IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KATHLEEN SCHMITZ and CRAIG EWING,	)	
Appellants-Respondents,	)	
	)	**WD71160**
v.	)	**(Consolidated with WD71198)**
	)	**OPINION FILED:**
GREAT AMERICAN ASSURANCE COMPANY a/k/a GREAT AMERICAN INSURANCE,	)	**June 1, 2010**
Respondent-Appellant.	)	

Appeal from the Circuit Court of Boone County, Missouri
The Honorable Gary M. Oxenhandler, Judge

Before Division II: Mark D. Pfeiffer, Presiding Judge, and Victor C. Howard and Alok Ahuja, Judges

Kathleen Schmitz and Craig Ewing (appellants) appeal from the judgment of the Circuit Court of Boone County (trial court) in favor of Great American Assurance Company (Great American).[1] On appeal, appellants raise two points. In their first point, appellants argue that the trial court erred in its interpretation of the Great American excess liability insurance contract and the corresponding law relating to the impact of a liability settlement for payment of less than the

[1] Because there are two judgments relevant to our discussion in this opinion, we hereinafter refer to the trial court's judgment that is the subject of this appeal as the "Equitable Garnishment judgment." The other relevant judgment is described and defined later in this opinion as the Wrongful Death judgment.

policy limits with the primary liability insurance carrier, Virginia Surety Company, f/k/a Combined Specialty Insurance Company (Virginia Surety). In their second point on appeal, appellants argue that the trial court erred in reducing the amount of the underlying Wrongful Death judgment against Great American's insured, Columbia Professional Baseball, LLC (CPB) after the Wrongful Death judgment had become final, because appellants argue that the trial court, in the underlying equitable garnishment proceeding, was not entitled to conduct a reasonableness review of the Wrongful Death judgment that had been entered in a different court and by a different trial judge.[2]

Great American cross-appeals with two points of claimed error. Because we affirm the Equitable Garnishment judgment in favor of Great American, we need not and do not address Great American's points of claimed error in our ruling today.

Statement of Facts and Procedural History

This case is rooted in a tragic accident that occurred on the campus of the University of Missouri on July 14, 2003. On that day, twenty-two-year-old Christine Ewing, the daughter of appellants, fell from a portable rock climbing wall when a safety cable snapped. Ewing died the next day from injuries suffered in the fall. The premises where the accident occurred were under the control of CPB, who then operated a minor league baseball team in Columbia, Missouri. The climbing wall was owned and operated by Marcus Floyd (Floyd), working under a contract with CPB. CPB had a primary liability insurance policy with Virginia Surety in the amount of $1,000,000 and an excess liability insurance policy with Great American in the amount of $4,000,000.

[2] The judgment described in this sentence in favor of Schmitz and against CPB was entered on March 16, 2005, by a different trial judge and under a separate caption and case number from the present case. To avoid confusion, we refer to this judgment against CPB as the "Wrongful Death judgment" in this opinion.

Appellants filed a wrongful death lawsuit against Floyd on March 19, 2004, and later amended the petition to include a claim against CPB (wrongful death lawsuit). On June 14, 2004, appellants settled with Floyd for $700,000, leaving CPB as the sole remaining defendant in the wrongful death lawsuit. Counsel for CPB repeatedly contacted Virginia Surety and Great American over the next few months to inform them of the wrongful death lawsuit and its progress. Neither insurer agreed to voluntarily defend CPB without reservation or indemnify CPB in the wrongful death lawsuit. Instead, Virginia Surety denied coverage to CPB for the appellants' claim because Virginia Surety argued it fell under an exclusion in the Virginia Surety insurance contract barring coverage for accidents involving "amusement rides." Great American communicated to CPB that, absent *primary* liability coverage, Great American had no contractual responsibility to provide *excess* liability coverage under the Great American insurance contract.

On December 28, 2004, CPB and appellants entered into an agreement authorized by section 537.065, RSMo 2000 (the 537.065 agreement), whereby appellants agreed to limit execution of any judgment against CPB in the wrongful death lawsuit to attempted collection of liability insurance indemnification proceeds that appellants may succeed in collecting against Virginia Surety and Great American, pursuant to either or both insurer's contractual responsibility of indemnification to CPB for any judgment entered against CPB in the wrongful death lawsuit. The trial court in the wrongful death lawsuit heard evidence on the wrongful death lawsuit in a March 16, 2005 evidentiary hearing. Upon the conclusion of the hearing, the trial court in the wrongful death lawsuit entered the Wrongful Death judgment in favor of appellants in the amount of $4,580,076. The Wrongful Death judgment was not timely appealed by any party and became a final judgment.

Appellants then filed an equitable garnishment lawsuit against Virginia Surety and Great American on May 6, 2005 (the equitable garnishment lawsuit). Thereafter, the parties to the equitable garnishment lawsuit filed motions for summary judgment on the issue of the applicability of liability coverage for CPB versus exclusion of liability coverage. On August 8, 2006, the equitable garnishment trial court ruled the motions in favor of appellants, concluding that Virginia Surety's amusement ride exclusion did not apply to rock climbing walls and that, therefore, Virginia Surety was required to indemnify CPB with regard to the Wrongful Death judgment.

On May 30, 2007, Virginia Surety settled with appellants. Pursuant to the terms of the Virginia Surety settlement agreement, appellants agreed to release all claims against Virginia Surety and to execute a partial satisfaction of judgment in the Wrongful Death judgment in the amount of $1,000,000 in exchange for payment by Virginia Surety in the sum of $700,000. Appellants notified the trial court in the equitable garnishment lawsuit of the Virginia Surety settlement, filed a partial satisfaction of judgment as to the Wrongful Death judgment in the amount of $1,000,000, and proceeded with the equitable garnishment lawsuit against General American for the outstanding Wrongful Death judgment in the amount of $2,880,076.[3]

The trial court in the equitable garnishment lawsuit heard evidence on the equitable garnishment lawsuit on October 15-16, 2008. The trial court issued the Equitable Garnishment judgment on May 13, 2009. In the Equitable Garnishment judgment, the trial court concluded, in pertinent part, that the Great American excess liability insurance contract specifically stated that excess liability payment was predicated upon the primary liability carrier's exhaustion of its limit of primary liability coverage by way of actual payment of the entire amount of the primary

[3] The $2,880,076 figure was arrived at by subtracting the $700,000 settlement with Floyd and a $1,000,000 partial satisfaction of judgment arising from the settlement with Virginia Surety from the original CPB judgment in the amount of $4,580,076.

liability coverage toward the loss suffered by the insured, CPB. The trial court found that Virginia Surety's payment of less than the full amount of Virginia Surety's limits of liability coverage in exchange for a full release of liability from any obligation to pay the remainder of Virginia Surety's primary limits of liability coverage under the Virginia Surety insurance contract did not constitute "exhaustion" as contemplated by the terms of the Great American insurance contract and, accordingly, Great American had no obligation to make any payment of excess liability insurance coverage to appellants.[4] In fact, after hearing two days of evidence on the circumstances of the 537.065 agreement between appellants and CPB, the Wrongful Death judgment, and the terms of the Settlement Agreement and Release between appellants and Virginia Surety, the trial court made the following finding in the Equitable Garnishment judgment:

> Though [appellants have] endeavored to show that the $1,000,000.00 threshold was met (by [appellants] and [Virginia Surety] entering into what ***this court believes to be a <u>contrived</u> "credit" agreement*), *this Court doesn't buy it***. [Virginia Surety], simply stated, didn't ***pay*** a million dollars; Great American's threshold for responsibility was never met.[5]

(Emphasis added.)

