



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

SHEYANN GEILER, ET AL.,)
)
) Respondents,)
)
v.) WD83363
)
LIBERTY INSURANCE) Opinion filed: January 12, 2021
CORPORATION, ET AL.,)
)
) Appellants.)

**APPEAL FROM THE CIRCUIT COURT OF ADAIR COUNTY, MISSOURI
THE HONORABLE GARY L. DIAL, JUDGE**

Division One: Thomas N. Chapman, Presiding Judge,
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

This appeal arises from an equitable garnishment action filed by Sheyann Geiler, et al. (collectively, "Plaintiffs") to collect from Liberty Insurance Corporation ("Liberty") proceeds of an umbrella insurance policy that was issued to Sharpe Holdings, Inc. ("Sharpe") to satisfy the \$7.5 million balance of a \$9.5 million wrongful death judgment after the primary insurer, Starr Indemnity & Liability Company ("Starr"), paid its policy limits of \$2 million. Liberty appeals from the trial court's grant of summary judgment in favor of the Plaintiffs and Starr and against Liberty. We affirm.

Factual and Procedural History

The material facts are not in dispute. On September 26, 2015, Richard Geiler ("Geiler") was fatally injured when he was ejected from a vehicle owned by Sharpe and driven by a Sharpe employee. At that time, Geiler was a resident at the Heartland Men's Recovery Center, a rehabilitation program operated by CNS International Ministries, Inc. ("CNS Ministries"), which required Geiler to work at Sharpe's dairy farm as part of its "Work Dynamic" program.

At the time of the incident, Sharpe was insured under a workers' compensation and employer's liability insurance policy issued by Starr, which provided primary insurance coverage to Sharpe with policy limits of \$2 million for bodily injury liability ("Starr Policy"). The Starr Policy states it will "pay all sums that you legally must pay as damages because of bodily injury to your employee, provided the bodily injury is covered by this Employers Liability Insurance." The "employers liability insurance" coverage provided by the Starr Policy provided coverage for Sharpe as to the bodily injury of Geiler that resulted in his death.

Sharpe was also insured by an umbrella policy issued by Liberty, which provided that it "will pay those sums in excess of the 'retained limit' that the insured becomes legally obligated to pay as damages because of 'bodily injury'" ("Liberty Policy"). The Liberty Policy defines "bodily injury" as "Bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "Retained Limit" is defined in the Liberty Policy as: "The total applicable limit of the 'underlying insurance' plus any applicable 'other insurance.'" The Liberty

Policy's "Employer's Liability" exclusion "does not apply . . . if the 'bodily injury' . . . is covered by 'underlying insurance.'" The underlying insurance for "Employers Liability" identified by the Liberty Policy is the Starr Policy. The Liberty Policy's umbrella liability coverage limit is \$10 million in excess of certain underlying insurance coverage, including but not limited to the Starr Policy.

On May 17, 2016, Plaintiffs filed the underlying petition for damages against Sharpe and CNS Ministries alleging that their negligence resulted in Geiler's death ("Wrongful Death Lawsuit"). Starr defended Sharpe in the Wrongful Death Lawsuit. In a letter dated July 12, 2016, Liberty notified Sharpe's counsel that Liberty denied coverage for the lawsuit and would not participate in the defense of Sharpe or CNS Ministries or pay any settlements or judgments. Plaintiffs sought to enter into a section 537.065 agreement¹ with Sharpe and Starr to preserve Plaintiffs' ability to pursue sums from Liberty in excess of the Starr Policy's liability limits.

