



In the Missouri Court of Appeals Eastern District

DIVISION THREE

HAROLD BARNETT,	)	No. ED109008
	)	
Respondent,	)	
	)	
vs.	)	
	)	Appeal from the Circuit Court
COLUMBIA MAINTENANCE	)	of the City of St. Louis
COMPANY, et al.,	)	
	)	
Respondents,	)	
	)	Honorable Christopher McGraugh
AMCO INSURANCE COMPANY	)	
and	)	
DEPOSITORS INSURANCE	)	
COMPANY	)	
	)	
Appellants.	)	Filed: June 29, 2021

AMCO Insurance Company and Depositors Insurance Company (collectively “Insurers”) appeal the circuit court’s order denying their motion to intervene in a proceeding to confirm an arbitration award. Insurers sought to contest confirmation of the award, which was entered in favor of Harold Barnett and against Insurers’ policy holders. Finding that the circuit court did not err, and that certain of Insurers’ points are not properly before this Court, we affirm.

Factual and Procedural Background

Terminated from his job, Barnett sued his employer, Columbia Maintenance Company, and William Hausman, the president and sole owner of Columbia Maintenance Company (collectively “Defendants”), alleging violations of the Missouri Human Rights Act, as well as

negligent infliction of emotional distress (“MHRA Action”). Insurers, who had issued commercial general liability and umbrella policies to Defendants, denied coverage and refused to defend Defendants. Insurers then filed a declaratory judgment action in federal court, seeking a declaration that under the terms, conditions, and exclusions of Defendants’ policies, Insurers had no duty to defend or to indemnify Defendants against Barnett’s MHRA Action.

After Insurers denied coverage and refused to defend Defendants, Barnett and Defendants entered into a contract pursuant to Section 537.065, which in part limited recovery to insurance proceeds (“537 Agreement”). Barnett notified Insurers of this contract on August 13, 2019. Five days later, Insurers moved to intervene in the MHRA Action. The circuit court granted intervention, and requested that the parties file memorandums concerning the extent to which Insurers could conduct discovery and participate in trial. After receiving those memorandum, the circuit court issued an order, dated October 4, 2019, in which the court stated that Insurers “must accept this lawsuit as they find it at the time of their intervention,” and then ordered that Insurers “have the same rights and responsibilities as any other party to this litigation, which includes conducting discovery and participating in trial” (“October 2019 Order”).

Barnett dismissed the MHRA Action, without prejudice, on January 30, 2020, and proceeded to binding arbitration with Defendants. Insurers were extended invitations to participate in that arbitration, but declined to do so. The arbitrator issued his award on April 29, 2020, in favor of Barnett and against Defendants in the total amount of \$11,437,009.90 (“Arbitration Award”). The arbitrator described Defendants’ actions as “one of the most egregious and blatant Missouri Human Rights case violations” that the arbitrator had ever seen. Barnett filed his application to confirm the award with the circuit court on May 1, 2020

(“Confirmation Proceeding”). Defendants responded, stating they had no objection to judgment being entered on the award.

Insurers moved to intervene in the Confirmation Proceeding on May 8, 2020. Insurers sought to intervene both as of right and by permissive intervention, pursuant to Rule 52.12, to contest confirmation of the Arbitration Award (“Motion to Intervene”). They also filed a motion to deny and/or dismiss the application for approval of the Arbitration Award on May 19, 2020 (“Motion to Dismiss”). The circuit court denied Insurers’ Motion to Intervene.

Insurers now advance nine points on appeal, alleging the circuit court erred in denying intervention, and in denying or implicitly denying their Motion to Dismiss. We address each point, but note that the issues raised by Insurers have largely been decided by *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 this Court’s recent decision, *Loveland v. Austin*, ED108859, 2021 WL1374010 (Mo. App. E.D. April 13, 2021).

Discussion

Points I and II: Intervention of Right

In their first two points on appeal, Insurers allege the circuit court misapplied Rule 52.12(a) in denying their Motion to Intervene in the Confirmation Proceedings as a matter of right.¹ 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.

¹ For clarity, we address Points I and II out of order.

Insurers claim a right to intervention pursuant to Rule 52.12(a)(1) because an unconditional right to do so is conferred by Section 537.065.2. Insurers claim a right to intervene pursuant to Rule 52.12(a)(2) because they had an interest in the Confirmation Proceeding and were so situated that disposition of the Confirmation Proceeding impaired or impeded their ability to protect their interests, which were not represented by the existing parties.

We address each claim in turn. In reviewing the circuit court's denial of intervention as of right, we consider the facts in the light most favorable to the court's judgment." *Britt*, 577 S.W.3d at 136 n.3 (internal quotation omitted). We will affirm the circuit court's decision 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. *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 403 (Mo. banc 2016); *see also Britt*, 577 S.W.3d at 139.

