



In the Missouri Court of Appeals Eastern District

DIVISION ONE

WESTON T. LOVELAND III,	) No. ED108859
	)
Respondent,	)
	)
vs.	)
	) Appeal from the Circuit Court of
GABRIEL AUSTIN,	) Cape Girardeau County
	)
Respondent,	)
	) Honorable Stephen R. Mitchell
SHELTER MUTUAL INSURANCE	)
COMPANY,	)
	)
Appellant.	) Filed: April 13, 2021

Shelter Mutual Insurance Company (“Shelter”) appeals the trial court’s judgment confirming the arbitration award on Weston Loveland’s (“Loveland”) personal injury claim against Gabriel Austin (“Austin”) in conjunction with the agreement entered into by Loveland and Austin limiting Austin’s liability pursuant to § 537.065 and denying Shelter’s motion to intervene in the case.¹ Shelter raises nine points on appeal, arguing that the trial court erred in various ways in denying its motions to intervene and to dismiss and/or deny confirmation of the arbitration award.

Finding that the trial court did not err, we affirm the judgment of the trial court.

¹ All statutory references are to Mo. Rev. Stat. Cum. Supp. 2019.

I. Factual and Procedural Background

On October 31, 2018, Loveland filed his initial petition against Austin asserting a claim for damages (the “Personal Injury Lawsuit”). In that petition, Loveland alleged that he was injured by Austin on or about June 11, 2017, when Austin negligently and recklessly stabbed Loveland in the back with a knife while Austin was under the influence of marijuana and alcohol. Loveland further alleged that he had significant permanent injuries from the incident and had incurred significant medical expenses and lost wages, and therefore requested damages. At the time of the stabbing, Austin’s parents had a homeowner’s insurance policy through Shelter; on December 18, 2018, Shelter declined to extend coverage to Austin or defend him against Loveland’s personal injury claims based on the homeowner’s insurance policy’s terms, conditions, and exclusions, and based on the facts known and available to Shelter. After Shelter denied coverage, Loveland and Austin agreed to submit the personal injury claim to arbitration and entered into an agreement limiting Austin’s personal liability pursuant to § 537.065 (the “.065 Agreement”). On April 25, 2019, the arbitrator entered an award in Loveland’s favor for the amount of \$9,095,206.76 (with a 7.5% post-judgment interest rate) after finding that Austin was indeed liable for the stabbing (the “Arbitration Award”).

On June 4, 2019, Austin’s attorney formally notified Shelter that Austin had entered into the .065 Agreement; Shelter then filed its motion to intervene in the still-pending Personal Injury Lawsuit on July 3, 2019. On July 15, 2019, Loveland thereafter filed his application to confirm the Arbitration Award in the Personal Injury Lawsuit, with Austin filing his response to that application on July 17, 2019. Neither Loveland nor Austin argued grounds for vacating or modifying the Arbitration Award. On August 5, 2019, the judge granted Shelter’s motion to intervene, permitting Shelter to file a response to Loveland’s application to confirm the Arbitration Award. Shelter opposed confirmation of the Arbitration Award. After hearing oral

argument and further briefing on the application to confirm the Arbitration Award, the judge entered his one-page order denying the application on October 11, 2019, finding that there was “no existing controversy” such that Loveland and Austin could have properly pursued arbitration and that “confirmation of [Loveland’s] collusive [A]rbitration [A]ward would be contrary to the 2017 amendments to Section 537.065 and the plain legislative intent shown by such amendments” (the “October 2019 Order”).² After being ordered by the court to “proceed with discovery,” Loveland voluntarily dismissed the Personal Injury Lawsuit without prejudice on October 29, 2019.

On November 1, 2019, Loveland filed a new petition seeking confirmation of the Arbitration Award pursuant to § 435.400 (the “Confirmation Proceeding”). Shelter thereafter filed its motions to intervene and to dismiss and/or deny Loveland’s petition to confirm the Arbitration Award on November 19, 2019. After several changes of judge were granted at the request of the parties, and after additional pleadings on Shelter’s motions to intervene and to dismiss and/or deny confirmation of the Arbitration Award were filed, the trial court held a hearing on Shelter’s motions on March 13, 2020.

On March 24, 2020, the trial court in the Confirmation Proceeding entered its judgment confirming the Arbitration Award pursuant to § 435.400, and denying Shelter’s motions to intervene and to dismiss and/or deny confirmation of the Arbitration Award. In its judgment, the trial court specifically found that the October 2019 Order in the Personal Injury Lawsuit denying Loveland’s application to confirm the Arbitration Award was “an interlocutory ruling in an ongoing proceeding and not a final determination of the merits.” The court further found that:

² The presiding judge in this proceeding did not state what, if any, evidence supported the finding that the Arbitration Award was collusive, nor did Shelter cite such evidence in any of its filings. In fact, no evidence was adduced at the hearing on the motions.

[T]he language in the October 11, 2019 order, insofar as it references collusion and the lack of an existing controversy, is gratuitous and outside the scope of [Loveland's] Application to Confirm Arbitration Award, because this Court is not called upon to judge the merits of the Arbitration Award unless asked to do so by a party to the arbitration proceeding.