On August 18, 2017, after a hearing on Plaintiffs' application for approval of partial settlement with Sharpe and settlement with CNS Ministries, and a bench trial on liability and damages on Plaintiffs' claims against Sharpe, the trial court entered a judgment approving the settlements and a separate judgment in Plaintiffs' favor against Sharpe, in the amount of \$9.5 million for the wrongful death of Geiler ("Wrongful Death Judgment"). In the Wrongful Death Judgment, the trial court found that: (1) Geiler was fatally injured when he was ejected from a van owned by

¹Section 537.065, RSMo 2016, allows a claimant and a tortfeasor to contract to limit recovery to specified assets or insurance coverage. See *Allen v. Bryers*, 512 S.W.3d 17, 25 n.4 (Mo. banc 2016) citing *Hunter v. Moore*, 486 S.W.3d 919, 922 n.2 (Mo. banc 2016).

Sharpe and operated on its behalf; (2) at the time of his injury, Geiler was an employee of Sharpe, acting within the course and scope of his employment, and exclusively involved in the ongoing dairy farm operations; (3) Geiler's "pay" for his work consisted of food, shelter, care, lodging and services provided by charitable organization CNS Ministries, with Sharpe making payment directly to CNS Ministries into an account that Geiler had no right to access; (4) Geiler was not an employee of Sharpe within the scope of Missouri Workers' Compensation Law; (5) at the time of his fatal injury, Geiler was not involved in the ongoing operations of CNS Ministries or any other affiliated entity; (6) Sharpe's negligence caused Plaintiffs to suffer damages and awarded Plaintiffs \$9.5 million for the wrongful death of Geiler. Thereafter, Plaintiffs filed a partial satisfaction of judgment in the amount of \$2 million reflecting payment of policy limits by Starr.

Plaintiffs filed this equitable garnishment action against Liberty and Sharpe to collect under the Liberty Policy to satisfy the outstanding balance of the Wrongful Death Judgment. In response, Liberty filed a third-party petition against Starr for equitable subrogation, breach of contract, and negligence. Liberty sought discovery from Plaintiffs to which Plaintiffs objected. Liberty filed a motion to compel discovery. In denying Liberty's motion to compel discovery, the trial court held that Liberty had wrongfully failed to defend Sharpe and that it was bound by the determinations of the Wrongful Death Court. Liberty filed a petition for writ of prohibition regarding discovery in WD82512, which was denied.

Plaintiffs, Starr, and Liberty each filed motions for summary judgment. On October 29, 2019, the trial court granted the motions for summary judgment, filed by Plaintiffs and Starr in two separate judgments both against Liberty ("Plaintiffs' Judgment" and "Starr's Judgment," respectively). Liberty appeals.

Standard of Review

We review an appeal from summary judgment *de novo*. *Lampley v. Missouri Commission on Human Rights*, 570 S.W.3d 16, 22 (Mo. banc 2019). We view the record in the light most favorable to the party against whom judgment was entered and affords that party the benefit of all reasonable inferences. *Id.* "Summary judgment is appropriate when the record demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Analysis

Liberty asserts four points on appeal. Liberty claims the trial court erred in: (1) failing to grant Liberty's motion for summary judgment because the underlying Wrongful Death Judgment was void; (2) granting Plaintiffs' motion for summary judgment on their garnishment claim because Liberty's Policy did not provide coverage for injury arising out of operations or work of CNS Ministries; (3) granting Plaintiffs' motion for summary judgment without permitting Liberty discovery; and (4) granting Starr's motion for summary judgment because Starr failed to discharge its duty to defend Sharpe.

Point I

In Point I, Liberty asserts the trial court erred in failing to grant Liberty's motion for summary judgment because the underlying Wrongful Death Judgment was void for the lack of the Wrongful Death Court's statutory authority to enter a judgment against Geiler's employer Sharpe, in that Geiler was found to be an "employee" of Sharpe engaged "exclusively" in work for the for-profit company and, therefore, subject to the exclusive remedy provisions of the Workers' Compensation Law. We disagree.

