 51.05, the legislature's amendment of § 537.065 RSMo. presents a question of first impression for this Honorable Court. Although the revised § 537.065 RSMo. grants Country Mutual a limited procedural right to "intervene," the legislature stopped short of altering long-standing Missouri law that an insurer waives any right to interfere in the parties' § 537.065 RSMo. Agreement or the defense of this suit by denying coverage and refusing to defend without reservation. Furthermore, Country Mutual has no broader rights in this action than Defendant Franklin, who has already consented to entry of judgment against him in the parties' statutorily-authorized and binding § 537.065, RSMo. agreement.

1. PRIOR TO THE 2017 AMENDMENTS TO § 537.065 RSMO. INSURERS WHO DENIED COVERAGE WAIVED ANY RIGHT TO CONTROL OR INTERFERE IN AN INSURED'S DEFENSE.

In § 537.065, RSMo., the General Assembly authorized a party claiming damages for personal injuries or death to enter into an agreement with a tortfeasor before judgment against the tortfeasor to limit the claim's satisfaction to the tortfeasor's specific assets, including insurance. *See Taggart v. Maryland Cas. Co*., 242 S.W.3d 755, 758 (Mo.App. W.D. 2008).

Prior to the 2017 amendments to § 537.065 RSMo., the law was clear that an insurer could not "**have its cake and eat it too** by both refusing coverage and at the same time continuing to control" the defense of the insured's action. *Allen v. Bryers*, 512 S.W.3d 17, 32 (Mo. banc 2016) (stating that an "insurer may not reserve the right to disclaim coverage and at the same time insist upon controlling the defense"). [Emphasis supplied.] *See also Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700, 710 (Mo. banc 2011) (Insurer cannot deny coverage and at the same time continue to control the defense of the claim). Therefore, a liability insurer that refused to defend its insured did not have the right to intervene in a tort action for the purpose of defending on the merits. This is true even though the claimant and insured entered into a settlement agreement under § 537.065 RSMo. *See Ballmer v. Ballmer*, 923 S.W.2d 365, 368 (Mo.App. W.D. 1996); *Whitehead v. Lakeside Hosp. Ass'n,* 844 S.W.2d 475, 480 (Mo.App. W.D. 1992).

As the court stated in *Estate of Langhorn v. Laws*, 905 S.W.2d 908, 911 (Mo.App. W.D. 1995):

> **The insurer has the opportunity to control the litigation by accepting the defense without reservation. If it elects some other course it forfeits its right to participate in the litigation and to control the lawsuit. If its decision concerning coverage is wrong it should be bound by the decision it has made**.

Id. at 911, quoting *Lodigensky v. American States Preferred Ins. Co*., 898 S.W.2d 661, 667 (Mo.App. W.D. 1995). [Emphasis supplied.] *See also Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64, 88 (Mo.App. W.D. 2005) (Liability insurer who denies coverage and files a declaratory judgment action waives any control of the defense and rights to participate in the underlying tort action).

Missouri courts reject an insurer's right to intervene and participate in the tort suit because, once an insurer denies coverage, its interest is "only, and nothing more than, the right to some day in some proper forum and cause, litigate its liability upon its above policy." *See Lodigensky,* 898 S.W.2d at 667; *see also Estate of Langhorn v. Laws*, 905 S.W.2d 908, 910-911 (Mo.App. W.D. 1995). Insurers already have available to them various defenses to a judgment predicated on a § 537.065 RSMo. agreement outside of intervening in the original tort action. This includes not only litigating the question of coverage, but also challenging the reasonableness of the § 537.065 RSMo. agreement in a subsequent action to collect on the policy, such as an equitable garnishment action. *See Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d 810 (Mo. 1997). Because insurers have no direct interest in the tort suit against their insured, Missouri courts have consistently and properly denied insurers the ability to "have their cake and eat it too" by refusing

insurers' attempts to participate directly in the underlying proceedings against the insured in the face of their denial of coverage.

2. THE 2017 AMENDMENT TO § 537.065 RSMO. DID NOT ABROGATE PRIOR MISSOURI LAW AND DOES NOT PERMIT INSURERS TO BOTH DENY COVERAGE AND A DEFENSE WHILE CONTROLLING OR INTERFERING IN THE INSURED'S DEFENSE.

Section 537.065.2 RSMo., as amended in 2017, now describes when a judgment can be entered against a tortfeasor who has entered into a contract under § 537.065 RSMo.:

> Before 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.