Intervention as a Matter of Right Pursuant to Rule 52.12(a)(1)

Insurers claim they were entitled to intervene in the Confirmation Proceeding as a matter of right pursuant to Rule 52.12(a)(1) because Section 537.065.2 conferred the unconditional right to do so. Section 537.065.1 allows any person with an unliquidated claim for damages to enter into a contract with a tortfeasor to limit the tort-feasor's liability for a judgment to specified assets, including insurance contracts. *Britt*, 577 S.W.3d at 140; *see also, Schmitz v. Great Am. Assurance Co.*, 337 S.W.3d 700, 709 (Mo. banc 2011). The right to enter into a section 537.065.1 contract limiting the tort-feasor's liability to an insurance contract is conditioned on the tort-feasor's insurer being afforded the opportunity to defend the tort-feasor and refusing to do so without reservation. *Britt*, 577 S.W.3d at 140. Section 537.065.2 then describes when a judgment can be entered against a tort-feasor who has entered into a Section 537.065.1 contract:

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.***

(Emphasis added).

Insurers claim this statutory right to intervene applies to the Confirmation Proceeding. In essence, Insurers seek to expand the statutory language to mean insurers have thirty days to intervene after receiving notice of a confirmation proceeding. This same argument was rejected in *Aguilar, Britt, and Loveland*.

Any time this Court is called upon to apply a statute, our primary obligation is to ascertain the intent of the legislature from the language used, and to give effect to that intent if possible. *Hixson v. Missouri State Highway Patrol*, 611 S.W.3d 923, 926 (Mo. App. E.D. 2020). We do so by considering the words used in their plain and ordinary meaning. *Id.* We examine the language used by the legislature, and do not supply what the legislature has omitted by engrafting additional language into the statute. *Missouri State Conference of Nat'l Ass'n for the Advancement of Colored People v. State*, 607 S.W.3d 728, 733 (Mo. banc 2020). “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.” *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 Section 537.065.2, it is clear the statute only allows an insurer to intervene as a matter of right provided the insurer files its motion to intervene within thirty days after receiving notice of an agreement executed pursuant to Section 537.065.1. Barnett provided the required notice of the 537 Agreement to Insurers on August 13, 2019. Though Insurers timely filed a motion to intervene in the MHRA Action that was pending at the time, that action was voluntarily dismissed, and Barnett and Defendants

proceeded to arbitration. Barnett filed his application to confirm the arbitration award on May 1, 2020. Insurers filed their Motion to Intervene in the Confirmation Proceeding seven days later, on May 8, 2020. Though filed days after commencement of the Confirmation Proceeding, Insurers' motion was nonetheless filed almost nine months after notice of the 537 Agreement - far outside the statute's thirty-day limit. Insurers did not file their Motion to Intervene within thirty days of receipt of written notice of the 537 Agreement, and thus Insurers' motion was untimely.

Even assuming the Confirmation Proceeding qualified as a "pending lawsuit involving the claim for damages" (an issue we need not decide), it was not pending during the thirty-day time period after Barnett gave written notice of the 537 Agreement to Insurers. Thus applying Section 537.065.2 as written, without adding provisions, the right to intervene granted under Section 537.065.2 cannot extend to the Confirmation Proceeding because it was not pending in the thirty-day time period after Insurers received notice of the 537 Agreement. The plain and ordinary language of Section 537.065.2 constrains the exercise of the right to intervene granted under that subsection to "any pending lawsuit" within the thirty-day time period after an insurer receives notice of an agreement made pursuant to Section 537.065.1. Whatever right to intervene that Insurers were granted under Section 537.065.2 had expired by the time the Confirmation Proceeding commenced. In sum, the plain and unambiguous language of Section 537.065.2 did not afford Insurers the right to intervene as of right in the Confirmation Proceeding. *Aguilar*, 588 S.W.3d at 199. As we stated in *Loveland*, "[s]hould 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."

Insurers on appeal acknowledge that their Motion to Intervene in the Confirmation Proceeding was filed more than thirty days after they received notice of the 537 Agreement, and that the Confirmation Proceeding was not pending at that time. Nonetheless, they argue their motion should not have been denied on this basis because of their successful and timely prior intervention, and the purported confirmation of their rights, in the MHRA Action to defend against Barnett's claims for liability and damages. Insurers argue that by virtue of these occurrences, they possessed a vested and acknowledged interest in contesting the arbitration award as a confirmed judgment, regardless of the fact that the Confirmation Proceeding was filed more than thirty days after they were provided notice of the 537 Agreement. They note they immediately moved to intervene in the Confirmation Proceeding – within thirty days of Barnett's confirmation application – and thus contend the circuit court should have granted their Motion to Intervene.

Insurers are mistaken. Insurers seek intervention beyond the statutory thirty-day time period. The plain and ordinary language of Section 537.065.2 does not support such a premise. Section 537.065.2 affords a limited right, to be exercised within thirty days of notice. Further, Insurers argue that by timely intervening in MHRA Action and securing the October 2019 Order, their interests in the Arbitration Award and future judgment became vested, and thus they possessed an existing right at the time of the Confirmation Proceedings. Insurers cite no authority for this proposition. Moreover, it does not matter that Insurers' motion to intervene in the MHRA Action was granted, as that case was voluntarily dismissed without prejudice. Once a plaintiff has voluntarily dismissed an action, it is as if the suit had never been filed. *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. App. S.D. 2009) (internal citations omitted).

