



SUPREME COURT OF MISSOURI

en banc

STATE ex rel. COUNTRY MUTUAL
INSURANCE COMPANY,

Relator,

v.

THE HONORABLE BRIAN H. MAY,

Respondent.

Opinion issued April 6, 2021

No. SC98650

ORIGINAL PROCEEDING IN PROHIBITION

COUNTRY Mutual Insurance Co. petitions this Court for a writ to prohibit the Honorable Brian H. May (Respondent) from taking any action in the case other than granting its timely filed application for a change of judge. Rule 51.05 provides intervenors with the right to a change of judge, and, after COUNTRY Mutual was granted leave to intervene, it filed a timely application for a change of judge. Upon COUNTRY Mutual's filing of its application for change of judge, Respondent had no authority to take any action in the case other than to grant the application. Therefore, Respondent is directed to vacate his orders entered after COUNTRY Mutual filed its application for change of judge and to sustain the application for change of judge. The preliminary writ in prohibition is made permanent.

Factual and Procedural Background

COUNTRY Mutual issued a homeowner's insurance policy to Silver Franklin. While the policy was in effect, Mr. Franklin worked for Action ATM, Inc., servicing ATMs in the St. Louis area. In August 2015, Mr. Franklin visited a St. Louis QuikTrip to service the ATM located there. At the QuikTrip, Mr. Franklin became engaged in an altercation with another man, Donte Woodson, and negligently discharged his firearm, fatally wounding Mr. Woodson.

Mr. Woodson's parents, Ithiwa Woodson and Robert Beene, filed a wrongful death suit against Mr. Franklin,¹ and the parties subsequently entered into a contract to limit recovery under section 537.065.² Pursuant to the terms of the section 537.065 agreement, Mr. Franklin consented to judgment in the parents' favor, and, in exchange, the parents agreed to limit their recovery on that judgment to the proceeds of his COUNTRY Mutual policy and his employer's commercial policy. The parents notified COUNTRY Mutual of the section 537.065 agreement within 30 days of entering into the contract. Upon receiving notice, COUNTRY Mutual filed a motion to intervene and stay the proceedings while its contractual obligation to provide coverage was determined in a declaratory judgment action pending in federal court.

On December 17, 2019, Judge David Lee Vincent III sustained COUNTRY Mutual's motion to intervene but overruled its motion to stay the proceedings. Judge Vincent then entered an order of recusal on December 20, and the case was reassigned to

¹ *Woodson v. Franklin*, No. 15SL-CC03780 (21st Jud. Cir. 2015).

² All statutory references are to RSMo Supp. 2017, unless otherwise noted.

Respondent on December 23. On January 16, 2020, COUNTRY Mutual filed an application for change of judge under subdivisions (a) and (b) of Rule 51.05.

Although Respondent noted COUNTRY Mutual had timely filed its application for change of judge pursuant to Rule 51.05, he entered an order denying the application. The order indicated Respondent interpreted section 537.065.2 to give insurers the right to intervene but the statute did not abrogate prior case law that prohibited insurers from participating in litigation after refusing to defend without reservation. After Respondent denied COUNTRY Mutual a change of judge, COUNTRY Mutual attempted to conduct discovery by noticing up the video deposition of Mr. Franklin. Mr. Franklin filed a motion to quash the deposition, and, at the motion hearing, Respondent stated the reasoning behind his denial of COUNTRY Mutual's application for a change of judge applied equally to its attempt to conduct discovery. Respondent ruled COUNTRY Mutual was not entitled to participate in the litigation beyond intervening pursuant to section 537.065.2. Consequently, Respondent entered an order quashing COUNTRY Mutual's notice of the video deposition.

COUNTRY Mutual filed a petition for a writ of prohibition in the court of appeals, which was denied. It then filed a petition for a writ of prohibition in this Court, seeking (1) to prevent Respondent from taking any action in the case other than granting its application for change of judge and (2) to "allow [COUNTRY Mutual's] substantive participation in discovery and any hearing or trial in this matter." This Court issued a preliminary writ of prohibition.

Analysis

This Court has authority to issue and determine original remedial writs. Mo. Const. art. V, sec. 4.1. A writ of prohibition may issue “to remedy an excess of authority, jurisdiction, or abuse of discretion where the lower court lacks the power to act as intended.” *State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 463 (Mo. banc 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.” *Id.*

COUNTRY Mutual claims Respondent exceeded his jurisdiction in denying its timely filed application for change of judge and continued to act in excess of his authority and jurisdiction³ in quashing its efforts to conduct discovery and otherwise participate in the litigation. It contends that, once it timely filed its application for change of judge, Respondent lost authority to take any action in the case other than to grant the application. Consequently, COUNTRY Mutual requests a writ of prohibition from this Court preventing Respondent from taking any action other than granting a change of judge.