In construing statutes to ascertain legislative intent it is presumed the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts. *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 456 (Mo.App. S.D. 2010). Therefore the legislature is presumed to be aware of long-standing Missouri law which provides that insurers waive any substantive right to control the defense or interfere in the tort suit against their insured. Here, the amendment to § 537.065 RSMo. does not say one word about altering clear, long standing Missouri precedent regarding an insurer's lack of substantive rights in regards to the tort action against their insured when they decline to

defend without reservation. There is no language in the amended § 537.065.2 RSMo. which suggests that the prior rights which had been lost by the refusal are reinstated, that the insured can assert a new right to defend the claim, or that the insurer acquires a substantive right to do anything.

On July 14, 2020, the Court of Appeals for the Western District issued its opinion in *Knight by and Through Knight v. Knight*, WD82860, 2020 WL 3966759 (Mo.App. W.D. July 14, 2020). In *Knight,* the insurer had insured a husband and wife under a personal liability umbrella policy. The insureds were subsequently sued by their grandson for injuries suffered in a watercraft accident while under the Knights' supervision. *Id.* at *1. The insurer refused to defend and disclaimed coverage for the accident, in reliance on a policy exclusion. *Id.* The insured defendants then entered into a settlement agreement with their grandson under § 537.065 RSMo., agreeing to seek recovery solely from the Knights' insurance. The agreement also specified that, at the plaintiff's option, his claims against the Knights would be resolved by binding arbitration. *Id.* The insurer intervened and argued that, under the current version of § 537.065 RSMo., it was entitled to a jury trial at which it could dispute its insured's liability for Collin's injuries. *Id.*

The Court of Appeals rejected this argument, noting that "**Adopting State Farm's expansive interpretation of § 537.065.2 would allow an insurer to "have its cake and eat it too," by refusing to honor its insurance contract and provide the insured with an unqualified defense, and yet retain all of the rights it would have had if it had provided such a defense**." *Id.* at *10 (Mo.App. W.D. 2020). The court further pointed out that there was no basis for the insurer's interpretation in the amended statute:

In amending the statute in 2017, it may be (as the dissent argues) that individual legislators intended to guarantee insurers an absolute right to contest the insured's liability, and the injured party's damages, on the merits, no matter what proceedings had taken place between the injured party and the insured prior to the insurer's intervention. But even if those were the intentions of the General Assembly as a body (which we have no way of confidently knowing), **those intentions were not enacted into law. We can only implement the statute the General Assembly actually enacted.** That statute only gave insurers two specific, limited rights: (1) the right to decide whether to defend the insured in the underlying litigation, prior to the insured's entry into a § 537.065 agreement; and (2) the right to intervene in "any pending lawsuit" within thirty days of receiving notice of a § 537.065 agreement.

By arguing that it has an absolute right to litigate Nelson Knight's liability on the merits, State Farm asks us to read provisions into § 537.065.2 which the legislature did not itself include in the statute.

…

State Farm was afforded the rights granted by § 537.065.2. It was notified of the § 537.065 agreement before the entry of judgment (and notably, it does not argue that the notice the Knights provided was itself untimely). State Farm was given

thirty days to intervene, and its timely motion to intervene was in fact granted by the circuit court. **Section 537.065.2 required nothing more.**[1]

Knight by and Through Knight v. Knight, WD82860, 2020 WL 3966759, at *7-8 (Mo.App. W.D. July 14, 2020). [Emphasis supplied.]

Principles of statutory construction support the Western District's interpretation of the scope of the 2017 amendment. Courts may look beyond the plain meaning of the statute 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

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[1] Country Mutual contends that *Knight* in fact supports its position, downplaying the Western District's clear holding that the 2017 amendment did not grant insurers any substantive rights beyond those specified by the amendment, and instead relying on the statement in the case that under the 2017 amendment "We recognize that, after being allowed to intervene, State Farm became a "party" to the lawsuit with the same rights of any other party." *Knight by and Through Knight v. Knight*, 2020 WL 3966759, at *8 (Mo.App. W.D. 2020). To the extent the Court of Appeals in *Knight* is suggesting that the insurer's status as an "intervenor" gives it the full rights of a party, Plaintiff respectfully disagrees. But furthermore, and as explained in Section II(B)(2), *infra*, Country Mutual's argument ignores the Western District's further holding in *Knight* that the insurer **has no broader rights than its insured and is bound by the terms of the § 537.065 RSMo. agreement**. *See Knight*, at *9 ("State Farm points to nothing in new § 537.065.2 which would give it *broader* rights than those possessed by its insured.") [Emphasis in original.]