The trial court then stated that “the language in the October 11, 2019 order referencing collusion and the lack of an existing controversy between the parties was not and is not supported by either the evidence or the law.”

The trial court went on to explain that, because Shelter refused to provide a defense for Austin without a reservation of rights, “Shelter forfeited its right to control the defense of the claims against ... Austin and that Austin was, thereafter, entitled under the law to enter into a Section 537.065 agreement to arbitrate the claims made against him by ... Loveland.” The court therefore concluded that Shelter could not intervene in the present case pursuant to § 537.065, reasoning that § 537.065 was inapplicable to a proceeding on whether to confirm an arbitration award because such a proceeding is not a lawsuit.³ Thus, the trial court found that it was required to confirm the Arbitration Award pursuant to § 435.400⁴, and that Shelter could not object to the confirmation of the Arbitration Award because it was not a party to the arbitration agreement or the arbitration proceedings. The court therefore granted Loveland's petition to confirm the Arbitration Award and entered judgment reflecting the award in Loveland's favor and against Austin, as decided by the arbitrator.

This appeal follows.

³ While the trial court found that § 537.065 did not apply to the Confirmation Proceeding, it further found that, “to the extent the notice provision [of § 537.065] is applicable, ... such notice was properly given to Shelter....”

⁴ Section 435.400 provides: “Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 435.405 and 435.410.”

II. Discussion

Shelter raises nine points on appeal relating to the trial court's denials of Shelter's motions to intervene and to dismiss and/or deny Loveland's petition to confirm the Arbitration Award in the Confirmation Proceeding. We first address those points raising issues pertaining to Shelter's right to intervene (Points I, II, III, IV, and V) because they are dispositive of or affect some of Shelter's remaining points, and thereafter address Shelter's points arguing that the trial court erred in denying Shelter's motion to dismiss and/or deny Loveland's petition to confirm the Arbitration Award (Points VI, VII, VIII, and IX).

We also note at the outset of our discussion that, while this case presents issues of first impression for our Court related to the most recent version of § 537.065⁵ being applied to procedural facts involving arbitration, the Western District of the Missouri Court of Appeals has addressed those topics in several similar cases. Specifically, the Western District's decisions in *Britt v. Otto*, 577 S.W.3d 133 (Mo. App. W.D. 2019), *Aguilar v. GEICO Cas. Co.*, 588 S.W.3d 195 (Mo. App. W.D. 2019), and *Knight by & through Knight v. Knight*, 609 S.W.3d 813 (Mo. App. W.D. 2020), each address some or all of the issues raised by Shelter in its appeal. While the Western District's decisions in those cases are not binding upon our Court, we consider the holdings in those cases to be instructive to the case at bar.

Standard of Review for Points I – V

A trial court's denial of intervention as a matter of right will be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Breitenfeld v. School Dist. of Clayton*, 399 S.W.3d 816, 837 (Mo. banc 2013) (quoting *Johnson v. State*, 366 S.W.3d 11, 20 (Mo. banc 2012)); see also *Britt*, 577

⁵ Amendments to § 537.065 became effective on August 28, 2017. Relevant to this case, those amendments included the addition of the requirement stated in § 537.065.2 of the current version, establishing a requirement to give insurers notice of an agreement executed pursuant to § 537.065.1 and providing the insurer a limited right to intervene in any pending lawsuit involving the claim for damages within 30 days of the notice.

S.W.3d at 139. “Motions to intervene as a matter of right ... are typically decided based upon the motion, pleadings, counsel’s arguments, and suggestions in support or opposition to the motion.” *Britt*, 577 S.W.3d at 139 (quoting *BMO Harris Bank v. Hawes Tr. Invs., LLC*, 492 S.W.3d 607, 615 (Mo. App. W.D. 2016)).

In contrast, we review a trial court’s denial of permissive intervention for abuse of discretion. *Breitenfeld*, 399 S.W.3d at 837. “A trial court abuses its discretion when its decision is ‘clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.’” *Britt*, 577 S.W.3d at 145 (quoting *Johnson*, 366 S.W.3d at 21).

Points I and II

In its first point on appeal, Shelter argues that the trial court misapplied Rule 52.12(a)(2) in denying its motion to intervene as a matter of right because Shelter claimed an interest relating to the transaction at issue (the Arbitration Award), the proceedings to confirm the Arbitration Award would have impaired or impeded Shelter’s ability to protect its interest, and Shelter’s interest was not represented by the existing parties.⁶ Relatedly, Shelter contends in its second point on appeal that the trial court misapplied Rule 52.12(a)(1) in that § 537.065.2 allowed Shelter to intervene as a matter of right.

Rule 52.12(a) states:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

⁶ All rule references are to Missouri Supreme Court Rules (2019).

Shelter argues in its first point that Rule 52.12(a)(2) required the trial court to grant its motion to intervene because it claimed an interest in the transaction at issue (the arbitration agreement and Arbitration Award) and that Shelter was so situated that the disposition of the confirmation action might impair or impede Shelter's ability to protect that interest. Specifically, Shelter claims that it had an interest arising from the .065 Agreement and from the October 2019 Order initially denying Loveland's petition for confirmation of the Arbitration Award in the Personal Injury Lawsuit.