This timely appeal follows.

[4] In the Equitable Garnishment judgment, the trial court also concluded that the Wrongful Death judgment was not reasonable and reduced the Wrongful Death judgment via the Equitable Garnishment judgment from $4,580,076 to $2,200,000. Because we agree with the trial court that the Great American exhaustion clause condition precedent has not been met and Great American is not obligated to make any payments to appellants under the Great American excess insurance policy, we do not address the propriety of the collateral attack of the Wrongful Death judgment (which had become final) by the trial court in its Equitable Garnishment judgment below.

[5] While it is not necessary to our ruling today, this finding by the trial court may have served as yet another reason to affirm the trial court's Equitable Garnishment judgment, in that a "contrived" agreement to attempt to establish "payment" that would qualify as "exhaustion" under the Great American insurance contract may not have been enforceable against Great American. *See Am. Standard Ins. Co. of Wis. v. May*, 972 S.W.2d 595, 601 (Mo. App. W.D. 1998) ("[I]n a court-tried case, we are required to affirm the judgment of the trial court if it is correct on any reasonable theory which is consistent with the pleadings and is supported by the evidence, regardless of the theory of recovery or defense relied upon by the respondent at trial.").

Standard of Review

As in any court-tried case, we review the case under the standard set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), and will affirm the judgment unless it is against the weight of the evidence, it is not supported by substantial evidence, or it erroneously declares or applies the law. *Id.*; *Am. Family Mut. Ins. Co. v. Peck*, 169 S.W.3d 563, 565 (Mo. App. W.D. 2005). However, where resolution of the case involves the interpretation of an insurance contract, we give no deference to the trial court as contract interpretation is a question of law that we review *de novo*. *Peck*, 169 S.W.3d at 565; *See also Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010); *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009); *Penn-Star Ins. Co. v. Griffey*, 306 S.W.3d 591, 596 (Mo. App. W.D. 2010). In the absence of a statute or public policy dictating insurance coverage, our review of whether insurance coverage is applicable is governed by a review of the underlying insurance contract. *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. banc 1991). In construing the language of an insurance contract, we give meaning to the language of the insurance contract which would be understood by an ordinary person of average understanding. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). We are also mindful that courts are "not permitted to create an ambiguity in order to distort the language of an unambiguous policy, or, in order to enforce a particular construction which it might feel is more appropriate." *Rodriguez*, 808 S.W.2d at 382.

Did Payment by Virginia Surety Qualify as Exhaustion?

We address the dispositive issue on appeal, that is, whether the express language of the Great American insurance contract obligates Great American to make excess liability payments

to appellants when the primary liability carrier, Virginia Surety, did not "actually pay" its underlying limits of liability insurance.[6]

In pertinent part, the Great American excess insurance contract states:

> [I]f the "Underlying Limits of Insurance"[7] . . . are . . . ***exhausted solely by payment of "loss"***, such insurance provided by this policy will apply in excess.

Section II.B.4 (emphasis added).

> "Loss" means those ***sums actually paid in settlement or satisfaction of a claim***.[8]

Section V.B. (emphasis added).

The word "sum" is not defined in the Great American insurance contract. When a policy's terms are not defined, we consider their plain and ordinary meaning to provide a reasonable construction, and often, we will look to the dictionary for that plain and ordinary meaning. *Derousse v. State Farm Mut. Auto Ins. Co.*, 298 S.W.3d 891, 895 (Mo. banc 2009); *Dibben v. Shelter Ins. Co.*, 261 S.W.3d 553, 557 (Mo. App. W.D. 2008). In this instance, *Merriam-Webster's* online dictionary[9] defines "sum" as:

1. an indefinite or specified amount of money;
2. the whole amount;
3. the utmost degree;
4. a summary of the chief points or thoughts;
5. the result of adding numbers.

Applied to the instant case, then, Great American's obligation to pay excess liability insurance coverage to appellants occurs if and when Virginia Surety's $1,000,000 of underlying

[6] Our research, including a review of cases presented by the parties, did not uncover any case that had interpreted the exact "exhaustion clause" language in the subject Great American insurance contract. We are mindful of our responsibility to review the terms of *this* insurance contract and apply them to the facts of *this* case in achieving the result of our ruling today. *See Rodriguez*, 808 S.W.2d at 382.

[7] It is undisputed that the "Underlying Limits of Insurance" in the instant case consists of the $1,000,000 limits of liability in the Virginia Surety primary liability insurance contract.

[8] For example, "loss" does not include the cost of defense that the primary liability insurer was contractually responsible for in its duty to defend the insured (a contractual duty that Great American had no responsibility for under the terms of its excess liability policy).

[9] *See* online dictionary definition for "sum" at http://www.merriam-webster.com/dictionary/sum.

limits of insurance are exhausted ***solely*** by ***payment*** of those specified amounts of money ***actually paid*** in settlement or satisfaction of a claim. Since the relevant "whole amount" of the "specified amount of money" is the Virginia Surety liability policy limit of $1,000,000, the "actual payment" anticipated by the Great American insurance contract is the actual payment of $1,000,000 by Virginia Surety.[10] Quite frankly, while appellants now claim that the "***payment***" contemplated by the Great American exhaustion clause means something other than "money actually paid," that is ***not*** how appellants ***actually*** used those terms in the Settlement Agreement and Release terms with Virginia Surety. For example, the Settlement Agreement and Release between Virginia Surety and appellants stated, in pertinent part:

- "It is the desire of Virginia Surety and [appellants] to enter into a settlement of all claims against Virginia Surety related to the death of Decedent and for any obligation of Virginia Surety to ***pay*** any ***monies*** pursuant to the [Wrongful Death judgment] beyond the ***payment*** recited herein."

- "Virginia Surety had a commercial general liability insurance policy . . . [providing for] personal and advertising injury limits of insurance of One Million Dollars ($1,000,000.00) with respect to any and all covered claims made by [appellants]."

- "Virginia Surety hereby agrees to ***pay*** . . . the ***sum*** of Seven Hundred Thousand Dollars ($700,000.00) jointly to [appellants] and, in consideration therefor, [appellants] will acknowledge partial satisfaction of the [Wrongful Death judgment] . . . to the extent of One Million Dollars ($1,000,000.00). . . . Further, [appellants] will cause to be filed a dismissal with prejudice of Virginia Surety in the [equitable garnishment] lawsuit."

[10] It should be noted, however, that our ruling today does not address the topic of the impact of bankruptcy or insolvency of a primary insurer upon the obligations of an excess insurer. In fact, the Great American excess insurance contract specifically addresses that topic with language confirming that bankruptcy or insolvency of the primary insurer "[w]ill not relieve us from the payment of any claim or suit covered by this policy."

- "For and in consideration of the ***payment*** of the ***sum*** of SEVEN HUNDRED THOUSAND DOLLARS AND 00/100 ($700,000.00) . . . ."[11]

(Emphasis added.)