result. *See In re DeBrodie*, 400 S.W.3d 881, 884 (Mo.App. W.D. 2013). Here, the legislature gave insurers a procedural right to intervene. But the plain language of the statute does not answer the "current dispute" as to the interpretation of the statute, because statutes or rules dealing with intervention are purely procedural, creating no substantive rights. *See e.g.*, 52 Am. Jur. 2d, Parties, Section 151. In other words, the rights of the intervenor in the action are governed by substantive law, not by a statute which merely gave the party the procedural right to intervene. This is particularly the case where granting a party such rights would overturn prior Missouri law, i.e. that insurers do *not* have any right to assume control of their insureds' defense of the underlying tort action once they have denied coverage and a defense. And here, instead of addressing the rights of the insurer to interfere in the defense of its insured, the legislature only answered the question of the insurer's right to intervene. Thus, while Country Mutual relies heavily on its status as an "intervenor" as giving it a right to a change of judge, that status alone cannot give it substantive rights to litigate the merits of this case which it has already affirmatively waived under well-established Missouri law.

If there were any doubt regarding the construction of the statute, it is dispelled by the fact that, subsequent to its passage of the amended version of § 537.065 RSMo., the legislature has repeatedly considered amending the statute to accomplish what Country Mutual now seeks to achieve. *See, e.g.* SB49 (2018); SB726 (2020); HB2049 (2020). These bills, which have not been enacted by the legislature, specifically would amend § 537.065 RSMo. to provide an insurer with substantive rights, including the following:

> [A]ll 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 tortfeasor in the absence of the contract entered into under this section or other agreement between the parties to that contract.

See SB49 (2018); SB726 (2020); HB2049 (2020).

The fact that the legislature continues to consider providing insurers these substantive rights conclusively shows that it has not already done so. Therefore Country Mutual did not have such rights at the time the § 537.065 RSMo. agreement was entered into between Plaintiffs and Defendant Franklin or at the time Country Mutual intervened in this action.

Country Mutual takes the position that the fact that the Missouri legislature has considered these bills, which *would* confer substantive rights to the insurer upon intervening, somehow supports their interpretation of the statute. *See Relator's Brief at 23*. Country Mutual speculates that the legislature's later act of considering bills which would give insurers substantive rights demonstrates that the legislature intended to give these rights to insurers in the first instance. But as a matter of simple logic, if the legislature had granted these rights to insurers in the 2017 amendment, then any further amendment would be unnecessary and mere surplusage. This would contradict the principle of construction, stated in Country Mutual's own brief, that "Missouri law

mandates a presumption that the legislature intended to change the law when it amends a statute." *See Relator's Brief at 21, citing State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 607 (Mo. 2017). It is unreasonable to assume that the legislature would take an unnecessary action in further amending a statute that would not, according to Country Mutual's own argument, alter the meaning of that statute in any way.

If the legislature had intended to overrule prior Missouri law and provide insurers with the rights of a party, which would include the right to a change of judge, it could easily have done so, as these bills demonstrate. The fact that these amendments have *not* been enacted cannot possibly support Country Mutual's position. And of course, if any such amendment were to be enacted by the legislature, it would not apply retroactively to the Section 537.065 RSMo. agreement in this case. *See Desai v. Seneca Specialty Insurance Company*, 581 S.W.3d 596 (Mo. 2019) (holding that 2017 amendment to Section 537.065 RSMo. was not retroactive as to agreements entered into before the amendment).

Country Mutual already possesses post-judgment defenses to an unreasonable or fraudulent § 537.065 RSMo. agreement (which this is plainly not). The issue of coverage under the policy is entirely separate and will be litigated in the declaratory judgment action that Country Mutual has already filed in the United States District Court for the Eastern District of Missouri.[2] The federal judge stayed that case pending the resolution of

[2] The filing of this declaratory judgment action by Country Mutual constitutes a denial of coverage and a defense as a matter of law. *See Ballmer v. Ballmer*, 923 S.W.2d 365, 369

this action. The legislature's amendment permits the insurer to intervene for the purpose of monitoring the underlying proceedings to allow the insurer to protect these rights and defenses it already possesses. There is no intent on the face of the statute to give the insurer any *new* direct interest in the litigation, right to litigate the case on the merits or right to interfere in the parties' § 537.065 RSMo. agreement prior to judgment. This common sense interpretation of the plain language of § 537.065 RSMo. is also consistent with the legislature's other primary change to the statute in the 2017 amendment, namely requiring written notice to the insurer of the execution of the agreement.