The circuit court did not err in denying Insurers' Motion to Intervene in the Confirmation Proceeding as a matter of right pursuant to Rule 52.12(a)(1), as Section 537.065.2 did not confer upon Insurers the unconditional right to do so in this case. We deny Point II.

Intervention as a Matter of Right Pursuant to Rule 52.12(a)(2)

Insurers argue Rule 52.12(a)(2) required the circuit court to grant their motion to intervene because they claimed an interest in the Confirmation Proceeding and were so situated that the disposition of the Confirmation Proceeding impaired or impeded their ability to protect their interests, which were not represented by the existing parties.

Again, a movant may intervene in an action as a matter of right upon timely application pursuant to Rule 52.12(a)(2) when three requirements are met: (1) the movant claims an interest relating to the property or transaction that is the subject of the action; (2) the movant's ability to protect the interest is impaired or impeded; and (3) the existing parties are inadequately representing the movant's interest. *Britt*, 577 S.W.3d at 142. Insurers, as movant and proposed intervenor, bore the burden of establishing each of the requirements for intervention. *Id.* If all three requirements are satisfied, the right to intervention is absolute. *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 127 (Mo. banc 2000); *Britt*, 577 S.W.3d at 142. But if any one of the requirements is not established, the motion to intervene may be denied. *Britt*, 577 S.W.3d at 142. Here, Insurers did not demonstrate the first requirement. Insurers claimed interests arising from three sources – the 537 agreement, the October 2019 Order, and a conclusion of law in the Arbitration Agreement. None of these are sufficient.²

Insurers first claimed an interest in the Confirmation Proceedings arising from the 537 Agreement. Insurers argue once Barnett and Defendants entered into that agreement, Defendants

² Because Insurers did not establish the first of three requirements, their motion necessarily must fail, and we do not discuss the other two requirements. See *Aguilar*, 588 S.W.3d at 200.

had no incentive to defend against Barnett's claims. Insurers contend they possessed sufficient interests in the determination of Defendants' liability and in preventing an uncontested judgment against Defendants to support their intervention as a matter of right. Our Court has addressed and rejected almost this exact argument in *Britt*, *Aguilar*, and *Loveland*.

The first requirement of Rule 51.12(a)(2) necessitates there be an interest in the property or transaction. For purposes of intervention as a matter of right, a movant'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." *Britt*, 577 S.W.3d at 142 (internal quotations and citations omitted). "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." *Id.*

"Missouri courts have long held that the 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." *Britt*, 577 S.W.3d at 142 (internal quotations omitted); *see also Aguilar*, 588 S.W.3d at 200; *Loveland*, 2021 WL1374010 at *4. "This is because the insurer does not either gain or lose from the direct operation of that judgment." *Id.* An action to confirm an arbitration award is not an action to compel Insurers to pay the award, it only seeks to reduce the award to a judgment. *Britt*, 577 S.W.3d at 144. "[T]he 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." *Id.* at 142 (internal quotations omitted). In other words, "in 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 the policyholder.” *Id.* Insurers will have their day in court upon the question of its liability, but it was not at the Confirmation Proceeding. *Britt*, 577 S.W.3d at 144; *see also Aguilar*, 588 S.W.3d at 200-201; *Loveland*, 2021 WL1374010 at *4-5. Insurers have no interest stemming from the 537 Agreement that would support intervention as a matter of right pursuant to Rule 52.12(a)(2).

Insurers next claimed an interest in the Confirmation Proceedings arising from the October 2019 Order. They note they successfully intervened in the MHRA Action, and that the circuit court ordered that they had the “same rights and responsibilities as any other party” to the litigation, which included conducting discovery and participating in trial as warranted. Insurers thus argue they clearly possessed interests in enforcing their rights acknowledged by the October 2019 order.

We hold Insurers had no interest stemming from the October 2019 Order. That order was correctly entered in the underlying MHRA Action. Barnett voluntarily dismissed that action without prejudice on January 30, 2020, before the Confirmation Proceeding. Once a plaintiff has voluntarily dismissed an action, it is as if the suit had never been filed. *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. App. S.D. 2009). Consequently, orders in dismissed actions have no affect. Insurers cite no authority for their proposition that an order from a dismissed case binds the court in a future proceeding.

Lastly, at oral arguments before this Court, Insurers argued they have a direct interest in the case by virtue of a conclusion of law in the Arbitration Award that states Insurers “were given an opportunity to fully participate in this hearing by consent of the parties under reasonable and understandable conditions and failed to do so.” Insurers state this interest is over

and above the issue of their financial liability, and complain that a conclusion of law was entered against them without the opportunity of being heard. Insurers contend this conclusion is binding on them, and that it will be used against them in the garnishment proceeding as evidence of their bad faith.

Insurers raised this argument for the first time on appeal. Insurers did not include this contention in their Motion to Intervene. As such, this argument is not properly before this Court. An issue raised for the first time on appeal and not presented to or decided by the circuit court is not preserved for appellate review. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 395 (Mo. App. W.D. 2011). An argument cannot be refined on appeal. Even had Insurers properly preserved this argument, we are not persuaded this conclusion will have any prejudicial effect in future actions. Though termed a conclusion of law, it really is just a statement of facts. Moreover, it is clear Insurers were not a party to the Arbitration Award or the judgment confirming that award.