Instead of ***paying*** the ***sum*** of $1,000,000 in ***money*** of the underlying limits of insurance, Virginia Surety, as the primary insurance carrier, only ***paid*** the ***sum*** of $700,000, and Virginia Surety made it clear in the Settlement Agreement and Release that the ***sum*** of $700,000 was the only ***payment*** that Virginia Surety would make to appellants and, ***in return***, Virginia Surety was to ***receive from appellants***, among other things, the consideration of a release of Virginia Surety's obligation to ***pay*** the entire underlying limits of its primary liability insurance contract of $1,000,000.

Stated another way, no matter how anybody may wish to define "***payment***," the "***payment recited herein***" to be made by Virginia Surety pursuant to the Virginia Surety settlement agreement with appellants was the ***sum*** of $700,000. Virginia Surety did not ***pay*** anything else in the form of cash or in kind consideration to appellants. The acts of the appellants in dismissing the equitable garnishment lawsuit as to any claims against Virginia Surety, releasing Virginia Surety and its predecessor and successor affiliated entities, and filing a partial satisfaction of the Wrongful Death judgment in the amount of $1,000,000 instead of $700,000, did not constitute acts of ***payment*** by Virginia Surety. Instead, these were acts by the appellants that Virginia Surety was ***receiving*** in exchange for the only ***payment*** made by Virginia Surety – $700,000.

[11] Given appellants' use of the words "sum," "payment," and "pay" in the Virginia Surety settlement agreement, it comes as no surprise that counsel for appellants conceded at oral argument that there is nothing ambiguous about the phrase "sums actually paid" as that phrase is used to define "loss" in the Great American insurance contract.

Thus, by the express terms of the Great American insurance contract, there is no evidence that the underlying limits of insurance have been exhausted in the manner provided in the Great American insurance contract, and Great American has no obligation to make payments to appellants under its excess insurance policy.

The "square peg" of Handleman applied to the "round hole" of Great American Policy

Appellants argue that the unanimous and controlling Missouri precedent has established that "exhaustion" occurs when a primary insurer settles its obligation to pay its underlying limits of liability insurance coverage, no matter the language in the excess insurance policy. In support of their argument, appellants fail to refer us to any case that involves equitable garnishment proceedings by a third party judgment creditor. Instead, appellants refer us to case precedent involving direct claims between insurers and their insureds or insurers versus insurers. The principal case relied upon by appellants is *Handleman v. United States Fidelity & Guaranty Co.*, 18 S.W.2d 532 (Mo. App. 1929), and as addressed *infra*, *Handleman* does not stand for the proposition that appellants contend that it does.

In *Handleman*, the dispute was a breach of contract lawsuit between an insured and insurer. 18 S.W.2d at 532. The United States Fidelity & Guaranty Co. (USF&G) excess insurance contract included a condition precedent provision in which the obligation of the excess liability carrier to make payments to its insured was not triggered unless and until all other insurance "shall have been exhausted in the payment of ***claims*** to the full amount of the expressed limits of such other insurance." *Id.* (emphasis added).[12] Handleman was a cloth

[12] The *Handleman* court concluded that this insurance contract provision was a valid provision, *id.* at 534, recognizing that an "exhaustion clause" is a valid condition precedent to excess insurance coverage. In contrast to the *Handleman* exhaustion clause that triggers exhaustion by "payment of ***claims***," the Great American excess policy exhaustion clause triggers exhaustion "solely by payment of ***'loss'***" and "loss" is defined as "those sums actually paid in settlement or satisfaction of a claim." (Emphasis added.) Thus, the emphasis of the *Handleman* exhaustion clause was on settling the underlying primary claim, whereas the emphasis of the Great American policy exhaustion clause is on the actual payment of sums (i.e. money) in settlement of the underlying primary claim. The

manufacturer who sued his excess insurance carrier for loss incident to a robbery, resulting in damages of $4,224.91. *Id.* at 533. Handleman had a primary loss policy covering up to $3,000 in claims and an excess policy with USF&G covering an additional $7,000 in loss claims. *Id*. at 532. At trial, no evidence was adduced regarding whether or not Handleman had received payment of $3,000 from the primary loss carrier.[13] Instead, Handleman argued, and the trial court agreed, that it was sufficient for him to prove that his loss exceeded the primary loss coverage by the amount sought from his excess loss carrier, $1,224.91. *Id.* at 533. On appeal, USF&G argued that its excess insurance policy contract required payment of the underlying claim and not simply proof that Handleman's loss exceeded the primary loss limits of coverage. *Id.* The St. Louis Court of Appeals agreed, reversing and remanding the case for a determination of whether "payment" of the "claim" had been "exhausted" pursuant to the terms of the USF&G excess insurance contract. *Id.*

Upon ***reversing*** the trial court's judgment against the excess insurer, the St. Louis Court of Appeals engaged in gratuitous discussion[14] of how the trial court ***might*** ultimately dispose of the case upon remand. This gratuitous discussion clearly was not essential to the court's decision. "[S]tatements are *obiter dicta* if they are not essential to the court's decision of the issue before it." *Brooks v. State*, 128 S.W.3d 844, 852 n.2 (Mo. banc 2004) (internal citations omitted). Dicta is ***not*** binding precedent. *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, 24

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differences between the two exhaustion clauses are stark and account for the different result between the subject case and the *Handleman* case.

[13] A receipt claiming to show that Handleman had settled with the primary loss insurance carrier was offered into evidence, but the trial court sustained the objection to the admissibility thereof. *Id*. at 533.

[14] The gratuitous discussion included commentary by the St. Louis Court of Appeals about the topics of exhaustion of first party property insurance coverage, what acts can constitute "payment" as contemplated by the *Handleman* excess property insurance contract, and the notion that "actual payments of cash" may be "harsh and unreasonable" in a first party property damage excess policy when that procedural scenario does not invoke any rational advantage for such an interpretation of a first party property loss insurance policy. *Id*. at 534-35.

(Mo. 1940). Nonetheless, it is the dictum of *Handleman* that is the focus of the appellants' argument in this appeal.

In dictum, the *Handleman* court relied, in part, upon *Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d 665 (S.D.N.Y 1928) (containing an identical exhaustion clause as the clause in *Handleman*), for stating the proposition that "exhaustion" of a "claim" can occur through compromise of a "claim" and that "payment" is not restricted to payment in cash. *Handleman*, 18 S.W.2d at 534-35. Importantly, though, the *Zeig* precedent relied upon by the *Handleman* court also specifically stated:

> The defendant argues that it was necessary for the plaintiff to actually collect the full amount of the policies . . . in order to "exhaust" that insurance. Such a construction of the policy sued on seems unnecessarily stringent. ***It is doubtless true that parties could impose such a condition precedent to liability upon the policy, if they chose to do so***.