(a) Preservation

Preliminarily, Plaintiffs argue this claim is not preserved for our review because the trial court did not expressly rule on Liberty's motion for summary judgment. Liberty asserts that its motion for summary judgment was "implicitly denied by the court's granting of Plaintiffs' motion." We agree that Liberty's motion for summary judgment was effectively denied by the trial court's judgment granting Plaintiffs' motion for summary judgment and, as such, is reviewable as the merits of the two motions were sufficiently intertwined.

Generally, "an order denying a motion for summary judgment is an interlocutory order and is not reviewable on appeal." *LVNV Funding, LLC v. Mavaega*, 527 S.W.3d 128, 135 n.7 (Mo. App. W.D. 2017) (citation omitted). "However, the overruling of a party's motion for summary judgment can be reviewed when its merits are intertwined completely with a grant of summary judgment in favor of an opposing party." *Id.* (citation omitted).

Here, the Plaintiffs' motion for summary judgment sought summary judgment on the basis that the Liberty Policy provided excess coverage for Geiler's death. Liberty's motion for summary judgment argued that the Workers' Compensation Law barred Plaintiffs' claims against Sharpe, precluding coverage by the Liberty Policy. Likewise, Liberty's response in opposition to Plaintiffs' motion for summary judgment asserted that the Liberty Policy precluded coverage for claims within the scope of the Workers' Compensation Law. Both motions argue the issue of Geiler's coverage by the Liberty Policy. As such, the motions are sufficiently intertwined such that the grant of Plaintiffs' motion for summary judgment indicates that the trial court rejected Liberty's motion for summary judgment necessarily denying it. Consistent with this conclusion is the trial court's finding in the Plaintiffs' Judgment that, "The Liberty policy provided coverage for Plaintiffs' damages arising out of Rich Geiler's wrongful death and *no exclusions apply to avoid such coverage*[" (Emphasis added). Thus, we conclude that the trial court effectively denied Liberty's motion for summary judgment and it is reviewable as its merits were sufficiently intertwined with Plaintiffs' motion for summary judgment. Nonetheless, Liberty's point fails on the merits.

(b) Liberty cannot collaterally attack the Wrongful Death Judgment on the basis that it was void for lack of subject matter jurisdiction due to a statutory bar as the law is clear that a statutory bar has no effect on jurisdiction

"A collateral attack is an attempt to impeach a judgment . . . in a proceeding not instituted for the express purpose of annulling the judgment." *State ex rel. General Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42, 48 (Mo. banc 2019) (citation omitted). "A collateral attack is appropriate when the underlying judgment is void, but a subsequent action 'will not be tolerated as a subterfuge or façade for litigating an issue to which a former final judgment is conclusive.'" *Id.* (citation omitted). "Generally, a judgment must be challenged via direct appeal and not by a collateral attack." *Interest of A.R.B.*, 586 S.W.3d 846, 860 (Mo. App. W.D. 2019) (citation omitted). "If the judgment was rendered by a court that had both subject-matter jurisdiction and personal jurisdiction, then the judgment is not open for attack." *Id.* A judgment void on its face may be collaterally attacked. *Barry, Inc. v. Falk*, 217 S.W.3d 317, 321 (Mo. App. W.D. 2007). Thus, "[w]hen a party secures a final judgment and attempts to satisfy the judgment with an action for equitable garnishment, the underlying judgment may not be collaterally attacked as long as the court issuing the judgment had personal and subject matter jurisdiction and the judgment is not void on its face." *Fostill Lake Builders, LLC v. Tudor Ins. Co.*, 338 S.W.3d 336, 342 (Mo. App. W.D. 2011).

Here, Liberty does not assert that the Wrongful Death Court was without personal jurisdiction or that the Wrongful Death Judgment is void on its face. Liberty only claims that the Wrongful Death Court did not have subject matter jurisdiction rendering the Wrongful Death Judgment void and open to collateral attack. Liberty's argument that the Wrongful Death Court lacked subject matter jurisdiction is based

solely on its argument that the claim was statutorily barred by the Workers' Compensation Law. However, Liberty's argument fails in that Missouri law is clear that a statutory bar has no effect on subject matter jurisdiction.