Ithiwa Woodson,⁴ on behalf of Respondent, contends COUNTRY Mutual does not qualify as a “typical intervenor” because it would not defend Mr. Franklin without reservation. Ms. Woodson asserts section 537.065.2 conferred on COUNTRY Mutual the

³ COUNTRY Mutual contends the circuit court acted in excess of its “jurisdiction” and, at times, “authority.” Whether a circuit court has the power to act as intended within the exercise of its personal and subject matter jurisdiction is an issue of circuit court authority. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. banc 2009). Discussion of circuit court jurisdiction should be confined “to constitutionally recognized doctrines of personal and subject matter jurisdiction.” *Id.* Therefore, “authority” will be used in this opinion rather than “jurisdiction.”

⁴ Plaintiff Robert Beene has not participated in this writ proceeding.

right to intervene but did not provide a right to participate further in the litigation because case law predating section 537.065.2 prohibits an insurer from both refusing to defend without reservation and interfering in the litigation.

Respondent overruled COUNTRY Mutual's application for a change of judge because he found COUNTRY Mutual waived any right to interfere in the litigation when it refused to defend Mr. Franklin without reservation. COUNTRY Mutual claims that, after its intervention under section 537.065.2, it has the right under this Court's rules to a change of judge regardless of whether it refused to defend without reservation.

Section 537.065.2 authorizes COUNTRY Mutual to intervene as a matter of right. Once the circuit court sustained its motion to intervene, COUNTRY Mutual's right to a change of judge and the procedure to obtain a change of judge was governed by Rule 51.05(d). Rule 51.05(d) expressly provides, "Application for change of judge may be made by one or more parties in any of the following classes: . . . (5) intervenors." Rule 51.05(b) further establishes when an intervenor must file an application for change of judge:

In the case of intervenors, the application must be filed within 30 days of intervention or designation of the trial judge, whichever is later, but in no event may any intervening party obtain a change of judge pursuant to this Rule 51 unless the application is filed within 180 days of the designation of the trial judge.

The principles used to interpret this Court's rules are the same as those used to interpret statutes. *State ex rel. Richardson v. May*, 565 S.W.3d 191, 193 (Mo. banc 2019). Undefined terms within a rule are given their plain and ordinary meaning. *Id.* There is nothing in the text of Rule 51.05 that would indicate the term "intervenor" means anything other than its plain and ordinary meaning: one that intervenes. *Intervenor*, WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1183 (3d ed. 2002). COUNTRY Mutual is an intervenor and, as such, falls squarely within Rule 51.05(d)'s provisions.

In denying COUNTRY Mutual's application for a change of judge, Respondent relied on *Borgard v. Integrated National Life Insurance Co.*, 954 S.W.2d 532, 535 (Mo. App. 1997), for authority that an insurer that declines to accept a defense without reservation forfeits the right to participate in the litigation. Respondent found *Borgard's* holding was "confirmed" in *Aguilar v. GEICO Casualty Co.*, 588 S.W.3d 195, 201 (Mo. App. 2019). *Borgard* and *Aguilar* addressed whether an insurer had a right to intervene, not whether an insurer had a right to a change of judge after intervening. *Borgard*, 954 S.W.2d at 534; *Aguilar*, 588 S.W.3d at 202. *Borgard* was decided prior to section 537.065.2's amendment to permit an insurer to intervene "as a matter of right" in any pending lawsuit involving its insured's claim of damages against a tortfeasor with whom the insured has entered into a contract authorized by section 537.065.1. See section 537.065.2. *Aguilar* addressed whether an insurer had a right to intervene when the insurer's application to intervene was not filed within 30 days after receipt of notice of the execution of a section 537.065.1 agreement. 588 S.W.3d at 199. In the underlying action, there was no dispute whether COUNTRY Mutual had a right to intervene; the circuit court sustained COUNTRY Mutual's motion to intervene pursuant to section 537.065.2 and that ruling has not been contested. On appeal, Respondent also cites *Knight ex rel. Knight v. Knight*, 609 S.W.3d 813, 820 (Mo. App. 2020), which rejected an insurer's claim that, after intervention as a matter of right pursuant to section 537.065.2, it was entitled to a jury trial at which it could dispute its insured's liability. *Knight* did not opine about the right to a change of

judge expressly afforded to intervenors under Rule 51.05(d). *Borgard, Aguilar and Knight*, therefore, do not apply to the present matter.

Once the circuit court sustained its motion to intervene, COUNTRY Mutual was entitled to a change of judge, and the record in the underlying case shows its application was timely filed. “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.” *Manion*, 305 S.W.3d at 463. Therefore, Respondent had no authority to take any action in this case other than to grant the application and, consequently, no authority to enter orders about matters submitted after COUNTRY Mutual timely filed its application for change of judge, including Mr. Franklin’s motion to quash COUNTRY Mutual’s notice of a video deposition. *Id.*; see *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986) (“Upon the filing of relator’s objection seeking disqualification, respondent was without jurisdiction to hear and rule on any motions which did not precede that filing.”). Because Respondent had no authority to take any action other than to grant the application for change of judge, the Court directs Respondent to vacate the order overruling COUNTRY Mutual’s application for change of judge and the order quashing the notice of deposition and to sustain COUNTRY Mutual’s application for change of judge. *Raack*, 720 S.W.2d at 944.