Zeig, 23 F.2d at 666 (emphasis added).[15]

Perhaps most importantly, there is nothing in *Handleman* suggesting that it is the public policy of the state of Missouri to require that courts must conclude that, for purposes of triggering excess insurance policy coverage, underlying policy "exhaustion" must be deemed to have occurred in all factual scenarios whereby the primary carrier has settled the full amount of the "claim" with the insured or judgment creditor for any agreed-upon payment or compromise ***regardless of the express language of the excess liability insurance contract***.[16] To the contrary,

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[15] In other words, even the *Handleman* and *Zeig* opinions recognize that cases involving excess insurance policies with condition precedent clauses do not revolve around ***public policy*** arguments; they revolve around the specificity of the language in the ***insurance policy***. *See Qualcomm, Inc. v. Certain Underwriters At Lloyd's, London*, 73 Cal. Rptr. 3d 770, 780 (Cal. 4 App. 2008) ("[T]he *Zeig* court acknowledged that parties in these circumstances may include excess policy language explicitly requiring ***actual payment*** [i.e. the subject Great American exhaustion clause refers to "sums ***actually paid***"] as a condition precedent to coverage and that a court may reach a contrary result [i.e. contrary to the result in *Zeig* and by extension *Handleman*] 'when the terms of the contract demand it.'"

[16] In fact, to make such a "public policy" argument defeats the purpose of primary liability insurance coverage when excess liability coverage exists and would expose excess insurers to nominal payments by primary insurers to settle the primary insurance obligation. For example, under appellants' present argument, had they

it is undisputed that the opposite is true, that the beginning point of any insurance contract interpretation must begin with a review of the actual language of the insurance contract in question. *See Handleman*, 18 S.W.2d at 534 ("In our view, this provision [exhaustion clause] is a condition precedent. Its terms are plain and unambiguous, and must be enforced as written.");[17] *Rodriguez*, 808 S.W.2d at 382 ("Thus, where insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage.").[18]

The condition precedent language in *Handleman* does not mirror the condition precedent language in the instant case. Where the condition precedent language of the excess insurance contract in *Handleman* required exhaustion to occur via satisfaction of the "claim" existing between the insured and primary loss carrier, the instant case and corresponding Great American insurance contract requires exhaustion to occur by the actual payment of money in the amount of the underlying limits of liability of $1,000,000. Where the condition precedent language of the

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accepted $1 from Virginia Surety instead of $700,000, they would have still been entitled to proceed against the excess insurer, Great American, in exactly the same procedural fashion as they did in the underlying equitable garnishment lawsuit. Such a scenario is not what CPB and Great American bargained for and agreed to in the Great American insurance contract, and a judgment creditor in an equitable garnishment proceeding cannot acquire more contractual rights than that which the insured originally possessed under the terms of the insurance contract. *Greer v. Zurich Ins. Co*., 441 S.W.2d 15, 30 (Mo. banc 1969); *Killian v. State Farm Fire & Cas. Co.*, 903 S.W.2d 215, 217 (Mo. App. W.D. 1995).

[17] Appellants note that both *United States Fidelity & Guaranty Co. v. Safeco Insurance Co. of America*, 555 S.W.2d 848, 853 (Mo. App. 1977), and *Reliance Insurance Co. v. Chitwood*, 433 F.3d 660, 664 (C.A. 8th Mo. 2006), interpreted the dictum of *Handleman* as *holding* that exhaustion of primary insurance coverage for purposes of excess insurance coverage may be achieved by settlement of the primary claim *regardless of the contractual provisions*; but as pointed out above, that is simply not the *holding* of *Handleman*. First, as dictum, the gratuitous discussion in *Handleman* is not the *holding* of *Handleman*. Second, *Handleman* and its predecessor, *Zeig*, both recognize that coverage under the insurance contract stands or falls on the contract "***as written***" and not upon some sort of public policy declaration. Any attempt to use *Chitwood* or *Safeco* to make *Handleman* something that it is not is simply inaccurate, and we decline the invitation to join in such misinterpretation of *Handleman*. For other reasons discussed *infra*, the factual and procedural histories of *Chitwood* and *Safeco* are also inapposite to the present appeal.

[18] In *Handleman's* conclusion in the opinion, the *Handleman* court refers to their "construction of the provision in the policy as above set out [i.e. the exhaustion clause]." 18 S.W.2d at 535. This statement demonstrates two things: (1) the *Handleman* court was interpreting an "insurance policy" and not "public policy"; and (2) the *Handleman* court was expressly concerned with interpreting the contract clause and facts before them, not some abstract theoretical discussion of "exhaustion."

excess insurance contract in *Handleman* was general in nature, the instant case and corresponding Great American insurance contract is specific.

In the dictum of *Handleman*, the St. Louis Court of Appeals examined the fact pattern of first party claims in property loss insurance policies between insureds and insurers and suggested that there is "no rational advantage" of requiring "actual payments" instead of compromised primary loss claims, 18 S.W.2d at 534; but this statement was made in the context of a property loss direct claim by a party to both the primary insurance contract and the excess insurance contract, not the context of a personal injury third party judgment creditor who is pursuing an equitable garnishment on the collection of insurance proceeds from an insurance contract the judgment creditor is not a party to. This distinction is one with a significant difference as recognized by *Johnson v. Milgo Industries, Inc.*, 458 F.Supp. 297, 301 (D.C.Minn. 1978), in its discussion of this topic and its relationship to the principal case relied upon by the *Handleman* court. ("[I]t is clear that *Zeig* is no authority for such revision of a contract if the insurer has a rational interest in having its provisions read literally.")

When one party to an insurance contract sues another party to the same contract, each party must defend itself or suffer the consequences of a default judgment. In *Handleman*, the parties to the litigation were also the parties to the insurance contract in dispute. 18 S.W.2d at 532. The "duty to defend" in the context of a personal injury lawsuit against an insured of a liability insurance policy was not at issue in *Handleman* or in any other case cited by appellants on this point. Conversely, in the present case, the "duty to defend" is of paramount importance to the parties to the Virginia Surety and Great American insurance contracts. In the primary liability policy with Virginia Surety, it is undisputed that the Virginia Surety insurance policy carried with it the "duty to defend" CPB when the claim against CPB fell within the terms of the

Virginia Surety insurance policy. However, in the excess liability policy between CPB and Great American, it contained the following clause:

> We [Great American] will ***not*** be required to assume charge of the investigation of any claim or defense of any suit against you [CPB].

Section III.A (emphasis added).

Thus, in the context of the present case, Great American had bargained for a "rational advantage" in its insurance policy with CPB and specifically predicated that advantage upon the primary insurer's "duty to defend" and obligation to pay the sum of its limits before excess liability coverage would be triggered under the Great American insurance contract. Stated another way, Great American had bargained not only for a defense of the personal injury litigation by the primary insurer, it had bargained for the sort of good faith defense by a primary insurer who has $1,000,000, not $700,000 or $1, at stake in the defense of the underlying personal injury claim against CPB. Is it any coincidence that the Great American premium on $4,000,000 of ***excess*** liability insurance coverage was $4,000 while the Virginia Surety premium on $1,000,000 of ***primary*** liability insurance coverage was $8,386?

To permit the primary insurer to relieve itself of its duty to defend and its responsibility to indemnify its insured for $1,000,000 for a payment less than $1,000,000 has the effect of ignoring the "rational advantage" that Great American bargained for in its contractual relationship with CPB. Since the *Handleman* case relied upon by appellants found the topic of "rational advantage" to be relevant to its dictum discussion, *Handleman*, 18 S.W.2d at 534, it follows that the topic should not be ignored when the facts illustrate the opposite rationale as that of the facts of *Handleman*.