We hold Insurers did not establish they had the requisite interest relating to the property or transaction which was the subject of the Confirmation Proceeding.³ The circuit court

³ We acknowledge that the Western District stated 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.” *Knight by and Through Knight v. Knight*, 609 S.W.3d 813, 819 (Mo. App. W.D. 2020). However, we reaffirm our explanation from our recent *Loveland* decision, wherein we stated:

... 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 Section 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 Section 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

therefore did not err in denying Insurers' Motion to Intervene as a right under Rule 52.12(a)(2).

We deny Point I.

Point III: Permissive Intervention

Next, Insurers allege the circuit court abused its discretion in denying permissive intervention. Though the circuit court's order denying permissive intervention under Rule 52.12(b) is not a final judgment, we nonetheless review the circuit court's denial for abuse of discretion.⁴ *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 837 (Mo. banc 2013); *Britt*, 577 S.W.3d at 145.

Rule 52.12(b) permits intervention in three instances, only two of which are relevant here: (1) "when a statute of this state confers a conditional right to intervene;" and (2) "when an applicant's claim or defense and the main action have a question of law or fact in common."⁵

coverage and an agreement has been executed pursuant to Section 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 Section 537.065.2 is unconditional or conditional. Thus, we recognize that the new statutory right to intervene under Section 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 Section 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.

Loveland, ED108859, 2021 WL1374010, *4 n.7. Further, the Western District's statement was made in the context of the Court's analysis of standing to appeal. There is nothing in *Knight* that suggests or implies that *Aguilar* and *Britt* should no longer be followed.

4 A circuit court order denying a motion to intervene under Rule 52.12(b), permissive intervention, is not a final judgment and therefore not reviewable on appeal. *Aguilar*, 588 S.W.3d at 201 (citing *BMO Harris Bank v. Hawes Trust Invs., LLC*, 492 S.W.3d 607, 615 (Mo. App. W.D. 2016)). The Supreme Court of Missouri has explained that "[t]he permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case." *State ex rel. Reser v. Martin*, 576 S.W.2d 289, 290 (Mo. banc 1978) (quoting *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947)); *Aguilar*, 588 S.W.3d at 201. The applicant "is at liberty to assert and protect his interests in some more appropriate proceeding. *Id.* "Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability." *Id.* However, courts in other cases involving the denial of permissive intervention have reviewed for abuse of discretion. See, e.g., *Britt*, 577 S.W.3d at 145; *Loveland*, 2021 WL1374010 at *7; *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 837 (Mo. banc 2013). Therefore, we will consider Insurers' point regarding permissive intervention on the merits, and review for abuse of discretion.

⁵ Rule 52.12(b) also permits intervention "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

Insurers contend permissive intervention was warranted under Rule 52.12(b)(1) because Section 537.065.2 provided them a conditional right to intervene. In light of our denial of Point II – holding that Section 537.065.2 did not confer upon Insurers the unconditional right to intervene as of right in the Confirmation Proceeding – this contention likewise fails.

Insurers argue permissive intervention was warranted under Rule 52.12(b)(2) because their objections to confirmation of the Arbitration Award presented plain questions of law and fact in common with Barnett’s application for confirmation of that award.

Simply comparing Insurers’ Motion to Intervene to Barnett’s application reveals that Insurers’ motion did not present a question of law or fact in common with the issues presented by Barnett. Barnett’s application requested the circuit court to confirm the Arbitration Award and enter judgment against defendants Columbia Maintenance Company and William Hausman. Defendants had no objection to entry of judgment, and asserted no grounds for vacating, modifying, or correcting the award.

In contrast, Insurers in their Motion to Intervene sought to preclude enforcement of the Arbitration Award. They argued the award was “collusive, invalid, and unenforceable and was procured by undue means.” They characterized the arbitration proceeding as a “sham,” designed solely to circumvent the October 2019 Order and to deprive them of statutory and constitutional rights. They contended the amount of the Arbitration Award was wholly unsupported by the evidence. They asserted claims of collusion against Barnett and Defendants, and argued issues of law that were not otherwise present in the Confirmation Proceeding.

Insurers did not and do not show how the facts or law underlying these matters are shared with the issues presented to the circuit court in Barnett’s application to confirm the Arbitration

thereof, and the state or governmental subdivision may in the discretion of the court be permitted to intervene, upon proper application.”

Award. Insurers want to challenge the validity of the Arbitration Agreement and the enforceability of the Arbitration Award. The parties to the Arbitration Agreement, however, were not required under Section 435.400 to litigate the validity of the arbitration agreement or to prove to the court that it was enforceable when seeking to confirm the award. *Aguilar*, 588 S.W.3d at 202. Because the circuit court here was asked to confirm the award, and no grounds were urged by the parties to the arbitration for vacating, modifying, or correcting the award, neither the validity nor the enforceability of the award was at issue. *Id.* Further, because no application was filed to vacate the award for undue fraud, questions of law and fact pertaining to the circumstances under which the parties entered the agreement were similarly not at issue. *Id.*

Though Insurers accuse Barnett and Defendants of collusion and fraud, their accusations are conclusory. We see no evidence in the record to support their accusations. All parties, upon Insurers denying coverage, proceeded according to their statutory rights. Insurers filed a declaratory judgment in federal court to determine coverage. Barnett and Defendants entered into the 537 Agreement, and Barnett gave notice of that agreement to Insurers, as required. Barnett was well within his rights to dismiss his case and proceed to arbitration. Proceeding according to ones' rights is not collusion, as Insurers would have us believe.