In *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), the Supreme Court addressed the concept of jurisdiction. The *Webb* court held that subject matter jurisdiction is the "court's authority to render a judgment in a particular category of case." *Id.* at 253. "[T]he subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution. Article V, section 14 sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that 'the circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal.'" *Id.* at 253 (emphasis added). The *Webb* court expressly rejected the notion of "jurisdictional competence" as a concept under which a statute can restrict subject matter jurisdiction. *Id.* at 254. The Supreme Court held, "Elevating statutory restrictions to matters of 'jurisdictional competence' erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides." *Id.* The *Webb* court concluded that because the case was a civil case, the circuit court had subject matter jurisdiction and authority to hear the dispute. *Id.* There, the statute at issue required a noncustodial parent who owed more than \$10,000 in child support arrears to post a bond in the amount of the arrears before filing a petition to modify a custody or visitation judgment. *Id.* at 255. The Court concluded that analysis of circuit court

jurisdiction is confined "to constitutionally recognized doctrines of personal and subject matter jurisdiction." *Id.* at 254.

Following *Webb*, in *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 474-75 (Mo. banc 2009), the circuit court dismissed McCracken's negligence claim against Wal-Mart, holding that it lacked subject matter jurisdiction over the claim because McCracken was a statutory employee of Wal-Mart pursuant to the Workers' Compensation Law. Citing *Webb*, the Supreme Court reversed finding that McCracken's action was a civil negligence case and, as such, the circuit court had subject matter jurisdiction under article V, section 14 of Missouri's constitution. *Id.* at 475. Moreover, the Supreme Court stated, "To the extent that prior cases state otherwise, they are in error and are overruled." *Id.* The Supreme Court again examined the distinction between subject matter jurisdiction and statutory authority stating:

Missouri's constitution is unequivocal in stating that circuit courts 'have original jurisdiction *over all cases and matters*, civil and criminal.' Mo. Const. art. V, sec. 14 (emphasis added). . . . As this Court recently has had occasion to clarify in [*Webb*], *Hendrix*, and *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 75–76 (Mo. banc 2009), to the extent that some cases have held that a court has no jurisdiction to determine a matter over which it has subject matter and personal jurisdiction, those cases have confused the concept of a circuit court's jurisdiction—a matter determined under Missouri's constitution—with the separate issue of the circuit court's statutory or common law authority to grant relief in a particular case.

Id. at 476-77.

In so holding, the Supreme Court concluded that this does not mean that McCracken has an undefeatable right to have his claim determined in the circuit

court without regard to whether he is Wal-Mart's statutory employee or whether his claim is otherwise one that Missouri statutes commit to determination by the Labor and Industrial Relations Commission. *Id.* at 477. "Rather, it means that this issue should be raised as an affirmative defense to the circuit court's *statutory authority to proceed* with resolving his claim." *Id.* The Supreme Court held that to the extent earlier cases held "that the [Workers' Compensation Law's] applicability is a matter of the trial court's subject matter jurisdiction, they are overruled." *Id.* at 479. *See also Treaster v. Betts*, 324 S.W.3d 487 (Mo. App. W.D. 2010) (Workers' Compensation Law's exclusivity defense is not a matter of subject matter jurisdiction but rather constitutes an affirmative defense citing *Webb* and *McCracken*); *Lambrich v. Kay*, 507 S.W.3d 66, 76 (Mo. App. E.D. 2016) (Exclusivity provision of the Workers' Compensation Law does not affect the trial court's subject matter jurisdiction; must be raised as an affirmative defense); *State ex rel. Franklin v. Burlison*, 469 S.W.3d 498, 500 (Mo. App. E.D. 2015) ("Because venue is determined by the applicable rule or statute, it does not relate to the court's jurisdiction over a case;" order transferring case not void or in excess of court's jurisdiction because granted under wrong venue statute).