While this rationale is not intended to constitute an exhaustive list of the "rational advantages" that an excess insurer possesses in the context of the facts of this case as compared

to the facts and dictum espoused in *Handleman*, the "duty to defend" illustration is instructive on the differences that exist between the facts and procedural circumstances of this case and those relied upon by appellants.[19]

Appellants' Attempt to Inject Claim of Ambiguity in Argument of Brief

Rule 84.04(d)(1) provides:

Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;

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[19] Appellants also cite to *United States Fidelity & Guaranty Co. v. Safeco Insurance Co. of America*, 555 S.W.2d 848 (Mo. App. 1977), and *Reliance Insurance Co. v. Chitwood*, 433 F.3d 660 (8th Cir. 2006). Neither of these cases are factually or procedurally relevant. Neither case involves a third party judgment creditor claim against a judgment debtor/insured under primary and excess liability policies.

In *Safeco*, the dispute revolved around automobile negligence and competing liability insurers in a declaratory judgment proceeding, one exposed to liability through an omnibus clause (USF&G) and the other exposed to liability through its non-owned automobile clause coverage (Safeco). "Basically, Safeco maintain[ed] that as excess carrier, it [had] no liability . . . until USFG, the primary carrier, has discharged its responsibilities by paying the full policy limit." *Id.* at 853. Of course, *Safeco's* reference to "excess carrier" is "excess" via the procedural comparison of omnibus insurance coverage (primary) versus non-owner insurance coverage (secondary). In other words, Safeco's insurance policy was not a true excess liability policy but, rather, had been deemed "excess coverage" in comparison to USF&G's omnibus clause coverage. There is no reference in the opinion to any specific insurance exhaustion clause, because it appears that Safeco did not assert a specific exhaustion clause condition precedent from the insurance contract in its defense (perhaps because none existed) but, rather, was making the generalized argument that the only circumstance that satisfies "exhaustion" is payment of the full policy limit. Thus, the court in *Safeco* referred to *Handleman* as a case that contradicted Safeco's over-simplified exhaustion argument and illustrated a scenario whereby "exhaustion" could be satisfied by settlement of the underlying primary coverage claim. But, *Safeco* is inapposite to the factual and procedural history of the subject case, because Great American asserts the contractual defense in its true excess liability policy of an "exhaustion clause" that is more specific and comprehensive than the "exhaustion clause" in *Handleman* (relied upon by *Safeco*) and, as we have described more fully in our ruling today, the express language of the insurance contract controls the outcome of the present case.

In *Chitwood*, the Eighth Circuit Court of Appeals, in its attempt to interpret Missouri law, stated: In *Handleman v. U.S. Fidelity & Guar. Co.*, 223 Mo. App. 758, 18 S.W.2d 532, 534-35 (1929), the Missouri Court of Appeals held that exhaustion did not require an insurer to pay the full dollar value of a policy. Rather, an insurance policy is exhausted 'when the insured proves that claims aggregating the full amount of the specific policy have been settled thereunder and full liability of the insurer discharged.'" *Chitwood*, 433 F.3d at 664. First, the interpretation of Missouri law by the Eighth Circuit Court of Appeals is not binding upon this court. *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995). Instead, we are constitutionally bound to follow the most recent controlling decision of the Missouri Supreme Court. *State v. Aaron*, 218 S.W.3d 501, 511 (Mo. App. W.D. 2007); Mo. Const. art. V, § 2. In this instance, *Chitwood* ignores our Missouri Supreme Court's precedent in *Rodriguez*, 808 S.W.2d at 382. Secondly, *Handleman* does not stand for the proposition that "any" insurance policy "exhaustion clause" is exhausted by settlement of the underlying liability claim. Rather, *Handleman* stands for the proposition that it was enforcing the terms of the insurance policy in *Handleman* as written. 18 S.W.2d at 534. ("[I]n our view, this provision [exhaustion clause] is a condition precedent. Its terms are plain and unambiguous, and must be enforced ***as written***. And this is true, though quite often the courts have gone far in the scope of judicial interpretation in aid of an insured. While it is the duty of courts in proper cases to construe the contracts of the parties, yet they have no power to construct a new contract for them . . .") (emphasis added).

(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.

The purpose of Rule 84.04(d)(1) is "'to give notice to the opposing party of the precise matters which must be contended with and to inform the court of the issues presented for review.'" *Crawford County Concerned Citizens v. Mo. Dept. of Natural Res.*, 51 S.W.3d 904, 908 (Mo. App. W.D. 2001) (citation omitted). Compliance with Rule 84.04 is mandatory in order to prevent appellate courts from becoming advocates for parties. *Treaster v. Betts*, 297 S.W.3d 94, 95 (Mo. App. W.D. 2009); *Arch Ins. Co. v. Progressive Cas. Ins. Co.*, 294 S.W.3d 520, 522 (Mo. App. W.D. 2009) ([Compliance with Rule 84.04] "'guards against the issuance of precedential decisions on issues which were not subject to a full adversarial presentation.'") (citation omitted). Issues raised for the first time in the argument section and not included in the point relied on are not properly before this Court. *Sullins v. Knierim*, ED 92849, 2010 WL 1037972, at *8 (Mo. App. E.D. Mar. 23, 2010) (citing to *Day ex rel. Finnern v. Day*, 256 S.W.3d 600, 602 (Mo. App. E.D. 2008)).

Perhaps more importantly, we find nothing in the record to suggest that appellants ever relied upon an "ambiguity argument" before the trial court below. It is no coincidence, then, that the trial court's judgment is devoid of any discussion relating to any alleged ambiguity of the Great American policy in question. It has long been the law that "an appellant is bound by the theory he or she relied upon at trial and may not raise a new theory on appeal." *Am. Standard Ins. Co. of Wis. v. May*, 972 S.W.2d 595, 601 (Mo. App. W.D. 1998).

While there is a plethora of case precedent discussing ambiguities in contractual settings, *Robin v. Blue Cross Hospital Service, Inc.*, 637 S.W.2d 695, 698 (Mo. banc 1982) ("Language is ambiguous if it is reasonably open to different constructions . . . ."), the responsibility of the

drafter of the contract to remove any such ambiguities, *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 211 (Mo. banc 1992) ("The insurance company is in the better position to remove ambiguity from the contract."), and the rule of contract construction when ambiguities exist, *Behr v. Blue Cross Hospital Service, Inc. of Mo.*, 715 S.W.2d 251, 255 (Mo. banc 1986) ("Where the provisions . . . are ambiguous they will be construed against the insurer."); *Trimble v. Pracna*, 167 S.W.3d 706, 714 (Mo. banc 2005) ("Where a contract is fairly open to two or more interpretations, it will be construed against the party who prepared the contract."), none of these cases or any similar to them are cited by appellants in their briefing. Appellants are required to cite law or other authority in support of an issue of claimed error presented to this Court, or must, at the least, explain why no authority is available. Rule 84.04(d)(5); *Crawford*, 51 S.W.3d at 908. Instead of doing so, appellants offer the unsupported argument that the insurance contract may be ambiguous in one paragraph of the argument section of their briefing, to-wit:

> Great American asserted that the use of the phrase "actually paid" in the definition of loss somehow creates a legal distinction from language of the other excess policies that state exhaustion requires "payment." To the contrary, Great American's definition of a loss creates, at best, an ambiguity about when, if ever, it would pay a claim. By the terms of its policy, Great American is only obligated to pay a "loss." If Great American, then, interprets loss only to be something that's already been "actually paid," then the policy makes no sense at any point. This falls far short of supporting an interpretation of Great American's policy that it is liable only after the primary is exhausted through actual payment (not settlement) of its limits, and it completely misses the point of unanimous, controlling Missouri precedent.