To conclude, we hold Section 537.065.2 did not confer insurers a conditional right to intervene, and the insurers' motion did not present questions of law or fact in common with those in the Confirmation Proceeding, such that Insurers could permissively intervene pursuant to Rule 52.12(b). Furthermore, in denying permissive intervention, the circuit court was entitled to consider that Insurers declined an invitation to participate in the arbitration proceeding. *Britt*,

577 S.W.3d at 145-46. The circuit court did not abuse its discretion in denying permissive intervention. We deny Point III.⁶

Point IV: Constitutional Rights

Insurers allege the circuit court's denial of their Motion to Intervene violated their right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and Article I Section 10 of the Missouri Constitution and deprived them of their constitutional right to access the courts pursuant to Article I Section 14 of the Missouri Constitution. Insurers insist they were given no opportunity to be heard on a judgment for which they are now subjected to garnishment.

Respondents argue, persuasively so, that this point is not preserved for our review. When asserting a constitutional claim, a party must "state the facts showing the constitutional violation." *Mayes v. St. Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. banc 2014); *Aguilar*, 588 S.W.3d at 199-200. Insurers did not do so. Insurers' Motion to Intervene contained only conclusory statements that denying intervention would impair their constitutional rights. This is not sufficient. The arguments in Insurers' Motion to Intervene and their suggestions in support of that motion are certainly not as developed as those presented now on appeal. "An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal." *Mayes*, 430 S.W.3d at 268 (footnote and internal quotations omitted).

Even if Insurers had properly presented and preserved this issue for appellate review, relief would not be forthcoming. Insurers' claim of constitutional deprivations is based upon the

⁶ Insurers' Motion to Intervene also fails because the motion was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought," as required by Rule 52.12(c). We cannot convict the circuit court of error for denying a motion that does not comply with the requirements of the Rules of Civil Procedure. See *State ex rel. Country Mutual Insurance Co. v. May*, 620 S.W.3d 96 (Mo. banc 2021)(Wilson, J., concurring); *Nast by and through Freeman v. Gateway Ambulance Service, LLC*, 502 S.W.3d 653, 656 (Mo. App. E.D. 2016).

premise that they must have the opportunity to be heard and to defend their interests related to Barnett's claim against Defendants. Insurers ignore two simple facts. First, they had the opportunity to participate and defend their interests when they had the chance to defend Defendants as the issuer of Defendants' policy. Instead, Insurers chose to deny coverage to Defendants, and refused to defend them against Barnett's claim. Further, Insurers declined the invitation to fully participate in arbitration. Contrary to their assertions, Insurers had an opportunity to be heard and to defend themselves against Barnett's claims. They chose not to. Second, the appropriate forum for Insurers' dispute at this point is in the pending declaratory judgment action and/or the pending garnishment action. *Aguilar*, 588 S.W.3d at 201; *Loveland*, 2021 WL1374010 at *5,8. Insurers acknowledge as much, and assert they will seek to dispute the amount of the judgment and their liability for that judgment in those actions.

Insurers were not entitled to intervention as a matter of right or permissive intervention in the Confirmation Proceeding. As such, Insurers have no recognizable interest on which to base their constitutional claims, and thus those claims necessarily fail. The circuit court did not violate Insurers' constitutional rights in denying their Motion to Intervene. *Loveland*, 2021 WL1374010 at *8; *Augspurger v. MFA Oil Co.*, 940 S.W.2d 934, 938 (Mo. App. W.D. 1997). We deny Point IV.

Point V: Objection to Confirmation of Arbitration Award

For their fifth point, Insurers allege the circuit court erred in ruling the Insurers were unable to object to confirmation of the arbitration award. Insurers allege the circuit court misapplied the law in that upon being granted intervention, and by the October 2019 Order, Insurers were entitled to assert the same rights as those held by Defendants, and alternatively,

under Section 537.065, were entitled to assert their own rights, independent of those held by Defendants. We hold this point is defective and not preserved for our review.

An appellant's point relied on defines the scope of appellate review. *Moore v. Firststar Bank*, 96 S.W.3d 898, 901 n.4 (Mo. App. S.D. 2003). In framing a point on appeal, an appellant must "[i]dentify the trial court ruling or action that the appellant challenges." Rule 84.04(d)(1)(B). Here, Insurers challenge a ruling, described as "unable to object to confirmation of the arbitration award," which Insurers say is located on Page 8 of the circuit court's order denying Insurer's Motion to Intervene. Review of the circuit court's order, and in particular Page 8 of that order, reveals that the circuit court was ruling on Insurers' claim for permissive intervention. There is no separate ruling – or even language stating that Insurers were "unable to object to confirmation of the arbitration award." We are unable to review a ruling never made.