The Western District addressed and rejected almost this exact argument in both *Britt* and *Aguilar*. As explained in *Britt*:

[Rule 52.12(a)(2)] necessitates an interest in the property or transaction that is the subject of the action. "An interest, for the purposes of intervention as of right, means a concern, more than mere curiosity, or academic or sentimental desire." The intervenor's interest "must be a direct and immediate claim to, and have its origin in, the demand made or the proceeds sought or prayed by one of the parties to the original action." "An interest necessary for intervention as a matter of right does not include a mere, consequential, remote or conjectural possibility of being affected as a result of the action, but must be a direct claim upon the subject matter such that the intervenor will either gain or lose by direct operation of judgment."

577 S.W.3d at 142 (internal quotations and citations omitted) (quoting *BMO Harris Bank*, 492 S.W.3d at 618). The Western District in *Britt* further recognized that "Missouri courts have long held that '[t]he liability of an insurer as potential indemnitor of the judgment does not constitute a direct interest in such a judgment so as to implicate intervention as of right in that action,'" noting that this is because an insurer does not either "gain or lose from the direct operation of that judgment." *Id.* (quoting *Sherman v. Kaplan*, 522 S.W.3d 318, 326 (Mo. App. W.D. 2017)); see also *Aguilar*, 588 S.W.3d at 200; *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 479 (Mo. App. W.D. 1992).

Finding that the Western District’s rationale in *Britt* and *Aguilar* (rejecting insurers’ claims that they had sufficient interests in actions similar to the underlying case at bar such that they could intervene as a matter of right under Rule 52.12(a)(2)) is persuasive, we further find that Shelter did not have a direct interest in the Confirmation Proceeding.⁷ See *Britt*, 577 S.W.3d at 142; *Aguilar*, 588 S.W.3d at 200.

We likewise reject Shelter’s claim that it had an interest in the Confirmation Proceeding deriving from the October 2019 Order initially denying Loveland’s petition in the Personal

⁷ We acknowledge that the Western District recognized in *Knight* that “[b]y enacting new § 537.065.2, the General Assembly necessarily rejected the judge-made rule that liability insurance carriers lack any direct interest in tort litigation against their insureds.” 609 S.W.3d at 819. However, to the extent *Knight* recognizes more than a limited statutory right of an insurer to intervene in any pending lawsuit involving a claim for damages against its insured within thirty (30) days after receiving the notice required under § 537.065.2, we reject any such expansion of that limited statutory right because it not only conflicts with the principle of statutory construction that “courts must give effect to the statute as written and cannot add provisions which do not appear either explicitly or by implication,” *id.* at 823 (quoting *Garza v. Valley Crest Landscape Maint., Inc.*, 224 S.W.3d 61, 64 (Mo. App. E.D. 2007)), but also conflicts with prior Western District precedent, *Britt* and *Aguilar*, each of which were also decided **after** the August 2017 amendment of § 537.065.2, which provided the new limited statutory right to intervene.

Section 537.065.2 (“a statute of this state”) clearly provides a “right to intervene” such that intervention is allowed under either Rule 52.12(a)(1) (if “an unconditional right to intervene” exists) or Rule 52.12(b)(1) (if “a conditional right to intervene” exists). Section 537.065.2 explicitly provides a statutory right to intervene (matching either Rule 52.12(a)(1) or Rule 52.12(b)(1)), but does not explicitly or implicitly establish that insurers have “an interest relating to the property or transaction that is the subject of” actions involving tort claims where the insurer has denied coverage and an agreement has been executed pursuant to § 537.065.1. See Rule 52.12(a)(2); see also *infra* Point I and II for further explanation of why we do not determine whether the statutory right to intervene granted by § 537.065.2 is unconditional or conditional. Thus, we recognize that the new statutory right to intervene under § 537.065.2 is limited to its express terms, and will not read any more into the statute than is written.

We therefore disagree with the premise of the specific reasoning in *Knight* that, by enacting § 537.065.2, “the General Assembly necessarily rejected the judge-made rule that liability insurance carriers lack any direct interest in tort litigation against their insureds,” and decline to adopt that rationale or follow it in this case. 609 S.W.3d at 819.

We further note that *Knight* is factually distinguishable from this case. In *Knight*, the insurer timely entered into the personal injury suit and objected to the confirmation of the arbitration award. *Id.* at 818. The trial court then entered judgment confirming the award, and the insurer appealed. *Id.* However, prior to addressing the merits of the case, the Western District addressed whether the insurer had standing to appeal the confirmation of the award, specifically addressing whether the insurer was “aggrieved” by the judgment. *Id.* at 818-19. It was in this regard that the Western District found that the General Assembly, having amended § 537.065.2 to allow a limited right to intervene, necessarily rejected the judge-made rule that insurers do not have a direct interest relating to the property or transaction that is the subject of the action, *id.* at 819, which is a required finding in order for an insurer to intervene pursuant to Rule 52.12(a)(2); however, there is no such requirement in § 537.065.2. If the General Assembly had intended to reject the judge-made rule completely, then it could have expressly so stated in § 537.065.2, and not limited the insurer’s right to intervene in any pending lawsuit to the 30-day period after notice is received.

