

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

FRANKLIN ALLEN,

Respondent/Garnishor,

v.

WAYNE BRYERS,

Defendant,

ATAIN SPECIALTY INSURANCE COMPANY,

Appellant/Garnishee.

DOCKET NUMBER WD77905

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: September 15, 2015

APPEAL FROM

The Circuit Court of Jackson County, Missouri
The Honorable John M. Torrence, Judge

JUDGES

Division II: Newton, P.J., and Howard and Pfeiffer, JJ.

CONCURRING.

ATTORNEYS

G. Michael Fatall
Kansas City, MO

Attorney for Respondent,

Nikki Cannezzaro
Kansas City, MO

Attorney for Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

FRANKLIN ALLEN,)
)
Respondent/Garnishor,)
v.)
)
WAYNE BRYERS,) **OPINION FILED:**
Defendant,) **September 15, 2015**
)
ATAIN SPECIALTY INSURANCE)
COMPANY,)
)
Appellant/Garnishee.)

WD77905

Jackson County

Before Division II Judges: Thomas H. Newton, Presiding Judge, and Victor C. Howard and Mark D. Pfeiffer, Judges

Atain Specialty Insurance Company (“Insurer”) appeals from the summary judgment entered by the Circuit Court of Jackson County, Missouri (“trial court”), in a garnishment in aid of execution proceeding.

Franklin Allen filed a petition for damages alleging that Wayne Bryers, an employee of Insurer’s insured, was negligent when he unintentionally and accidentally discharged his weapon while he was physically removing Allen from the premises of an apartment complex owned by Insurer’s insured (“Underlying Lawsuit”). Insurer’s commercial general liability policy issued to its insured had a policy limit for personal injury of \$1 million.

Insurer moved to intervene as of right in the Underlying Lawsuit pursuant to Rule 52.12(a)(2). The trial court denied Insurer’s motion to intervene and Insurer did not immediately appeal the denial of its motion to intervene while the Underlying Lawsuit was still pending. Thereafter, the Underlying Lawsuit proceeded to a bench trial, and the trial court entered judgment in favor of Allen in the amount of \$16 million (“Underlying Judgment”).

After the Underlying Judgment had become final, Allen filed an application for garnishment in aid of execution on the Underlying Judgment against Insurer as garnishee. Allen moved for summary judgment as to his garnishment petition, which the trial court granted. Insurer filed its second motion to intervene in the Underlying Lawsuit (which by that time had become a final judgment as opposed to a pending lawsuit) and moved to set aside the Underlying Judgment almost a year after the Underlying Judgment became final. The trial court denied the motions, and Insurer appealed.

Insurer asserts that the trial court erred in denying its motion to intervene because it established all the required elements to intervene under Rule 52.12(a)(2). Insurer further asserts that the trial court erred in denying its motion to set aside the underlying tort judgment. Insurer contends that the garnishment court exceeded its jurisdiction and erred in granting summary judgment in the amount of \$16 million because relief under a writ of garnishment in aid of execution is limited to the collection of property that Insurer has the present obligation to pay Bryers. Insurer argues that it had no present obligation to pay Bryers, that its policy had policy limits of \$1 million, and that Allen's garnishment claim for \$16 million was based on independent claims of damages for breach of contract and/or bad faith that have not been reduced to judgment. Insurer further contends that the garnishment in aid of execution remedy does not allow for the litigation of these separate, independent claims of damages.

AFFIRMED IN PART, REVERSED IN PART, AND DISMISSED IN PART.

Division II holds:

1. Insurer had a right to immediately appeal the denial of its motion to intervene while the Underlying Lawsuit was pending, but chose not to. Instead, Insurer waited until the Underlying Lawsuit proceeded to trial that resulted in the Underlying Judgment (against Insurer's insured). Then, almost one year after the Underlying Judgment became final, Insurer moved to intervene in the Underlying Lawsuit. At that point, the trial court had no jurisdiction to consider Insurer's motion to intervene, the corresponding ruling was void, and appeals may not be taken from void orders. Insurer's point related to its motion to intervene is dismissed.
2. Under Rule 74.06(b), a *party* may move for relief from a final judgment. Because Insurer was not a party, it had no standing to file a motion to set aside the Underlying Judgment and the trial court had no authority to consider such a motion from a non-party. Thus, the trial court's ruling is void and appeals may not be taken from void orders. Insurer's point related to its motion to set aside the Underlying Judgment is dismissed.
3. The only issue properly before a trial court in a Rule 90 garnishment proceeding under the fact situation presented in this case is whether the garnishee insurance company furnished coverage to the judgment debtor as an insured under the policy. This is because a Rule 90 garnishment proceeding is an *in rem* action directed at a particular property or fund held by the garnishee. In the Underlying Judgment, the trial court found that Bryers was acting in the course of his employment with Insurer's insured. Thus, under the plain, unambiguous language of the policy, the policy covered Bryers's liability

for the accident that caused Allen's bodily injury, and none of the exclusions relied on by Insurer barred coverage. Accordingly, the trial court did not err in its summary judgment that there was no factual dispute that Insurer has a duty to indemnify its insured, Bryers, up to the policy limit of \$1 million.

A claimant who receives a judgment for negligence against an insured defendant stands in the shoes of the insured person and has rights no greater or no less than the insured's rights would have been if the insured had paid the judgment and sued his insurance company to recover the amount paid. Here, garnishor Allen has attempted to substitute the purely incidental remedy of garnishment for an action alleging breach of the contract of insurance for bad faith refusal to defend Bryers. Such litigation is not within the narrow confines of a garnishment in aid of execution proceeding. Because the trial court exceeded its authority in rendering judgment in this Rule 90 proceeding in excess of the policy limits of \$1 million, that portion of the judgment is reversed.

Opinion by: Mark D. Pfeiffer, Judge

September 15, 2015

* * * * *

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.