Though we are not obliged to review an argument in the face of a defective and thus unpreserved point, we have nevertheless briefly reviewed Insurers' argument under this point. Insurers appear to be challenging the circuit court's ruling regarding permissive intervention. Insurers incorporate by reference their argument set forth in support of Point III, which was the point challenging the circuit court's ruling on permissive intervention. Insurers then argue they had a right to intervene, and that right necessarily means they have the right to not only stand in the shoes of the Defendants, but also to assert their own independent interests, to contest confirmation of the arbitration award and defend against Barnett's allegations. Insurers thus argue, that because they had these rights, they should have been allowed to permissively intervene, and accordingly seek reversal, claiming the circuit court misapplied the law in denying permissive intervention. Insurers' argument fails because their argument is premised upon their

contention they had a right to intervene. We have already addressed, and rejected, this contention. We deny Point V.

Points VI, VII, VIII, and IX: Motion to Dismiss

Insurers, in Points VI, VII, VIII, and IX, allege the circuit court erred in denying or impliedly denying their Motion to Dismiss and/or Deny Confirmation of the Arbitration Award and in entering judgment confirming the Arbitration Award. Insurers filed this motion during the Confirmation Proceeding. Insurers were not a party to the Arbitration Agreement or Award, and intervention in the Confirmation Proceeding had not been, and was never granted.

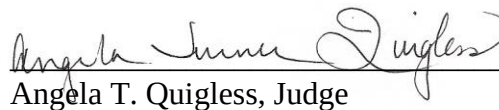
Barnett asserts Insurers conceded during the hearing on their Motion to Intervene that they had no standing to bring this motion unless the circuit court granted intervention. We agree with this proposition. However, the hearing on the Motion to Intervene was not recorded or transcribed. We therefore have no record of what was actually said, argued, or conceded. We will not presume or infer any purported concession. We can only go on the record before us, and that record shows the Motion to Dismiss was never noticed up for hearing. Further, the circuit court did not mention or address the Motion to Dismiss in its order and judgment denying intervention and confirming the Arbitration Award. The Motion to Dismiss simply was not a subject of the circuit court's ruling. Again, an appellant's point relied on defines the scope of appellate review. *Moore*, 96 S.W.3d at 901 n.4. Insurers in these four points allege error in the denial of their Motion to Dismiss. On the record before this Court, Insurers motion was never argued to the circuit court and no ruling was made thereon. Since lack of a specific ruling preserves nothing for review, this Court need not and will not consider a point upon which no ruling has been made. *Holt v. Holt*, 780 S.W.2d 156, 157 (Mo. App. S.D. 1989). We therefore

deny, without further discussion, Points VI, VII, VIII, and the portion of Point IX alleging error in the denial of the Insurers' Motion to Dismiss.

Lastly, Insurers also allege in Point IX that the circuit court erred in denying their Motion to Intervene because the court entered a judgment in the absence of a necessary party. In an undeveloped argument, Insurers argue they had an absolute and unconditional statutory right to intervene under Section 537.065.2, and therefore the circuit court lacked discretion to deny their Motion to Intervene and render judgment without their presence and participate in the action. This contention fails because Insurers did not have a right to intervene under Section 537.065.2. We deny Point IX.

Conclusion

For the foregoing reasons, we affirm the circuit court's order denying Insurers' Motion to Intervene in the Confirmation Proceeding.


Angela T. Quigless, Judge

Kurt S. Odenwald, J., concurs in a separate opinion and
James M. Dowd, J., concurs in a separate opinion.



In the Missouri Court of Appeals Eastern District

DIVISION THREE

HAROLD BARNETT,	)	No. ED109008
	)	
Respondent,	)	
	)	
vs.	)	
	)	Appeal from the Circuit Court
COLUMBIA MAINTENANCE	)	of the City of St. Louis
COMPANY, et al.,	)	
	)	
Respondents,	)	
	)	Honorable Christopher McGraugh
AMCO INSURANCE COMPANY	)	
and	)	
DEPOSITORS INSURANCE	)	
COMPANY	)	
	)	
Appellants.	)	Filed: June 29, 2021

CONCURRING OPINION

The majority opinion correctly affirms the circuit court's Judgment denying the Insurers' Motion to Intervene in an action seeking confirmation of a multi-million dollar award rendered following the arbitration of workplace discrimination claims. In so holding, the majority applies and follows the recent opinions of this Court and those issued in the Western District addressing the interface of an insurer's right of intervention granted under Section 537.065, the temporal limitation of that right to intervene, and the independent and distinct nature of arbitration proceedings. I write separately to acknowledge some of the concerns raised by the Insurers in

the circuit court litigation and arbitration proceeding, but moreover to again emphasize the role of the judiciary in following the plain language of the statutes.