Injury Lawsuit.⁸ To the extent Shelter suggests it would have had the right to litigate whether Austin's actions were covered under his parents' homeowner's insurance policy issued by Shelter, "the appropriate forum for that dispute at this point is the pending garnishment action." *Aguilar*, 588 S.W.3d at 201.⁹

In its second point on appeal, Shelter alternatively (but relatedly) claims that it should have been allowed to intervene as a matter of right pursuant to Rule 52.12(a)(1) because

⁸ See *infra* **II. Discussion, Point VI** for further explanation of the effect of the October 2019 Order. Furthermore, at oral argument Respondent's counsel correctly noted that *Knight* addressed the insurance company's right to appeal once it had properly intervened. Thus, *Knight* is not analogous to this case in that regard.

⁹ Shelter also had the ability to protect its interests by filing a declaratory judgment action asking the court to determine its potential liability under the policy when it became aware of Loveland's claim against Austin, rather than just deny liability and refuse to defend Austin. For example, the Western District in *Geiler v. Liberty Ins. Corp.*, citing numerous prior cases, recently encouraged insurance companies to take such action, specifically noting as follows: "Missouri courts have expressly advised that insurers with good faith coverage questions in similar scenarios should file a declaratory judgment action simultaneous to the underlying personal injury action and seek a stay of the personal injury lawsuit proceedings until the declaratory judgment action is decided." 2021 WL 96068, at *5 n.2 (Mo. App. W.D. Jan. 12, 2021) (quoting *U-Haul Co. of Missouri v. Carter*, 567 S.W.3d 680 n.4 (Mo. App. W.D. 2019)). In this regard, *Geiler* further noted:

Liberty, believing it had good faith coverage questions, could have moved to stay proceedings in the wrongful death lawsuit pending resolution of its coverage dispute in a declaratory judgment action, but it failed to do so. Instead, Liberty did not file its declaratory judgment action and endeavored to challenge their coverage issues in the equitable garnishment case appealed herein. Liberty's absence from the wrongful death lawsuit was due to its own failure to take the necessary actions to determine its coverage issues in a timely manner.

Id.

Likewise, *Britt* similarly recognized that, "the insurer has a forum by declaratory judgment action or in the action to compel indemnity for the judgment that affords the insurer full scope to protect its interests against the contention of coverage, and hence liability for the judgment." 577 S.W.3d at 142 (quoting *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 479, 480 (Mo. App. W.D. 1992)). In this regard, *Britt* continued, "[i]n other words, '[i]n the third party liability claim context, the insurance carrier has no right to intervene in litigation between its policyholder and the third party; the carrier can participate in the litigation only pursuant to its contractual obligation to defend its policyholder.'" *Id.* (quoting *Charles v. Consumers Ins.*, 371 S.W.3d 892, 897-98 (Mo. App. W.D. 2012)) (second bracketed material in original). *Britt* further noted, "[i]f either party to the insurance contract breaches in such a way that results in the insurer not providing a defense to the insured during the underlying lawsuit, that matter may be raised only in the proper forum, i.e., a declaratory judgment action or a subsequent garnishment action." *Id.* Moreover, *Britt* further recognized that even if the insurer in that case had been permitted to intervene in the action to confirm the award, "[it] would not have been able to insist on [a] determination of its liability to pay the award." *Id.* at 144. Rather, pursuant to § 435.400, "upon application of a party to an arbitration proceeding, 'the court **shall confirm an award**, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award....' " *Id.* (emphasis in original). However, *Britt* expressly recognized that, "[t]he authorized grounds for vacating an award are limited, and do not include relitigating the facts or legal issues determined by the award." *Id.* (citing the Federal Arbitration Act, 9 U.S.C. § 10, and the Missouri Uniform Arbitration Act, § 435.405.1).

§ 537.065.2 provided it an unconditional right to intervene. While it is clear that § 537.065.2 provides insurers either an unconditional right to intervene under Rule 52.12(a)(1) or a conditional right to intervene under Rule 52.12(b)(1),¹⁰ we find that the right to intervene granted by § 537.065.2 did not extend to the Confirmation Proceeding filed by Loveland.

Sub-sections .1 and .2 of § 537.065 relevantly state:

1. Any person having an unliquidated claim for damages against a tort-feasor, on account of personal injuries, bodily injuries, or death, provided that, such tort-feasor's insurer or indemnitor has the opportunity to defend the tort-feasor without reservation but refuses to do so, may enter into a contract with such tort-feasor or any insurer on his or her behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither such person nor any other person, firm, or corporation claiming by or through him or her will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract. Execution or garnishment proceedings in aid thereof shall lie only as to assets of the tort-feasor specifically mentioned in the contract or the insurer or insurers not excluded in such contract. Such contract, when properly acknowledged by the parties thereto, may be recorded in the office of the recorder of deeds in any county where a judgment may be rendered, or in the county of the residence of the tort-feasor, or in both such counties, and if the same is so recorded then such tort-feasor's property, except as to the assets specifically listed in the contract, shall not be subject to any judgment lien as the result of any judgment rendered against the tort-feasor, arising out of the transaction for which the contract is entered into.