On the other hand, it is Country Mutual's interpretation of the amendment that would lead to an "absurd or illogical result", i.e. that by giving insurers a procedural right to intervene, and nothing more, the legislature also intended to overturn decades of Missouri law *sub silentio*.

(Mo.App. W.D. 1996) ("An insurers' decision to file a declaratory judgment action rather than to drop their reservation of rights defense is a risky one. **That decision is treated as a refusal to defend an insured**.") [Emphasis supplied.]

3. LOWER MISSOURI COURTS THAT HAVE ADDRESSED THIS ISSUE HAVE FOUND THAT THE AMENDMENTS TO § 537.065 RSMO. DO NOT GIVE INSURERS SUBSTANTIVE RIGHTS OR THE RIGHT TO INTERFERE IN THEIR INSURED'S DEFENSE.

Since the 2017 amendments to § 537.065 RSMo., a number of Missouri courts in addition to *Knight* have examined this issue and have found that amendments give the insurer no substantive rights to interfere in the pending cause of action between the plaintiff and tortfeasor or the parties' § 537.065 RSMo. agreement.

In *O'Neill v. Cowley* in Clay County, Missouri, the circuit court addressed a similar claim by an insurer. *See O'Neill v. Cowley*, Case No. 15CY-CV07590-01 (Mo. Cir. Ct. September 12, 2019). *See Respondent's Exhibit 3*. Having allowed intervention, the court was required to determine what the insurer was allowed to do, since the statute granted no rights other than the right to intervene. The Honorable Janet Sutton, Judge of the Circuit Court of Clay County rejected the argument that an intervening insurance company could assert defenses or demand a jury trial. *Id.* Instead, the Court held that having denied coverage, the intervening insurer was not granted any substantive right to control the defense of the claim, demand a jury trial, or otherwise control the claim. *Id*. at 033.

The *O'Neill* Court found that, consistent with applicable precedent, an intervention right was purely procedural, and did not create any substantive rights for the intervening party. *Id*. at 033. The Court likewise held that the intervenor was subject to any agreements or proceedings prior to its intervention. *Id*. at 034. The Court therefore

entered an Order that the insurer, having intervened, did not have any substantive rights to control the defense, to request a jury trial, or alter the agreements and proceedings which had occurred prior to the insurance company's procedural intervention, including the § 537.065 RSMo. agreement. *Id*. *at 035-036*.

The Honorable Patricia Joyce, Judge of the Circuit Court of Cole County, reached a similar conclusion on the question of the rights of an intervening insurer under § 537.065 RSMo. *See Keilholz v. Ludy*, Case No. 18AC-CC00246 (Mo. Cir. Ct. September 12, 2019). *See Respondent's Exhibit 4*. In *Keilholz*, the court held an insurer who intervenes under the new statute has no substantive rights. After consideration of the law, the Court held that the statute did not confer any substantive rights on an insurer, and noted that while there was a bill which would have provided such rights (SB49), it had not been adopted. *Id*. at 039.

Instead, being provided only a procedural right, the insurer had no substantive rights to assert anything in the underlying tort case. *Id*. at 039-040. The Court also noted that the intervenor was bound by all of the agreements which had been entered, including the arbitration agreement entered pursuant to § 537.065 RSMo. *Id*. The *Keilholz* Court allowed the intervention, but held that substantively, the intervenor could not take any steps of controlling the defense of the underlying case. *Id.*

Furthermore**,** two additional opinions from the Court of Appeals for the Western District, *Britt v. Otto*, 577 S.W.3d 133 (Mo.App. W.D., 2019) and *Aguilar v. GEICO Casualty Co*., 588 S.W.3d 195, 201 (Mo.App. W.D. 2019), both issued after the 2017 amendment, further demonstrate the continuing validity of Missouri law regarding the

waiver and lack of substantive rights and interests of insurers in the underlying tort action once they have denied a defense without reservation. In both *Britt* and *Aguilar,* which involved arbitration proceedings between plaintiffs and defendants filed after the original suit against the insured had been dismissed without prejudice, the court found that the insurer had failed to timely intervene pursuant to amended § 537.065 RSMo. and could not take advantage of the intervention provided for in that statute. However, the court in *Aguilar*, relying on *Britt*, reaffirmed Missouri law by stating that **an insurer who denies coverage and refuses to defend without reservation waives any right to control or interfere in the suit against their insured,** notwithstanding the amendments to § 537.065 RSMo. *See Aguilar*, 588 S.W.3d at 202. [Cit. Omit.]