We are often called upon to issue rulings that appear “fair and just” in the face of legislation that is characterized as unfair and unjust. Acting on such pleas for fairness would sometimes require this Court to act as policy makers—which we are not. I recognize that the inequity resulting from a strict adherence to statutory language often adversely impacts the more vulnerable members of society—those persons having fewer resources to influence legislation, e.g., consumers, employees, victims of negligence or other torts. In other words, to borrow from the noted movie character, George Bailey, those everyday people who “do most of the working and paying and living and dying” in this world. This case presents a contrasting scenario as we are asked to address the potential for unfairness and injustice perpetrated on Insurers (the alleged Mr. Potter of this case). And while I may agree that Insurers’ description of the underlying proceedings suggests a maneuvering that reasonably can be characterized as unfair to them, we must apply Section 537.065 as written, even if the strict application of the statute seems inequitable in the context of the arbitration engaged in between the plaintiff and the Insurers’ insureds.

I need not repeat the litany of judicial authority embodied in the majority opinion, which accurately tracks the development of the case law addressing recent issues of intervention by an insurer as provided under Section 537.065, when that intervention must occur, and why the right of intervention provided under the statute does not apply to a request to intervene in a separate proceeding initiated to confirm an arbitration award. But the facts presented do give reason to pause. Were the complaining appellants someone other than Insurers, one might acknowledge the possibility of systemic unfairness. Here, Insurers refused to provide a defense without a

reservation of rights for their insureds who were sued in circuit court for employment discrimination under the Missouri Human Rights Act. While the underlying litigation was pending, Plaintiff and the defendant insureds entered into a Section 537.065 agreement. Insurers were notified of the agreement, and timely filed their motion to intervene in the underlying litigation. The trial court granted Insurers' motion to intervene, and entered an order allowing Insurers to engage in discovery. Following this development, plaintiff and defendants dismissed the underlying petition without prejudice. Plaintiff and defendants then agreed to submit plaintiff's MHR claim to arbitration.

Insurers portend an inherent unfairness and potential for collusion exists where the parties to a Section 537.065 agreement proceed with arbitration and the defendant's insurers are not permitted to intervene in the arbitration proceeding. Indeed, Insurers maintain in this appeal that the arbitration award was the product of an invalid and unenforceable arbitration agreement and was procured by undue means and collusion. Insurers recite facts that manifest a potential for unfairness. Insurers did not partake in the arbitration proceedings. In Capraesque fashion, the Respondents and the majority opinion admonish Insurers for not participating in the underlying arbitration. But Insurers' refusal to join the arbitration must be considered in light of the conditions placed upon Insurers' participation. Insurers claim they were told that they could participate in the arbitration proceeding only if Insurers agreed to a binding arbitration proceeding without any ability to conduct discovery, without any ability to subpoena witnesses, without any ability to participate in choosing the arbitrator, and without knowledge of the rules of procedure under which the arbitration would be conducted. Insurers also had to agree that the

proceedings would be “off the record” such that no court reporting would be permitted.¹ Lastly, Insurers were required to submit to arbitration the declaratory judgment action then pending in federal court as to their liability to the insureds under the policies of insurance. Yes, Insurers chose not to participate in the arbitration, but only because of the above stated conditions which Insurers argue limited their ability to effectively engage in the arbitration with the underlying parties. Insurers vehemently argue that their insureds, the defendants in the underlying arbitration, lacked the incentive to engage in discovery or defend against plaintiff’s claims in the arbitration since plaintiff’s recovery of any arbitration award was limited to the proceeds of the insureds’ policies of insurance with Insurers. The arbitrator in the proceeding made a “Conclusion of Law” that the Insurers “were given an opportunity to fully participate in this hearing by consent of the parties under reasonable and understandable conditions and failed to do so.” The “reasonableness” of said the conditions is decidedly debatable. Such conditions are unequivocally beneficial to the underlying plaintiff, and to the defendants seeking a resolution to plaintiff’s claims without personal risk. But any objectively reasonable individual can appreciate the Insurers’ concerns over such restrictions, especially in light of the requirement that Insurers abandon their declaratory judgment action in a federal court where their constitutional rights of advocacy were protected and the litigation process was fully transparent. The arbitrator further commented in the award that this matter was one of the most egregious and blatant Missouri Human Rights case violations the arbitrator has seen and that the defendants were vigorously defended by their attorney during the arbitration hearing. I do not question the integrity of the arbitrator. But the lack of a record of the arbitration hearing provides no basis by which such

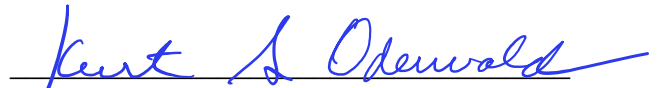
¹ Missouri law condemns as unconscionable arbitration agreements which limit the selection process of the arbitrator. See State ex rel. Hewitt v. Kerr, 461 S.W.3d 798, 813 (Mo. banc 2015) (citing State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 859 (Mo. banc 2006)).

subjective opinions can be reviewed and undermines the integrity of the process. Moreover, the lack of any witnesses called on behalf of the defendants provides fuel for Insurers' argument that the deal was done once plaintiff dismissed the lawsuit and the parties embarked on arbitration.