It is, indeed, the appellants' claim of "unanimous, controlling Missouri precedent" that appellants relied upon at the trial court and at this Court. In fact, appellants argue that there is only one reasonable interpretation of the Great American policy:

> [G]reat American's policy can be reasonably interpreted only to state that Great American will pay an insured loss, above the limits of the primary insurance, once the primary is obligated to pay its limits.

This is consistent with the position taken by appellants at the trial court and in their point relied on to this Court, which states:

> The trial court erred in ruling that Appellants were barred from recovering from the excess insurer, Respondent Great American, due to the fact that the primary insurer paid Appellants only Seven Hundred Thousand Dollars of its One Million Dollars in coverage because Appellants credited Respondent Great American with, and filed a partial satisfaction of judgment for, the full One Million Dollars in that Missouri law allows claimants to recover from an excess insurer even after settling their claim against the primary insurer so long as the excess insurer receives a credit for the primary insurer's full limits of insurance coverage.

Quite simply, appellants rely upon the case of *Handleman v. United States Fidelity & Guaranty Co.*, 18 S.W.2d 532 (Mo. App. 1929), and claim that the Great American policy can only be interpreted one way – the way appellants interpret it. Appellants did not argue to the trial court below that the Great American insurance policy was ambiguous and must be construed against the drafter, Great American. Appellants did not claim ambiguity as a basis for trial court error in their point relied on to this Court. Appellants do not cite even one case discussing the rules of insurance contract construction when the contract may be ambiguously phrased. In sum, appellants have not properly raised or developed any alleged trial court error based upon an ambiguity argument. Our role as an appellate court is to advocate our declaration of the law within the boundaries of the law and not to serve as an advocate for any of the parties to the lawsuit. Accordingly, we do not address any suggestion or contention that the Great American policy may have been ambiguous as that issue is not properly before this Court.

Conclusion

The dispositive issue on this appeal centers on the condition precedent exhaustion clause of the Great American excess insurance contract. As the Great American excess insurance contract is written, appellants have failed to demonstrate that the condition precedent has been met. Accordingly, appellants are not entitled to pursue excess insurance coverage payments by

Great American pursuant to the terms of the Great American excess insurance contract. Given this dispositive conclusion, all other points raised by the parties in this appeal are moot and we need not and do not address them.

The judgment of the trial court is affirmed.

Mark D. Pfeiffer, Presiding Judge

Victor C. Howard, Judge, concurs.
Alok Ahuja, Judge, dissents in separate opinion.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

KATHLEEN SCHMITZ and CRAIG EWING,	)	
Appellants-Respondents,	)	
v.	)	**WD71160**
	)	**(Consolidated with WD71198)**
GREAT AMERICAN ASSURANCE COMPANY a/k/a GREAT AMERICAN INSURANCE,	)	**FILED: June 1, 2010**
Respondent-Appellant.	)	

DISSENTING OPINION

Because I believe Great American's payment obligation under its excess liability insurance policy was triggered by the judgment entered against CPB and Appellants' settlement with CPB's primary insurer, I respectfully dissent.

I.

First, a provision of the policy on which Appellants rely (but which the majority ignores) directly addresses when Great American's payment obligations accrue. Section VI(L), entitled "When 'Loss' Is Payable," states:

> Coverage under this policy will not apply unless and until the Insured or the Insured's "underlying insurance" is ***obligated to pay*** the full amount of the "Underlying Limits of Insurance."
>
> ***When the amount of "loss" has finally been determined***, we will promptly pay on behalf of the Insured the amount of "loss" falling within the terms of this policy.

(Emphasis added.)

This provision makes no reference to the "payment" or "actual payment" of the underlying limits of liability; instead, § VI(L) specifies that Great American's coverage obligations were triggered when either CPB or Virginia Surety were "obligated to pay" the amount of CPB's primary coverage, and promises that Great American would "promptly pay" "[w]hen the amount of 'loss' has finally been determined."

Notably, Great American's Brief appears to acknowledge that § VI(L) specifies when its coverage obligation is triggered (which is, after all, the plain meaning of the section's title):

> ***Section 6 L of Great American's policy is critical.*** Under it, the only parties' actions that may serve to trigger Great American's duty to make payment are the insured or the underlying carrier. ***Only after those parties have become obligated to pay the full amount of the underlying limits will Great American's duty to make payment arise.***

(Emphasis altered.) Great American then argues that Virginia Surety was not "obligated to pay" its underlying limits due to its settlement with Appellants.

Several things are noteworthy about Great American's argument concerning § VI(L). First, its argument that its payment obligation is triggered when the underlying insurer becomes "obligated to pay" the limits of the underlying coverage is inconsistent with Great American's primary argument: that its payment obligation only accrues when the underlying limits are "actually paid." Second, Great American ignores that Virginia Surety became "obligated to pay" the entirety of its limits of liability on August 8, 2006 (if not before), when the garnishment court rejected Virginia Surety's reliance on the amusement ride exclusion, and held that it was required to indemnify CPB. Third and finally, Great American's § VI(L) argument ignores that *its insured* – CPB – *remains* "obligated to pay" the Schmitz's wrongful death judgment, within the meaning of its insurance coverage, despite having entered an agreement under § 537.065, RSMo, which limited the assets against which Appellants may levy execution. *See Farmers Mut. Auto. Ins. Co. v. Drane*, 383 S.W.2d 714, 719-20 (Mo. 1964), followed in, *e.g.*, *Butters v.*

City of Independence, 513 S.W.2d 418, 425 (Mo. 1974); *Sexton v. Omaha Prop. & Cas. Ins. Co.*, 231 S.W.3d 844, 850 n.6 (Mo. App. S.D. 2007); *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 193 F.3d 966, 971 (8th Cir. 1999) (Missouri law).

The meaning of § VI(L) – that Great American's coverage is triggered when the Insured and/or the primary carrier are "obligated to pay" the underlying limits, and the amount of that obligation "has finally been determined" – is confirmed by § VI(F). Section VI(F) addresses when third parties (like the Appellants) may file a lawsuit to recover directly from Great American. It provides:

> There will be no right of action against us under this Insurance unless:
>
> 1. you have complied with all the terms of this policy; and
> 2. ***the amount you owe has been determined*** by settlement with our consent or by actual trial and final judgment.

(Emphasis added.)

Thus, the policy specifically allows a third party to bring a lawsuit against Great American based on a "determin[ation]" of the amount that the Insured *owes*. It does *not* require that this amount "actually [be] paid." This provision is significant: it cannot be that the policy grants a third party the right to sue Great American directly (based on a "determin[ation]" of "the amount [the Insured] owe[s]") at a time when Great American has no present obligation to discharge its Insured's liability to the third party. The direct-action provision confirms that Great American's coverage obligations accrue on final determination of the amount that the Insured and/or its primary insurer are "obligated to pay" or "owe."