The insurer in *Aguilar* asserted that "the 2017 amendment of section 537.065 give insurers an unconditional right to intervene in an underlying lawsuit and, in fact, abrogated settled law that an insurer's potential indemnification of a judgment does not satisfy the direct-interest requirement [.]" *See Aguilar v. GEICO Casualty Co*., 588 S.W.3d 195, 200 (Mo.App. W.D. 2019). The court in *Aguilar* rejected the proposition that the amendments abrogated prior law, holding that insurers continued to have no interest in the underlying suit and no right to control, participate or interfere in their insured's defense:

> [T]o the extent that GEICO suggests that it would have had the right to litigate coverage issues in the confirmation proceeding, we agree with Mr. Aguilar that the appropriate forum for that dispute at this point is the pending garnishment action. ... To the extent that GEICO claims it should have been able to litigate

> "any of the purported findings of fact and conclusions of law in the Arbitration Award absent the Trial Court's Judgment and denial of the Motions to Intervene being vacated and GEICO being permitted to intervene to challenge the Arbitration Award," we would note that **it had every opportunity to enter a defense of Ms. Hollandsworth without reservation and thus to litigate such matters, but chose not to do so**.
>
> *See Aguilar*, 588 S.W.3d at 200. [Emphasis supplied.]

Country Mutual suggests that *Aguilar* supports its position, speculating that the court in *Aguilar would* have given the insurer substantive rights to participate in the litigation had it timely intervened pursuant to amended § 537.065 RSMo. To the contrary, the court in *Aguilar* explicitly reaffirmed that refusing to defend without reservation and denying coverage waives any right of the insurer to control or interfere in the defense of the suit:

> The actions that the parties took in entering a section 537.065 agreement and an agreement to submit their dispute to arbitration are authorized by statute. **The company waived the right to contest the cause of the accident or the extent of Mr. Aguilar's injuries and damages by choosing not to defend Ms. Hollandsworth without reservation and disclaiming any liability under the Clymenses' automobile insurance policy**. GEICO will have the opportunity to litigate its liability in the garnishment action.
>
> *See Aguilar*, 588 S.W.3d at 202.

As set forth above, there is not one word in the amendment changing Missouri law on this issue and granting insurers the unfair ability to have "two bites at the apple" as Country Mutual seeks to do in this action. Therefore this remains the law in Missouri. For this reason, Country Mutual is not entitled to control or interfere in its insured's defense of this action, including by seeking a change of judge.

For all of the above reasons, Country Mutual's First Point Relied On should be denied.

II. RESPONSE TO RELATOR'S SECOND POINT RELIED ON.

A. STANDARD OF REVIEW.

"The standard of review for writs of mandamus and prohibition ... is abuse of discretion." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. Banc 2007). This Court has also stated that "the extraordinary remedy of a writ of prohibition is available: (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 880 (Mo. 2009), citing *State ex rel. T.W. v. Ohmer,* 133 S.W.3d 41, 43 (Mo. 2004). The writ of mandamus is issued to prevent the exercise of powers exceeding judicial jurisdiction or to correct an abuse of judicial discretion. *State v. Saffaf,* 81 S.W.3d 526, 528 (Mo. banc 2002).

The Court begins with the presumption that the actions taken by the trial judge were proper. *State ex rel. Jackson County Prosecuting Atty. v. Moorhouse*, 70 S.W.3d

552, 554 (Mo. App. W.D. 2002); *see also Hill v. Kendrick*, 192 S.W.3d 719, 720 (Mo. App. E.D. 2006) ("The burden is on the petitioning party … and that burden includes overcoming the presumption in favor of the trial court's ruling.") (cit. om.).

B. COUNTRY MUTUAL IS NOT ENTITLED TO AN ORDER FROM THIS COURT GRANTING IT FREE REIGN TO LITIGATE THIS CASE ON THE MERITS AND INTERFERE IN THE PARTIES' SECTION 537.065 RSMO. AGREEMENT DESPITE ITS REFUSAL TO PROVIDE COVERAGE OR A DEFENSE TO DEFENDANT FRANKLIN.