As it is clear that a statutory bar has no effect on subject matter jurisdiction (does not render the judgment void), Liberty's collateral challenge to the Wrongful Death Judgment on that basis is without merit and thus fails.

The cases cited by Liberty that pre-date *Webb* are inapplicable as they have been expressly overruled. The cases relied on by Liberty that post-date *Webb* likewise

offer no support for Liberty's position. *Ground Freight Expeditors, LLC v. Binder*, 359 S.W.3d 123, 126 (Mo. App. W.D. 2011) involved a direct appeal in which this Court cited and followed *Webb* in holding that a statute cannot strip the court of subject matter jurisdiction but may limit the court's ability to grant a remedy. *Patel v. Patel*, 380 S.W.3d 625, 632 (Mo. App. W.D. 2012) involved only personal jurisdiction. *Wilson v. Nenninger*, 561 S.W.3d 804 (Mo. App. E.D. 2018) involved an order of an administrative agency and there was no issue pertaining to statutory authority and subject matter jurisdiction.

This point fails because the trial court did not err in failing to grant Liberty's motion for summary judgment because the Wrongful Death Judgment was not void and, therefore, not subject to collateral attack.

Point I is denied. ²

²Missouri 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." *U-Haul Co. of Missouri v. Carter*, 567 S.W.3d 680 n.4 (Mo. App. W.D. 2019) (citing *Ballmer v. Ballmer*, 923 S.W.2d 365, 369-70 (Mo. App. W.D. 1996); *State ex rel. Mid-Century Ins. Co., Inc. v. McKelvey*, 666 S.W.2d 457, 459 (Mo. App. W.D. 1984); *Allen v. Bryers*, 512 S.W.3d 17, 41 (Mo. banc 2016) (Wilson, J. concurring)). In *U-Haul*, this court protected the insurer by reversing and admonishing the trial court for declining to stay the personal injury lawsuit where the insurer filed a simultaneous declaratory judgment action. 567 S.W.3d 680 n.4. In doing so, the courts have demonstrated that they will protect insurers when they protect themselves.

In contrast, here, the insurer was aware of the wrongful death action and had every opportunity to file a declaratory judgment action and seek a stay of the wrongful death lawsuit pending resolution of the declaratory judgment action but did not do so. Plaintiffs filed their wrongful death lawsuit, Liberty mailed Sharpe a letter in which Liberty advised that it would not participate in Sharpe's defense, pay any amounts in settlement, or satisfy any settlement achieved or judgment rendered against Sharpe. At the point of writing that letter, 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.

During oral argument, counsel for Appellant excused Appellant's failure to follow *U-Haul*

Point II

In Point II, Liberty claims the trial court erred in granting the Plaintiffs' motion for summary judgment because Liberty's Policy did not afford coverage for the Wrongful Death Judgment due to exclusions for bodily injuries arising out of the operations and/or work of CNS Ministries. Liberty asserts that the exclusions were either established by the findings in the Wrongful Death Judgment, or alternatively, that there was a genuine dispute of material fact that precluded summary disposition for the Plaintiffs by virtue of those findings. Specifically, Liberty claims the findings in the Wrongful Death Judgment that Geiler was working at the Sharpe Dairy Farm by mandate of CNS ministries and was being transported from the CNS Ministries facility in a van used exclusively by CNS Ministries either undisputably established that he was engaged in CNS operations at the time of the accident, or alternatively, that there was (at very least) a genuine factual dispute as to whether his acts arose from CNS operations. We disagree.

Though Liberty's Policy does indeed exclude coverage for bodily injuries arising out of the operations or work of CNS Ministries, Liberty's failure to respond Plaintiffs' "Further Statement of Additional Uncontroverted Material Facts" left the following statement therein undisputed:

113. At the time of his fatal injury on September 26, 2015, [Decedent] Richard Geiler was not involved in the ongoing operations of non-party

because *U-Haul* was decided after this case was heard at the trial court level. However, as can be seen by the extensive list of citations following the note 4 quote in *U-Haul*, as well as the quote itself, the legal principle stated in *U-Haul* is longstanding.