2. 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 sum, § 537.065.1 allows a tort-feasor to contract with a person bringing an unliquidated claim for damages against said tort-feasor to limit the tort-feasor's liability for a judgment to specified assets, including insurance contracts, if an insurer denies coverage and refuses to defend the tort-

¹⁰ Rule 52.12(b)(1) states that "[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene...."

feasor without reservation. *See Britt*, 577 S.W.3d at 140. Section 537.065.2 thereafter requires that written notice of an agreement executed pursuant to § 537.065.1 be given to an insurer before judgment may be entered against the tort-feasor, and provides the insurer 30 days to intervene as a matter of right “in any pending lawsuit involving the claim for damages.”

“The ‘primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.’” *Nicolazzi v. Bone*, 589 S.W.3d 638, 641 (Mo. App. E.D. 2019) (quoting *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. Banc 2014)); *see also Perkins v. Bridgeton Police Dept.*, 549 S.W.3d 504, 506 (Mo. App. E.D. 2018). “In statutory construction, courts must give effect to the statute as written and cannot add provisions which do not appear either explicitly or by implication.” *Knight*, 609 S.W.3d at 823 (quoting *Garza v. Valley Crest Landscape Maint., Inc.*, 224 S.W.3d 61, 64 (Mo. App. W.D. 2007)).

From examining the plain and ordinary language of § 537.065.2, it is clear that the statute only allows an insurer to intervene as a matter of right “***in any pending lawsuit*** involving the claim for damages,” provided the insurer files its motion to intervene ***within 30 days*** after receipt of notice of an agreement executed pursuant to § 537.065.1 (emphasis added). Austin provided the required notice of the .065 Agreement to Shelter on June 4, 2019. The Confirmation Proceeding (initiated by Loveland’s petition for confirmation of the Arbitration Award), was filed on November 1, 2019, and thus, was not pending during the timeframe provided by § 537.065.2—specifically, 30 days after Austin gave written notice of the .065 Agreement to Shelter on June 4, 2019. Thus, applying § 537.065.2 as it is written, and without adding provisions that do not appear explicitly or by implication, *see Knight*, 609 S.W.3d at 823, the right to intervene granted under § 537.065.2 cannot extend to the Confirmation Proceeding because it was not pending in the 30-day period after Shelter received notice of the .065 Agreement. *See Aguilar*, 588 S.W.3d at 199 (concluding that, while the insurer’s motion to

intervene was timely filed in the initial personal injury action, that personal injury action was voluntarily dismissed, the parties proceeded to arbitration, and the action to confirm the arbitration award was filed far outside the 30-day limit provided by § 537.065.2 such that the motion to intervene in the action to confirm the arbitration award could not have been timely). As the plain and ordinary language of § 537.065.2 constrained the exercise of the right to intervene granted under that subsection to “any pending lawsuit” within the 30-day timeline after an insurer receives notice of an agreement made pursuant to § 537.065.1, whatever right to intervene that Shelter was granted under § 537.065.2 had expired by the time the Confirmation Proceeding was commenced.¹¹ Should the General Assembly desire to enlarge the right of an insurance company to intervene in a lawsuit or other proceeding involving one of its insureds, it is certainly free to do so.

As the trial court did not misapply Rule 52.12(a) or § 537.065.2 in denying Shelter’s motion to intervene in the Confirmation Proceeding, *Breitenfeld*, 399 S.W.3d at 837; *Britt*, 577 S.W.3d at 139, 145, Shelter’s Points I and II are denied.

Point III

In its third point on appeal, Shelter argues that the trial court abused its discretion in denying Shelter’s motion to permissively intervene. Specifically, Shelter contends that the trial court abused its discretion by preventing Shelter from permissively intervening because Shelter’s objections to confirmation of the Arbitration Award presented plain questions of law and fact in common with Loveland’s petition, such that permissive intervention was permitted under Rule 52.12(b)(2), or, alternatively, because § 537.065.2 provided Shelter a conditional right to intervene warranting permissive intervention under Rule 52.12(b)(1).

¹¹ Because we find that Shelter could not have effectively asserted a right to intervene in the Confirmation Proceeding pursuant to § 537.065.2, we need not address whether the Confirmation Proceeding constituted a “lawsuit involving the claim for damages” or whether the right to intervene granted by § 537.065.2 is unconditional or conditional.

Rule 52.12(b) states:

Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common; or (3) when the validity of a statute, regulation or constitutional provision of this state, or an ordinance or regulation of a governmental subdivision thereof, affecting the public interest, is drawn in question in any action to which the state or governmental subdivision or an officer, agency or employee thereof is not a party, the court may in its discretion notify the chief legal officer of the state or governmental subdivision thereof, and the state or governmental subdivision may in the discretion of the court be permitted to intervene, upon proper application.