Country Mutual further seeks an order from this Court prohibiting Respondent from limiting its ability to participate in this action, asserting that it "has all rights of any party existing as of the time of its intervention[.]" *Relator's Brief, at 32.* Country Mutual relies both on the 2017 amendments to § 537.065 RSMo. as well as on the statement in *Knight* that "We recognize that, after being allowed to intervene, State Farm became a "party" to the lawsuit with the same rights of any other party." *Knight by and Through Knight v. Knight*, WD 82860 2020 WL 3966759, at *8 (Mo.App. W.D. July 14, 2020). Country Mutual's arguments are unavailing and should be rejected by this Honorable Court.

First, and as discussed in response to Country Mutual's First Point Relied On, the amendment to § 537.065 RSMo. does not alter established Missouri law that Country Mutual has waived any right to interfere in the defense of this suit or litigate this action on the merits as a result of its refusal to provide coverage or a defense. To the extent

Knight departs from this well-settled Missouri law, Plaintiff respectfully submits that it should not be followed.

Second, Country has no independent interest in this action prior to judgment and demand for payment on Country Mutual and is bound by action as it found it upon intervention, including the terms of the parties' § 537.065 RSMo. agreement. That agreement includes Defendant Franklin's explicit consent to entry of judgment against him.

1. COUNTRY MUTUAL DOES NOT HAVE THE RIGHT TO SUBSTANTIVELY INTERFERE IN THIS ACTION AND LITIGATE IT ON THE MERITS BECAUSE IT WAIVED ANY SUCH RIGHT BY REFUSING COVERAGE OR A DEFENSE.

Country Mutual asks for the right to litigate this case on the merits and take control of the defense of the action in order to overrule its insured's statutorily-authorized agreement not to contest liability. It is not entitled to do so. As discussed in response to Relator's First Point Relied On, while the 2017 amendment to § 537.065 RSMo. provides for a limited right to intervene, it does not change settled Missouri law that an insurer who refuses to provide coverage and a defense has no interest in the underlying tort action and has waived any right to interfere in or control its insured's defense of that action. Furthermore, Country Mutual's mere status as an "intervenor" does not grant it back these rights that it voluntarily waived by refusing coverage or a defense. Each of these arguments set forth above in relation to Relator's First Point Relied On regarding Country Mutual's attempt to obtain a change of judge applies with equal force to

Relator's broader assertion that it has "all rights" of a party, including the right to defend the case on the merits.

This Honorable Court should reject Country Mutual's request and refuse to grant it the *carte blanche* it seeks to gut the protections provided to Missouri insureds under § 537.065 RSMo.

2. COUNTRY MUTUAL HAS NO BROADER RIGHTS THAN ITS OWN INSURED AND IS THEREFORE BOUND BY THE PARTIES' PRIOR § 537.065 RSMO. AGREEMENT FOR PURPOSES OF THIS ACTION, INCLUDING DEFENDANT FRANKLIN'S AGREEMENT THAT HE WOULD NOT CONTEST LIABILITY AND WOULD CONSENT TO ENTRY OF JUDGMENT AGAINST HIM.

Additionally, even if Country Mutual's status as an "intervenor" gave it some limited procedural status as a party, it does not give Country Mutual the broad rights it claims to assume control of the defense of this case.

The court in *Knight* held that "it is well established that 'an intervenor must accept the action pending *as he finds it at the time of intervention.*'" *Knight by and Through Knight v. Knight*, WD82860, 2020 WL 3966759, at *8 (Mo.App. W.D. July 14, 2020). (emphasis in original) (internal cit. omit.) Furthermore, the Court of Appeals found that "In the context of liability insurance, it would be unwarranted to permit an insurer who has intervened under § 537.065.2, after having been given an earlier opportunity to defend its insured, to ignore or "unwind" everything that has transpired in the litigation prior to the insurer's intervention." *Id*. at *10. In *Knight*, and as here, the defendant had

agreed in the Section 537.065 agreement not to contest liability, and in *Knight* the parties had arbitrated the case on that basis. Therefore, "By the time of State Farm's intervention, [the defendant insured] no longer had the right to contest his liability to [plaintiff], or the amount of [plaintiff's] damages. **State Farm points to nothing in new § 537.065.2 which would give it *broader* rights than those possessed by its insured**[.]." *Id*. at *9. [Emphasis supplied. Italics in original.] Here, because Defendant Woodson (who has already pleaded guilty to negligently causing the death of Plaintiff's decedent in collateral criminal proceedings) has similarly agreed not to contest liability, Country Mutual has no substantive right to do so.