CNS International Ministries, Inc., Heartland Men's Recovery, or any other related or affiliated entity. Judgment at ¶30.

Rule 74.04(c)(4) provides:

Within 15 days of service, if movant files a statement of additional material facts pursuant to Rule 74.04(c)(3), the adverse party shall file a sur-reply. The sur-reply shall set forth each additional statement of fact in its original paragraph number and immediately thereunder admit or deny each such factual statement. The sur-reply shall be in the form and shall be supported in the manner prescribed by Rule 74.04(c)(2).

....

A sur-reply that does not comply with Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement of additional material facts is an admission of the truth of that numbered paragraph.

Thus, when movants (such as the Geiler Plaintiffs) file a statement of additional material fact pursuant to Rule 74.04(c)(3), "then the adverse party has an obligation to file a sur-reply, admitting or denying each factual statement" as required by Rule 74.04(c)(4). *LVNV Funding, LLC*, 527 S.W.3d at 142. "A sur-reply that does not comply with Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement of additional material facts is an admission of the truth of that numbered paragraph." *Id.* (citation omitted). By failing to file a sur-reply, Liberty admitted those additional material facts set forth in Plaintiffs "Further Statement of Additional Uncontroverted Material Facts." *Id.* Thus, there is no genuine issue of material fact as to Geiler's lack of involvement in the ongoing operations of CNS Ministries at the time of his fatal injury. As such, this point fails due to Liberty's

own admission. Notably, this was raised by Plaintiffs in their brief, and although Liberty filed a reply brief, this argument remains unanswered by Liberty.³

Point II is denied.

Point III

In Point III, Liberty claims that the trial court erred in granting summary judgment to Plaintiffs without permitting Liberty to engage in discovery. In support of their position, Liberty cites *Gulf Insurance Co. v. Noble Broadcast*, 936 S.W.2d 810 (Mo. banc 1997), for the premise that Liberty was entitled to develop evidence to contest the reasonableness of the judgment. Liberty further asserts that that there were multiple indicia which indicated that the \$9.5 million judgment was excessive and unreasonable, because the decedent was a repeat felon who was without home, assets, dependent, or a work history for the majority of his adult life – facts which were not disclosed to the Wrongful Death Court. Liberty also asserts that, though not delineated as such, the wrongful death judgment included punitive damages which were not insured by the policy.

Liberty's point relied on challenges the trial court's grant of Plaintiffs' motion for summary judgment on the basis that Liberty was denied discovery. Liberty sought discovery from Plaintiffs to which Plaintiffs objected. Liberty filed a motion to compel discovery responses which the trial court denied. However, Liberty

³To the extent that Liberty makes additional arguments that exceed the scope of the point relied on regarding trial court error relating to discovery or other unrelated findings of the trial court, they are considered abandoned. See *KDW Staffing, LLC v. Grove Construction, LLC*, 584 S.W.3d 833, 837 (Mo. App. W.D. 2019) ("Our courts 'adhere to the well-entrenched doctrine that the questions for decision on appeal are those stated in the points relied on, and a question not there presented will be considered abandoned.'").