We first note that, in conjunction with our denial of Shelter's second point on appeal, Shelter's second argument asserted in its third point (that Shelter had a conditional right to intervene warranting permissive intervention under Rule 52.12(b)(1)) likewise fails. *See supra* **II. Discussion, Points I and II**. Thus, we only need address Shelter's argument that its objections to confirmation of the Arbitration Award (which were attached to its motion to intervene) presented plain questions of law and fact in common with Loveland's petition such that Shelter could permissively intervene under Rule 52.12(b)(2).

From simply comparing Shelter's motion to intervene in this case to Loveland's petition for confirmation of the Arbitration Award, we find that Shelter's motion did not present a question of law or fact in common with the issues presented by Loveland or Austin. Both Loveland and Austin agreed as to the validity of the arbitration agreement and sought to confirm the Arbitration Award; in contrast, Shelter, which was not party to the arbitration agreement or arbitration proceedings because it had denied coverage to Austin and refused to defend him without reservation, argued in its motion to intervene that the arbitration agreement was invalid, asserted claims of collusion against Loveland and Austin, and argued issues of law that were not otherwise present in the Confirmation Proceeding. In sum, Shelter's motion did not present questions of law or fact in common with those in the Confirmation Proceeding such that Shelter

could permissively intervene pursuant to Rule 52.12(b)(2). Therefore, the trial court did not abuse its discretion in denying Shelter's motion to intervene. *Breitenfeld*, 399 S.W.3d at 837; *Britt*, 577 S.W.3d at 139, 145.

Shelter's Point III is denied.

Points IV and V

In its fourth point on appeal, Shelter argues that the trial court misapplied the law in denying Shelter's motion to intervene because the court deprived Shelter of its constitutional rights to access the courts pursuant to Art. I, § 14 of the Missouri Constitution and the right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and Art. I, § 10 of the Missouri Constitution. Relatedly, Shelter argues that the trial court misapplied the law in finding that Shelter lacked standing to object to confirmation of the Arbitration Award in its fifth point on appeal.

In sum, Shelter's fourth and fifth points on appeal are based upon the premise that Shelter must have the opportunity to defend its interests related to Loveland's personal injury claim against Austin. However, Shelter ignores two simple facts. First, Shelter did have the opportunity to participate and defend its "interest" (to the extent it has an interest in this case) when it had the chance to defend Austin as the issuer of Austin's parents' homeowner's insurance policy; instead, Shelter chose to deny coverage to Austin and refused to defend him against Loveland's claim without reservation, which allowed Austin to enter into the .065 Agreement with Loveland. See *Adams v. Certain Underwriters at Lloyd's of London*, 589 S.W.3d 15, 37–38 (Mo. App. E.D. 2019) ("An insurer who refuses to defend a named insured does so at its peril. That insurer gives up the right to control the litigation, and if it is later found it refused wrongfully, it will be bound by all those issues and questions necessarily determined in the underlying case. In such circumstances, the insured is free to enter into an agreement with the claimant under

Section 537.065 in order to limit his liability.”). In addition, Shelter’s argument that it should have been allowed to intervene because it will be bound by the factual determinations made by the arbitrator in this case and thus precluded from further arguing whether Austin’s actions (specifically, whether he negligently and recklessly stabbed Loveland) were covered under his parents’ homeowner’s insurance policy is unpersuasive when considering the procedural history. In Loveland’s original petition in the Personal Injury Lawsuit filed on October 31, 2018, Loveland expressly asserted that he was entitled to damages from Austin because Austin was “negligent and reckless” when he stabbed Loveland. It is undisputed that Shelter was aware of this claim and thereafter declined coverage and refused to defend Austin on December 18, 2018. From the very beginning of the Personal Injury Lawsuit, Loveland’s claim was always that Austin negligently and recklessly stabbed him; indeed, the arbitrator’s findings of fact are very much consistent with that claim. Thus, Shelter cannot now claim that it did not know that Loveland had asserted these facts—as it is clear that Shelter certainly did know—nor can Shelter now claim that it did not have the opportunity to argue those facts. Shelter refused to defend Austin, without reservation, against those factual assertions, and did so at its own peril. *See id.*

Second, as we have stated previously, “the appropriate forum for [Shelter’s policy] dispute ***at this point*** is the pending garnishment action.” *See Aguilar*, 588 S.W.3d at 201 (emphasis added). Consistent with our conclusions on Shelter’s second and third points on appeal, Shelter was not entitled to intervention as a matter of right or permissive intervention in the Confirmation Proceeding. *See supra* **II. Discussion**, Points I, II, and III. As such, the trial court’s finding that Shelter did not have standing to object to the confirmation of the Arbitration Award is not erroneous, nor did the trial court violate Shelter’s constitutional rights in denying its motion to intervene. We find Shelter’s arguments asserted in its fourth and fifth points unpersuasive. *Breitenfeld*, 399 S.W.3d at 837; *Britt*, 577 S.W.3d at 139, 145.

Shelter's Points IV and V are denied.