While Insurers argue that the process was collusive and undermined their rights, the majority opinion properly notes that the parties merely engaged in the process "according to their statutory rights." While one reasonably can glean the motivation of the plaintiff and defendants in dismissing the underlying litigation and proceeding with arbitration after the trial court allowed Insurers to intervene and fully participate in discovery, the fact remains that the law expressly permitted this action. The fact that the parties used the existing statutes and court rules to redirect their controversy to arbitration does not undermine the integrity of the arbitration process or necessarily constitute collusive or untoward conduct.

The majority opinion has correctly held that Insurers were properly denied the right to intervene in the action brought to confirm the arbitration award for reasons based upon the express language of Section 537.065 and the judicial opinions construing that statute. Whether it is unfair to preclude an insurer which has declined coverage and representation of its insured an opportunity to intervene when the motion to intervene is filed more than thirty days after notification of the Section 537.065 agreement is a matter of policy left to the legislature. Whether it is unfair to preclude that same insurer the opportunity to intervene in an arbitration proceeding is a matter of policy left to the legislature. To be sure, I think it naïve to ignore the fact that arbitration hearings proceeding under a Section 537.065 agreement are subject to potential misuse and abuse. The Insurers argue that the arbitration award of \$11,196,415.00 for a part-time employee earning \$160 weekly epitomizes such an abuse. The legislature created a unique and limited statutory right of intervention for insurers under Section 537.065. We review

the alleged unfairness of the application of that right to ensure the constitutional protections of due process to all parties. We lack authority to address the unfairness of a statute that does not transcend those constitutional rights. Whether and to what extent that right of intervention should be extended to arbitration proceedings is a matter of policy to be addressed by the legislature, and not the courts. But lest we forget, under our system of laws and justice, even Mr. Potter is guaranteed a fair resolution of the claims brought against him.


Kurt S. Odenwald, Judge



In the Missouri Court of Appeals Eastern District

DIVISION THREE

HAROLD BARNETT,	)	No. ED109008
	)	
Respondent,	)	
	)	
vs.	)	
	)	Appeal from the Circuit Court
COLUMBIA MAINTENANCE	)	of the City of St. Louis
COMPANY, et al.,	)	
	)	
Respondents,	)	
	)	Honorable Christopher McGraugh
AMCO INSURANCE COMPANY	)	
and	)	
DEPOSITORS INSURANCE	)	
COMPANY	)	
	)	
Appellants.	)	Filed: June 29, 2021

CONCURRING OPINION

I write to give additional context to the Insurers' lamentations. First, the procedures followed here by Barnett and Columbia Maintenance Company were fair, proper, transparent, and sanctioned by our legislature and well-established case law. The road taken was in large measure selected by Insurers when Insurers decided to deny coverage to Columbia Maintenance. Insurers had an absolutely legitimate contractual right to deny coverage if they concluded following a review of the circumstances of the claim that there was no coverage. But, with that

choice to deny coverage comes certain consequences, including that Insurer lost control over the defense of the litigation.

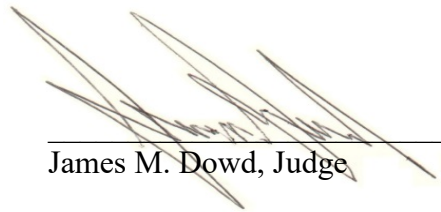
Second, Insurers are by no means left defenseless. In fact, they retain multiple avenues and forums to protect their interests on the coverage question. Here, Insurers filed in federal court a declaratory judgment action in which they have sought to prove that they were factually and legally correct to deny coverage. If they successfully do so, the underlying judgment entered in this case will become academic and meaningless to them.

And as to the litigation that resulted in the judgment confirming the arbitrator's award here, though their intervention efforts were thwarted, Insurers retain a robust ability to challenge the judgment in a subsequent garnishment proceeding which Columbia Maintenance and/or Barnett may bring. Again, if Insurers' decision to deny coverage to their insured is correct, a subsequent suit for garnishment and bad faith refusal to settle is meaningless to them.

Finally, with respect to Insurers' claim to rights purportedly granted to them by section 537.065.2's intervention language and by an order in a case that has been dismissed without prejudice, some perspective is needed. Because dismissal of the underlying lawsuit means that "it is as if the suit were never brought," *Matter of Gurgel*, 543 S.W.3d 135, 139 (Mo. App. S.D. 2018), the majority's and the first concurring opinion's parroting of the Insurers' reliance on an order from that non-existent case runs contrary to this well-established principle.

Moreover, neither the legislature nor our own Supreme Court have clarified the parameters of an insurance company's participation in litigation when it has intervened under section 537.065.2. The statute merely *gives a right* to intervene but does not address the prickly question of what they get to do once they enter. In his concurrence in *State ex rel. Country Mut. Ins. Co. v. May*, 620 S.W.3d 96, 101 (Mo. banc 2021), Judge Wilson identified some

fundamental truths, namely that the law does not allow *kibitzers* in lawsuits, and a party who has intervened must comply with Rule 52.12(c) by filing a pleading setting forth the intervening parties' claim(s) or defense(s). Otherwise, in the context of this case, what would be the Insurers' role in an underlying lawsuit or in the arbitration case because, after denying coverage, they certainly no longer stand in the shoes of their insured Columbia Maintenance.



James M. Dowd, Judge