conspicuously fails to challenge or even mention the 19-page ruling by the trial court denying Liberty's motion to compel discovery from the Plaintiffs. The argument made on appeal is the same argument raised in Liberty's motion to compel upon which the trial court made findings of fact and conclusions of law. Liberty fails to identify what finding(s) therein it believes were erroneous. Nonetheless, Liberty repeats its argument that where a judgment arose from a settlement, a party is entitled to develop evidence via discovery to contest the judgment's reasonableness. This is insufficient. "Rule 84.04(d)(1) requires points relied on to '(A) identify the trial court ruling or action that the appellant challenges; (B) State concisely the legal reasons for the appellant's claim of reversible error; and (C) Explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.'" *KDW Staffing, LLC v. Grove Constr., LLC*, 584 S.W.3d 833, 837 (Mo. App. W.D. 2019) (citation omitted). By not challenging a trial court's findings on appeal, "a party 'waives any claim' that necessarily runs counter to those findings." *TracFone Wireless, Inc., v. City of Springfield*, 557 S.W.3d 439, 445 (Mo. App. S.D. 2018) (citation omitted). "It is an appellant's burden (as the moving party) to overcome our presumption that the judgment of the trial court is correct." *Id.* "An appellate court's role is to review specifically challenged trial court rulings, not to sift through the record to detect possibly valid arguments." *Id.* (citation omitted). "This narrow role reflects the interwoven policy interests governing appellate review, including the reviewing court's duty not to act as advocate for any party; the efficient use of judicial

resources; notice and fairness to the parties; judicial decision-making based on fully-briefed issues; and the law's preference for finality of judgments." *Id.*

Here, Liberty's failure to identify and challenge the trial court's ruling is fatal to its point. Failure to comply with Rule 84.04 preserves nothing for review. *Hoover v. Hoover*, 581 S.W.3d 638, 640 (Mo. App. W.D. 2019). Moreover, Liberty's failure to challenge the articulated grounds for the trial court's ruling is fatal to its appeal. *KDW Staffing, LLC*, 584 S.W.3d at 838.

In any event, even if Liberty had properly identified and challenged the findings of the trial court in its order denying Liberty's motion to compel discovery, this point would still fail as the trial court's findings that the Wrongful Death Judgment arose from a trial is clearly supported by the record. We review the denial of a discovery motion for abuse of discretion. *Nigro v. St. Joseph Medical Center*, 371 S.W.3d 808, 814 (Mo. App. W.D. 2012). "A circuit court abuses its discretion when its ruling shocks the sense of justice, shows a lack of consideration, and is obviously against the logic of the circumstances." *Id.* The burden is on the appellant to demonstrate that the circuit court abused its discretion. *Id.*

In *Gulf Insurance*, the Supreme Court held "a reasonableness standard is appropriate in determining the enforceability of section 537.065 settlements." 936 S.W.2d at 815 (emphasis added). "The Gulf Insurance test only applies to section 537.065 settlements." *Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700, 709 (Mo. banc 2011).

Here, the trial court found, in pertinent part:

The *Gulf* decision has been cited by the court numerous times in determining whether or not a Section 537.065 settlement is reasonable. Liberty's reliance on the *Gulf Insurance* case is misplaced. In the underlying action, there was a judgment approving a partial wrongful death settlement with Sharpe Holdings, Inc. and a wrongful death settlement with CNS [Ministries]. The partial settlement did not resolve Sharpe's negligence or liability for damages. In fact, the settlement language itself stated, 'The parties further agree that recognizing the refusal of Liberty to properly protect Sharpe and in the interest of economy and efficiency, Sharpe and Plaintiffs agree to waive their right to a jury trial and, instead, submit all matters including negligence, liability and damages to the court in a bench-trying case.' In fact, the transcript reflects that there was a bench trial held on the issues of Sharpe's negligence, liability and the damages sustained by the Plaintiffs.

....

In the case before the Court, Liberty had the opportunity to participate in, control, and manage the litigation in the wrongful death case. It wrongfully refused to do so, therefore, it cannot now contest the reasonableness of the judgment.