Standard of Review for Points VI – IX

As in any court-tried case, we will affirm a trial court's judgment confirming an arbitration award unless it is unsupported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 735 (Mo. banc 2017); *Caldwell v. UniFirst Corp.*, 2020 WL 6278737, *3 (Mo. App. E.D. Oct. 27, 2020); *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976); *see also* § 435.440 (stating that an appeal from an order confirming or denying confirmation of an arbitration award "shall be taken in the manner and to the same extent as from orders or judgments in a civil action").

Point VI

In its sixth point on appeal, Shelter argues that the trial court erroneously applied the law in denying Shelter's motion to dismiss and/or deny confirmation of the Arbitration Award and in entering judgment confirming the award because Loveland's petition to confirm the award in the Confirmation Proceeding was barred by the doctrine of collateral estoppel. Specifically, Shelter argues that Loveland's petition in the Confirmation Proceeding and the October 2019 Order denying Loveland's original application to confirm the Arbitration Award in the Personal Injury Lawsuit (entered before Loveland voluntarily dismissed the same without prejudice) met the requirements of collateral estoppel such that Loveland was barred from re-litigating the issues raised in the Confirmation Proceeding.

"The doctrine of collateral estoppel, commonly known as issue preclusion, precludes the same parties from relitigating issues previously adjudicated between the same parties or those in privity with them." *Xiaoyan Gu v. Da Hua Hu*, 447 S.W.3d 680, 686 (Mo. App. E.D. 2014) (quoting *Robin Farms, Inc. v. Beeler*, 991 S.W.2d 182, 185 (Mo. App. W.D. 1999)).

For collateral estoppel to apply, (1) the issue decided in the first action must be identical to the issue in the second; (2) the prior litigation must have resulted in a judgment on the merits; (3) the party to be estopped must have been a party or in privity with a party to the prior adjudication; and (4) the party to the prior adjudication must have had a full and fair opportunity to litigate the issue in the prior suit.

Kinsky v. 154 Land Co., LLC, 371 S.W.3d 108, 112 (Mo. App. E.D. 2012); *see also Williams v. S. Union Co.*, 364 S.W.3d 228, 233 (Mo. App. W.D. 2011). A “final judgment on the merits” must have been rendered on the issue sought to be precluded in the cause in question for that issue to be barred under collateral estoppel. *Jeffrey v. Cathers*, 104 S.W.3d 424, 430 (Mo. App. E.D. 2003); *Spath v. Norris*, 281 S.W.3d 346, 351 (Mo. App. W.D. 2009).

In this case, the October 2019 Order denying Loveland’s original application to confirm the Arbitration Award in the Personal Injury Lawsuit was not a “final judgment” such that Loveland’s petition to confirm the award filed in the Confirmation Proceeding was barred by the doctrine of collateral estoppel. Shelter’s argument that the October 2019 Order was a “final judgment” because it was immediately appealable under § 435.400 is incorrect. Although § 435.400 grants a statutory right to appeal under several circumstances in cases involving arbitration awards (including from “an order confirming or denying confirmation of an award,” as in this case), such appeals involve “interlocutory orders,” not “final judgments.” *Sanford v. CenturyTel of Mo., LLC*, 490 S.W.3d 717, 718–20 (Mo. banc 2016) (finding that an order denying arbitration was immediately appealable under § 435.400, but was not a “final judgment”). “[A]n interlocutory order [(such as one denying a motion to confirm an arbitration award)] is, by definition, not ‘final’ because Rule 74.01(b) provides that it remains modifiable and, therefore, ‘[a]t any time *before final judgment* a court may open, amend, reverse or vacate an interlocutory order.” *Id.* at 719–20 (emphasis in original) (third alteration in original) (quoting *Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 365 (Mo. App. S.D. 2015)).

Although a statute may make an interlocutory order appealable despite its interlocutory nature, said statute does not make the order a “final judgment” because “[i]t is not a judgment or dispositive order.” *Id.* at 718.

In the case at bar, the October 2019 Order denying Loveland’s original application to confirm the Arbitration Award did not dispose of the merits of Loveland’s original personal injury case; rather, it was simply an interlocutory order that very clearly left the merits of the case completely unresolved. This is even supported by the fact that the judge further instructed the parties to proceed with the case by beginning the discovery process. Furthermore, as indicated by the Supreme Court of Missouri in *Sanford*, the October 2019 Order was subject to modification until a final judgment was entered in the case. *See* 490 S.W.3d at 719–20. Thus, the October 2019 Order denying Loveland’s original application to confirm the Arbitration Award was not a “final judgment” such that Loveland’s petition to confirm the Arbitration Award filed in the Confirmation Proceeding was barred by collateral estoppel. *See id.* at 718–20; *Williams*, 364 S.W.3d at 233; *Jeffrey*, 104 S.W.3d at 430.