Country Mutual contends that *Knight* is distinguishable because arbitration had already occurred and the only remaining issue was whether the plaintiff's arbitration award should be confirmed and judgment entered. Country Mutual contends that it stepped into the current case at a time when judgment has not been entered and therefore the question of liability remains open and "it is completely within its rights as an intervenor to protect its own interests." *See Relator's Brief at 35.*

To be clear, Country Mutual's contention that liability issues remain "open" in this case is simply not true. The arbitration award in *Knight* was not a final judgment at the time of the insurer's intervention, therefore according to Country Mutual's argument liability issues remained "open" in *Knight* as well. But what was determinative was that the arbitration in *Knight* was undertaken pursuant to the parties' Section 537.065 agreement, was binding on the insured, and that the insurer had "no broader rights than those possessed by its insured" to violate the terms of that agreement. *See Id*. at *9.

Here, while the Section 537.065 agreement is structured differently from *Knight*, the result is the same because Defendant Franklin has already entered into a binding agreement that "**Defendant consents to entry of a judgment against Defendant on the Plaintiffs' Petition with regard to liability**[.]" Therefore, just as in *Knight*, Defendant Franklin "no longer has the right to contest his liability[.]" *Knight* at *9. While Country Mutual attempts to dance around this provision by contending that the trial court is not bound by Franklin's agreement not to contest liability, that is irrelevant. Country Mutual in this case is neither defending any claim against itself nor bringing any claim against Plaintiff in this case. In this case, any rights or interest that Country Mutual has in this action under Missouri law are derivative of its insured's rights, and it has no broader rights or interest. *See Id., see also Lodigensky,* 898 S.W.2d at 667 (once insurer denies coverage, its interest in the underlying action is "only, and nothing more than, the right to some day in some proper forum and cause, litigate its liability upon its above policy.")

As a clear example of Country Mutual's attempt to violate the plain terms of the Section 537.065 RSMo. agreement, Country Mutual has already sought to depose Mr. Franklin for the purpose of defending this action on the merits. *See Relator's Ex. S, Ex. T.* But, as stated, Defendant is specifically barred by the Section 537.065 RSMo. agreement from defending this action on the merits. Therefore Country Mutual cannot claim any prejudice from Respondent's appropriate decision to quash Relator's notice of deposition.

Country Mutual cites *Martin v. Busch*, 360 S.W.3d 854 (Mo. App. E.D. 2011) for the principle that an intervenor, while bound by what has occurred previously in the case, "is not bound by the same position of those already in the suit." However, the dicta

quoted from a footnote in *Martin* involved a completely different set of circumstances. The question in *Martin* was whether other family members of the same class as a wrongful death plaintiff have a statutory right to intervene. The intervenors in that case were other family members with their own, distinct claims and damages recoverable under the wrongful death statute arising from the death of their loved one. *Martin* did not involve the rights of insurers who have denied their insured coverage or a defense, and who lack any direct and independent interest in the underlying tort action. As such *Martin* has no bearing on the issues before the Court.

For all of the above reasons, Country Mutual's Second Point Relied On should be denied.

CONCLUSION

It is obvious why insurance companies want to gut the protections provided to their insureds under § 537.065 RSMo. by giving themselves both the right to refuse to defend their insureds without reservation while still being able to interfere in the insureds' attempts to protect their own interests in the underlying suit. The insurance companies seek to "have their cake and eat it too." However, the amendments to § 537.065 RSMo. do not give them these unfettered rights. Country Mutual has the right to intervene and nothing more. Furthermore, Country Mutual is bound by the parties' § 537.065 RSMo. agreement, including Defendant Franklin's agreement to consent to entry of judgment. Country Mutual is therefore barred from litigating the issue of liability or otherwise interfering in this action. Therefore Country Mutual's Petition for Writ of Prohibition or Mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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. 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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RULE 84.06(c) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent, pursuant to Rule 84.06(c), hereby certifies to this Court that:

1. The brief filed herein on behalf of Respondent contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 84.06(a).

3. The number of words in this brief, according to the word processing system used to prepare this brief, is **8,077**, exclusive of the cover, certificate of service, this certificate of compliance and the signature block.

By: */s/ Richard K. Dowd*