II.

Rather than relying on § VI(L), the majority concludes that the policy's definition of "loss" required that Virginia Surety actually pay, in cash, the full underlying liability limits

before Great American would be obligated to pay under its excess coverage. I do not believe the "loss" definition can support the weight the majority places on it; indeed, under a proper construction the "loss" definition provides further support for *Appellants'* argument.

The Great American policy's insuring clause provides:

> We will pay on behalf of the Insured the amount of "loss" covered by this insurance in excess of the "Underlying Limits of Insurance" shown in Item 5 of the Declarations, subject to Insuring Agreement Section II., Limits of Insurance.
>
> "Loss" is defined to mean:
>
> those sums actually paid in settlement or satisfaction of a claim which you are legally obligated to pay as damages after making proper deductions for all recoveries and salvage.
>
> Section II(B)(4) provides:
>
> if the "Underlying Limits of Insurance" described in Item 5. of the Declarations are either reduced or exhausted solely by payment of "loss," such insurance provided by this policy will apply in excess of the reduced underlying limit or, if all underlying limits are exhausted, will apply as "underlying insurance" subject to the same terms, conditions, definitions and exclusions of the "first underlying insurance" . . ..

The majority interprets these provisions to require that CPB's primary insurer actually have paid, in cash, the full amounts of its underlying limits of liability. I do not believe that the "loss" definition can be read in that way, however.

A.

First, the majority's reading of the "loss" definition runs headlong into *Handleman v. U.S. Fidelity & Guaranty Co.*, 18 S.W.2d 532 (Mo. App. 1929), which expressly holds that a settlement whereby a claimant fully releases a primary insurer, and recognizes satisfaction of its claim to the full amount of the primary insurer's limits of liability, constitutes "payment" of the primary insurer's limits, and triggers excess insurance coverage. Indeed, the result reached by the majority is inconsistent with what appear to be the only three Missouri-law cases to have

addressed this precise exhaustion question in the last 80 years: *Handleman*, and two cases following it, *Reliance Insurance Co. v. Chitwood*, 433 F.3d 660 (8th Cir. 2006) (Missouri law); and *U.S. Fidelity & Guaranty Co. v. Safeco Insurance Co.*, 555 S.W.2d 848 (Mo. App. 1977).

In *Handleman*, the excess policy required that the primary policy be "exhausted in the payment of claims to the full amount of the expressed limits thereof." 18 S.W.2d at 533. Although the court held that this provision required the insured to prove that the primary policy had in fact been exhausted (rather than merely seeking recovery of all damages in excess of the $3,000 underlying limits of liability), the court nevertheless held that the exhaustion provision did not require that the insured "has actually collected $3,000 [the underlying policy's limits] in cash." *Id.* at 534. The court explained:

> It may be well to state, however, that, though we rule that the provision in the policy requiring that the specific insurance be exhausted in the payment of claims to the full amount of the expressed limits thereof is a valid provision in the nature of a condition precedent to any liability thereunder, yet we cannot agree with the contention of the appellant that under said clause plaintiff, as one of the predicates for liability on the part of the defendant, must prove that he has actually collected $3,000 in cash, the full face of the primary policy of insurance. Such suggested construction is harsh and unreasonable, and particularly so in light of the fact that to so hold would be of no rational advantage to the insurer. ***Such condition is complied with when the insured proves that claims aggregating the full amount of the specific policy have been settled thereunder and full liability of the insurer discharged***. As was ruled in the case of *Zeig v. Mass. Bonding & Ins. Co.*[, 23 F.2d 665 (2d Cir. 1928)], in construing an identical provision in an insurance policy, "***there is no need of interpreting the word 'payment' as only relating to payment in cash. It often is used as meaning the satisfaction of a claim by compromise, or in other ways.*** To render the policy in suit applicable, claims had to be and were satisfied and paid to the full limit of the primary policies. Only such portion of the loss as exceeded, not the cash settlement, but the limits of these policies, is covered by the excess policy." [Quoting *Zeig*, 23 F.2d at 666.]
>
> ***If, therefore, plaintiff . . . can show that he compromised his claim for an alleged loss in an amount equal to the full expressed limit***, under said primary policy against the Fidelity & Deposit Company of Maryland, and that such compromise was a settlement in full of any and all liability on the part of said company under said policy, and left no further insurance therein in effect, ***then plaintiff must be held to have fully met such said condition precedent***.

Id. at 534-35 (emphasis added).[1]

While *Handleman* involved first-party burglary insurance coverage, it was followed in both *USF&G*, 555 S.W.2d 848, and more recently in *Chitwood*, 433 F.3d 660, both of which involve liability insurance. Neither case references the specific policy language at issue there; instead, both cases proceed on the basis that *Handleman* stated a rule generally applicable to the exhaustion of primary insurance coverage. Thus, *USF&G* states:

> Safeco, as excess carrier, is liable only when the primary insurer's (USFG) liability has been exhausted. Therefore, our first question is – Was USFG's liability exhausted by settlement [for less than its policy limits] or can it only be exhausted by payment of its full coverage as Safeco argues? This court, in *Handleman v. USF&G Co.*, 223 Mo. App. 758, 18 S.W.2d 532 (1929), while emphasizing that exhaustion of the primary insurance was a necessary condition precedent to liability under the excess policy, clearly held that "Such condition is complied with when the insured proves that claims aggregating the full amount of the specific policy have been settled thereunder and full liability of the insurer discharged." [*Id.* at 534.] Based on this precedent, we hold that USFG's liability was exhausted by the settlement with the Alonzos and Safeco's liability as the excess carrier arose.

555 S.W.2d at 853.

Similarly, *Chitwood* quoted *Handleman* for the proposition that "an insurance policy is exhausted 'when the insured proves that claims aggregating the full amount of the specific policy have been settled thereunder and full liability of the insurer discharged,'" 433 F.3d at 664 (quoting *Handleman*, 18 S.W.2d at 534), and noted that *USF&G* had similarly held "that an excess insurer's obligation was triggered when the primary insurer reached a settlement for less than the policy limit." *Id.*

To my knowledge, *Handleman*, *USF&G* and *Chitwood* are the only three Missouri-law cases in the last 80 years to have addressed the precise issue we face today: whether a primary

[1] While the majority characterizes this as a "gratuitous discussion" and therefore *dictum*, it appears that the *Handleman* court intended this discussion to guide further proceedings on remand of the case. As discussed in the text, later cases have interpreted the quoted passage as a holding of the court.

insurer's settlement with a claimant for a cash payment of less than the primary's limits, but which results in satisfaction of the claim up to those limits, exhausts the primary policy. All three reach the same result – a result contrary to the majority's here. Under these cases, Great American's liability on its excess insurance policy was triggered when Appellants reached a settlement with Virginia Surety that resulted in satisfaction of Appellants' claims to the full extent of Virginia Surety's liability limits, even though Virginia Surety did not pay, in cash, the full amount of its policy limits to the Appellants.