Shelter’s reliance on *Pinkerton v. Technical Education Services, Inc.*, 616 S.W.3d 477 (Mo. App. W.D. 2020) is misplaced. In *Pinkerton*, the Western District held that the prior action (an arbitrator’s decision finding the arbitration provision in an agreement to be unenforceable), actually resulted in a judgment on the merits, and the facts determined in the arbitration proceeding may not be relitigated “where there has been a final and binding arbitration between the parties.” *Id.* at 487 (quoting *Cooper v. Yellow Freight System, Inc.*, 589 S.W.2d 643, 645 (Mo. App. E.D. 1979)). In *Cooper*, this Court stated that, “[i]f the procedure used to settle the dispute is one of the party’s own choosing, as it was here, and was a final and binding arbitration between the parties, the courts may not relitigate facts determined in the arbitration proceeding.” 589 S.W.2d at 645. In this case, the facts and issues are not analogous, and Shelter seeks to

relitigate facts that were determined in the arbitration proceeding, after declining the opportunity to defend its insured. Further, it is clear that the trial court's ruling on the motion to confirm the arbitration award in the Personal Injury Lawsuit was an interlocutory order, as discussed above, rather than a "final judgment" or any type of "judgment" at all. Therefore, Loveland's voluntary dismissal under Rule 67.02 served to "wipe[] the slate clean." *Pinkerton*, 616 S.W.3d at 481. While Loveland had the option of appealing the trial court's refusal to confirm the Arbitration Award pursuant to § 435.400, he also had the ability to dismiss the Personal Injury Action and refile a petition seeking to confirm the Arbitration Award pursuant to § 435.400.

Thus, the trial court did not erroneously apply the law as Shelter contends. *State ex rel. Greitens*, 509 S.W.3d at 735; *Caldwell*, 2020 WL 6278737 at *3; *Murphy*, 536 S.W.2d at 32; § 435.440.

Shelter's Point VI is denied.

Points VII

In its seventh point on appeal, Shelter argues that the trial court misapplied the law in denying its motion to dismiss and/or deny confirmation of the Arbitration Award and in entering judgment confirming the award because the award was the result of an invalid and unenforceable agreement. Specifically, Shelter argues that there was no existing controversy at the time that Loveland and Austin executed the arbitration agreement.

Section 435.350 (entitled "Validity of arbitration agreement, exceptions") states, in relevant part: "A written agreement to submit any existing controversy to arbitration ... is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." From examining the Arbitration Award, it is clear that there were two existing controversies that Loveland and Austin contracted to submit to the arbitrator: (1) whether Austin was liable to Loveland and, if so, (2) the extent of Austin's liability to Loveland.

Those controversies clearly existed at the time Loveland and Austin executed the arbitration agreement. Thus, the trial court did not misapply the law as Shelter contends. *State ex rel. Greitens*, 509 S.W.3d at 735; *Caldwell*, 2020 WL 6278737 at *3; *Murphy*, 536 S.W.2d at 32; § 435.440.

Shelter's Point VII is denied.

Points VIII and IX

In its eighth point on appeal, Shelter argues that the trial court misapplied the law in denying its motion to dismiss and/or deny confirmation of the Arbitration Award and in entering judgment confirming the award because doing so deprived Shelter of its constitutional rights to access the courts pursuant to Art. I, § 14 of the Missouri Constitution and the right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and Art. I, § 10 of the Missouri Constitution. Relatedly, Shelter argues in its ninth point on appeal that the trial court misapplied the law in denying its motion to dismiss and/or deny confirmation of the Arbitration Award and in entering judgment confirming the award because the court lacked subject matter jurisdiction over the case under Art. V, § 14 of the Missouri Constitution because there was no "case or controversy."

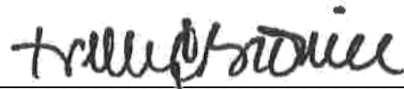
Shelter's eighth point on appeal mirrors its fourth point, and simply applies the same constitutional arguments to the trial court's denial of its motion to dismiss and/or deny confirmation of the Arbitration Award in place of the court's denial of Shelter's motion to intervene. Consistent with and for the same reasons as our conclusion on Shelter's fourth point, we find that the trial court did not violate Shelter's constitutional rights by denying its motion to dismiss and/or deny confirmation of the Arbitration Award. Shelter had and will have other opportunities to litigate the issues present in this case. *See Aguilar*, 588 S.W.3d at 201; *Adams*, 589 S.W.3d at 37–38.

Regarding Shelter's argument asserted in its ninth point that there was no "case or controversy" before the trial court such that it did not have subject matter jurisdiction, § 435.430 (entitled "Court, jurisdiction") dispels that contention. Section 435.430 states: "The term '**court**' means any court of competent jurisdiction of this state. The making of an agreement described in section 435.350 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under sections 435.350 to 435.470 and to enter judgment on an award thereunder." As Loveland and Austin executed a valid arbitration agreement pursuant to § 435.350, and given that Loveland filed his petition to confirm the Arbitration Award granted by the arbitrator following arbitration pursuant to § 435.400, the trial court clearly had subject matter jurisdiction pursuant to § 435.430. Thus, Shelter's argument raised in its ninth point is implicitly meritless.

Shelter's Point IX is denied.

III. Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.



Kelly C. Broniec, Judge

Colleen Dolan, P.J. and
Robert M. Clayton III, J. concur.