The parties invite the court to further decide whether to order Respondent to “allow [COUNTRY Mutual’s] substantive participation in discovery and any hearing or trial in this matter.” Aside from the fact such an order would conflict with this Court’s finding that Respondent has no authority to act, whether COUNTRY Mutual may further

participate in the litigation will be a matter before the transferee judge, who is not a party to this proceeding. *See id.* The transferee judge will have the responsibility to rule on the motions in which Respondent previously ruled in excess of the judge’s authority. *Id.* To do as the parties ask would be to mandate the transferee judge’s ruling on issues he or she has not yet considered. In a writ proceeding, “[t]his Court’s duty is only to confine the trial court to its authority and direct it to exercise that authority, not to give an advisory opinion as to what orders it should issue[.]” *State ex rel. White Fam. P’ship v. Roldan*, 271 S.W.3d 569, 575 n.6 (Mo. banc 2008).

Conclusion

Respondent is directed to vacate his orders of February 19, 2020, overruling COUNTRY Mutual’s application for change of judge and April 9, 2020, sustaining Mr. Franklin’s motion to quash COUNTRY Mutual’s notice of deposition. He is further directed to sustain COUNTRY Mutual’s application for change of judge. The preliminary writ in prohibition is made permanent.

PATRICIA BRECKENRIDGE, JUDGE

Draper, C.J., Wilson, Russell, Powell and Fischer, JJ. concur; Wilson, J. concurs in separate opinion filed.



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CONCURRING OPINION

COUNTRY Mutual moved to intervene and stay the underlying action. Respondent granted the motion to intervene and denied the stay. I believe it was error to grant COUNTRY's Mutual's motion to intervene as the motion plainly was defective under Rule 52.12. But neither Plaintiffs nor Defendant sought a writ challenging Respondent's decision to grant intervention, and Plaintiff Woodson does not argue on behalf of Respondent in this action that Respondent properly denied COUNTRY Mutual's change of judge application because COUNTRY Mutual's motion to intervene was defective. In fact, she appears to concede Respondent properly sustained COUNTRY Mutual's motion to intervene. Accordingly, I am compelled to concur in the principal opinion.

Missouri rules of procedure do not allow for kibitzers in lawsuits. Lawsuits are comprised of parties who are asserting or defending claims, and intervenors – even those who have (or claim) a statutory right to intervene – are no exception to this principle.

Rule 52.12 makes this clear.

(c) Procedure. A person desiring to intervene shall serve a motion upon all parties affected thereby. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

Rule 52.12(c).

COUNTRY Mutual's motion to intervene asserted a statutory right to intervene under section 537.065.2¹, but its motion was not “accompanied by a pleading setting forth the claim or defense for which intervention is sought.” This defect was – or should have been – fatal to its motion to intervene.

The requirement that a would-be intervenor identify in a pleading the claim it wishes to assert or defend is not an inconsequential matter of form. Instead, that pleading defines the role the intervenor will play and the procedural rights it will have. The claim the intervenor asserts or defends determines whether and to what extent it is permitted to conduct discovery or adduce evidence at trial, among other things, and it determines what substantive rights and liabilities of the intervenor will or even can be determined in any judgment on the merits. Nothing in section 537.062.2 purports to exempt insurers from this requirement, and Rule 52.12(c) ends with a plainly worded admonition that the

¹ All statutory citations are to RSMo Supp. 2017.

procedural requirements of the rule, including the requirement that the would-be intervenor's motion be accompanied by a pleading setting forth the claim or defense for which intervention is sought, applies even when the movant has a statutory right to intervene.

Much of the arguments made on behalf of Respondent in this action focus on the substantive or procedural rights Plaintiff Woodson contends COUNTRY Mutual has and does not have. As the principal opinion explains, and I agree, COUNTRY Mutual – like any other intervenor – has a right to a change of judge under Rule 51.05. And, properly, the principal opinion goes no further. But, when the underlying lawsuit resumes and questions arise concerning what COUNTRY Mutual is and is not permitted to do and which (if any) of COUNTRY Mutual's substantive rights and liabilities are or are not to be decided, these questions can be answered only in light of whatever pleading COUNTRY Mutual may file on remand setting forth the claim or defense it is asserting. It is not clear what claim COUNTRY Mutual could assert against Plaintiffs or Defendant in the underlying lawsuit, or how or why COUNTRY Mutual is a proper defendant to the only claim already pending in that lawsuit (i.e., wrongful death), but these questions must first be resolved below. In the absence of such a pleading, however, COUNTRY Mutual fails to identify the claim or defense it will pursue in the lawsuit and should not have been allowed to intervene under the plain language of Rule 52.12(c).

Paul C. Wilson, Judge