The policy language at issue here cannot be meaningfully distinguished from the language at issue in *Handleman*.[2] While certain provisions of Great American's policy provide that its excess coverage is triggered "*solely by* payment" or by "*actual* payment," Great American's arguments ultimately depend on reading the words "payment" and "paid" to require the actual outlay of cash in the full amount of the primary policy's limits. But that argument was expressly rejected in *Handleman*: "there is no need of interpreting the word 'payment' as only relating to payment in cash," because the word "payment" "often is used as meaning the satisfaction of a claim by compromise, or in other ways." 18 S.W.2d at 534-35. I find it significant that, presumably to avoid *Handleman*'s construction of the bare word "payment," other insurance policies require that sums be "actually paid *in cash* in the settlement or satisfaction of losses."[3] Great American's policy contains no such qualifier; under *Handleman*, it cannot be added by judicial construction.

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[2] I agree with the majority that the issue presented must be decided based on the language of the policy at issue here, and that there is no Missouri public policy preventing an excess insurer from conditioning its coverage obligations on full payment, in cash, of the underlying liability limits, if it does so with sufficient clarity in the policy itself. Great American simply failed to do so here.

[3] *See, e.g., Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 342 (Mass. 2009); *Central Ill. Light Co. v. Home Ins. Co.*, 795 N.E.2d 412, 422-23 (Ill. App. 2003).

The majority also relies on the fact that the policy in *Handleman* referred to the "payment of *claims*," while Great American's policy refers to the "payment of '*loss*.'" But whatever difference there may be between the two terms, when considered in the abstract, here the "loss" definition of Great American's policy itself refers to payments made "in settlement or satisfaction *of a claim*." The minor wording difference between the policies at issue here and in *Handleman* cannot justify our disregarding *Handleman*'s reading of the word "payment."

The majority emphasizes that Great American's policy refers to "*sums* actually paid." But even if "sums" is read as the majority suggests – namely, to mean "an indefinite or specified amount of money" – that still leaves unanswered the question *Handleman* directly addresses: what actions by the primary insurer constitute "payment" of that "indefinite or specified amount of money"? A "specified amount of money" was at issue in *Handleman* too: the underlying policy limits of $ 3,000. *Handleman* did not suggest that this "specified amount of money" was irrelevant; instead, it held that the "specified amount of money" could be "paid" by satisfaction of an underlying claim, not merely by payment in cash. The use of the word "sums" in the Great American policy does not, in my opinion, justify the majority's departure from *Handleman*.[4]

B.

The majority's reading of the "loss" definition to require payment in cash also produces absurd results in the context of the policy as a whole.[5] If the *definition* of "loss" is substituted for the *word* "loss" in the insuring clause, the following results:

> We will pay on behalf of the Insured the amount of [those sums actually paid in settlement or satisfaction of a claim which you are legally obligated to pay

[4] I also question whether the exhaustion provision, § II(B)(4), has any real relevance here. It appears to address the situation where *prior* "losses" have either reduced, or wholly exhausted, the primary insurer's limits. Unlike the situation contemplated by § II(B)(4), Appellants are not seeking to have Great American's policy "apply as 'underlying insurance'" (*i.e.*, with a defense obligation, etc.).

[5] This argument was made by Appellants both in their briefing and at oral argument.

> as damages] covered by this insurance in excess of the "Underlying Limits of Insurance" shown in Item 5 of the Declarations, subject to Insuring Agreement Section II., Limits of Insurance.

Thus, substituting the "loss" definition into the insuring clause turns Great American's policy into a reimbursement agreement: Great American will only pay "on behalf of the Insured" sums which have (*already*) been "actually paid in settlement or satisfaction of a claim."

That cannot be right. Importing the "loss" definition, as interpreted by the majority, directly into the insuring clause would render the insuring clause itself ambiguous. The insuring clause promises to make payment "on behalf of the Insured" – presumably, to third parties to whom the Insured has been found liable. Yet, according to the "loss" definition, Great American would only be obligated to pay "on behalf of the Insured" after *someone else* has "actually paid [sums] in settlement or satisfaction of a claim" against the Insured. The most common situation will be that an Insured has no insurance coverage, apart from its Great American policy, above the limits of its primary insurance. Reading the "loss" definition into the insuring clause in the manner the majority suggests would require the Insured to actually pay its excess liability before seeking reimbursement from Great American. Yet a payment *to* the Insured is not a payment "on [his] behalf."

Great American's policy plainly contemplates that payments "on behalf of the Insured" are different from payments *to* the Insured. The "Terms Conformed to Statute" provision of the policy (§ VI(K)), states that, "[i]f we are prevented by law or statute from paying on behalf of the Insured, then we will, where permitted by law or statute, indemnify the Insured." Section VI(K) plainly contemplates that, but for a contrary law or statute, Great American will pay *third parties* "on behalf of the Insured" for sums for which the Insured is legally obligated; it will *only* pay the

Insured directly where a statute prevents Great American from paying third parties "on behalf of the Insured."[6]

C.

Although the majority emphasizes the benefits Great American received due to the existence of Virginia Surety's primary coverage, in terms of Virginia Surety's obligation and incentive to investigate and defend claims implicating both primary and excess coverage, that argument is undercut to a significant degree by the Great American policy's "Maintenance of Underlying Insurance" provision (§ VI(G)). Section VI(G) provides that, if the Insured fails to keep the underlying policies "in full force and effect," and "maintain[ ]" the underlying insurance's "Limits of Insurance," then Great American "will only be liable to the same extent that we would have been had you fully complied with these requirements." Arguably, as a result of the Appellants' settlement with Virginia Surety, CPB has failed to "maintain" the limits of Virginia Surety's primary coverage as it relates to this claim. Yet the consequence for such a failure to "maintain" primary coverage specified in § VI(G) is not the outright termination of Great American's obligations under its excess coverage – the forfeiture the majority enforces here – but instead the *continuance* of Great American's obligations, subject to a credit for the amount of primary coverage which would otherwise have been available.

Conclusion

The provisions of Great American's policy reflect that actual payment of underlying limits is not necessary, but instead that Great American's payment obligations accrue when the

[6] I note that § VI(H)(4) of the policy provides that, "[i]f the 'Underlying Limits of Insurance' are exhausted solely by payment of 'loss,' no insured will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent." It is unusual that the policy would prohibit voluntary payments by the Insured, if Great American's own payment obligations were only triggered by the "actual payment" of the Insured's liabilities by another party.

Insured or its primary insurer is "obligated to pay" an amount in excess of primary limits, and when the amount that the Insured "owes" is "finally . . . determined." Even if "payment" of the underlying limits were required, under the wording of Great American's policy and the rule announced in *Handleman*, Appellants' settlement with Virginia Surety constituted "payment" of the full underlying liability limits, since it resulted in the satisfaction of $1 million of the Appellants' underlying claim. In my opinion the majority's resolution of the exhaustion issue cannot be squared with prior Missouri caselaw, or with the language of Great American's policy. I accordingly dissent from the majority's holding that Appellants failed to establish that the Virginia Surety policy was exhausted, and thus failed to show that Great American's excess coverage was ever triggered.[7]

Alok Ahuja, Judge

[7] I recognize that Great American raises additional arguments by way of a cross-appeal which could arguably support affirmance, independent of the exhaustion issue. Because the majority has not addressed these additional issues, I do not discuss them.