The record reflects that the Plaintiffs filed an application for approval of *partial* wrongful death settlement with Sharpe and wrongful death settlement with CNS Ministries. Plaintiffs noticed up a hearing on their motion for approval of wrongful death settlement and a bench trial. Plaintiffs filed a trial brief stating that they would introduce a report from an economist showing a total loss of \$9,446,337 regarding the death of Geiler. A bench trial was held at which Geiler's two daughters and father testified. Plaintiffs submitted numerous exhibits including incident reports, photographs of the vehicle, witness depositions, Sharpe employee statements, OSHA reports, and an economist's report. After the bench trial, the Wrongful Death Court entered two judgments. The Wrongful Death Court entered a judgment approving the partial wrongful death settlement with Sharpe and wrongful

death settlement with CNS Ministries. The Wrongful Death Court entered a second judgment, the Wrongful Death Judgment "on the trial" of the matter in which it made findings of fact and conclusions of law, and awarded Plaintiffs \$9.5 million for the wrongful death of Geiler. The record supports the trial court's finding that the Wrongful Death Judgment arose from a trial. *See Schmitz v. Great American Assurance Co.*, 337 S.W.3d 700 (Mo. banc 2011) (section 537.065 agreement did not admit liability or damages; award of damages entered after a bench trial rendering *Gulf Insurance* inapplicable).

Liberty failed to properly challenge the trial court's denial of its motion to compel discovery but such a challenge would have failed on the merits in that the record supports the trial court's finding that the Wrongful Death Judgment arose from a trial and not from a settlement. The trial court did not abuse its discretion in denying Liberty's motion to compel discovery.

Point III is denied.

Point IV

In Point IV, Liberty claims that the trial court erred in granting Starr's motion for summary judgment because material facts remained in dispute with respect to Liberty's claims for breach of contract as third-party beneficiary, equitable subrogation, and negligence, in that Starr failed to discharge its duty to defend their mutual insured and cooperated to set up an unsupported judgment implicating Liberty's excess policy. We disagree.

The trial court found that the counts of equitable subrogation, breach of contract and negligence alleged by Liberty against Starr are all premised on the notion that Starr had the opportunity to settle within its policy limits but refused to do so. The trial court found that there was no evidence that Starr had the opportunity to settle within its policy limits and, thus, Starr is entitled to summary judgment on all three counts.

Like Liberty's argument in Point III, Liberty's argument here also fails to challenge the findings of the trial court. Liberty's failure to challenge the articulated grounds for the trial court's ruling is fatal to its appeal. *KDW Staffing, LLC*, 584 S.W.3d at 838. "When an issue is presented and decided by the trial court, an appellant abandons any claim of error as to an issue not raised in its points relied on in its appellant's brief." *Kabir v. Mo. Dept. of Soc. Services*, 845 S.W.2d 102-03 (Mo. App. W.D. 1993). By not challenging a trial court's findings on appeal, "a party 'waives any claim' that necessarily runs counter to those findings." *TracFone Wireless, Inc.*, 557 S.W.3d at 445. "It is an appellant's burden (as the moving party) to overcome our presumption that the judgment of the trial court is correct." *Id.* "An appellate court's role is to review specifically challenged trial court rulings, not to sift through the record to detect possibly valid arguments." *Id.* (citation omitted). "This narrow role reflects the interwoven policy interests governing appellate review, including the reviewing court's duty not to act as advocate for any party; the efficient use of judicial resources; notice and fairness to the parties; judicial decision-making based on fully-briefed issues; and the law's preference for finality of judgments." *Id.*

As such, Liberty has abandoned any claim that the trial court erred in finding Starr had no opportunity to settle the underlying claim against Sharpe for its policy limits.

We note that Liberty improperly includes a string of unrelated additional arguments that are not included in the point relied on and, therefore, are not subject to our review. *See Johnson v. Mo. Dept. of Corrections*, 534 S.W.3d 869, 873 (Mo. App. W.D. 2017) ("We do not review arguments and issues raised in the argument under a point that are not fairly encompassed by that point.").

Point IV is denied.

Conclusion

We affirm the trial court's judgment.

All concur.


W. DOUGLAS THOMSON, JUDGE