CASE NO. SC91098

IN THE MISSOURI SUPREME COURT

KATHLEEN SCHMITZ AND CRAIG EWING,

Appellant-Respondents,

vs.

GREAT AMERICAN ASSURANCE CO., a/k/a
GREAT AMERICAN INSURANCE, et al.

Respondent/Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
The Honorable Gary M. Oxenhandler, Circuit Judge

SUBSTITUTE BRIEF OF RESPONDENT / CROSS-APPELLANT

Paul L. Wickens #23549
Kyle N. Roehler #51727
FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.
911 Main Street, 30th Floor
Kansas City, Missouri 64105
Phone: (816) 472-7474
Fax: (816) 472-6262
ATTORNEYS FOR RESPONDENT GREAT AMERICAN ASSURANCE COMPANY

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases

OTHER:

JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

This is an appeal from a Judgment rendered in the Boone County Circuit Court.

The Judgment was affirmed by the Court of Appeals in *Schmitz v. Great American Assurance Co.*, No. WD71160 (Mo. App. W.D. June 1, 2010). This Court sustained Appellants' Application for Transfer. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

In this equitable garnishment action, Plaintiffs Kathleen Schmitz and Craig Ewing appeal the trial court's judgment that a preceding judgment obtained by § 537.065 for $4,580,076.00 was unreasonable pursuant to the test adopted by this Court in *Gulf Ins. Co. v. Noble Broadcast, Inc.*, 936 S.W.2d 810 (Mo. banc 1997). The trial court concluded a reasonably prudent defendant in the position of Columbia Professional Baseball, LLC ("CPB") would have paid $2.2 million to settle plaintiffs' claim. *Id.* The plaintiffs also appeal the trial court's ruling that plaintiffs failed to exhaust the limits of the underlying carrier's policy, which precludes recovery from Great American. Consistent with the standard of review applicable to court-tried cases, Great American submits this statement of the facts in the light most favorable to the prevailing party, and disregarding all contrary evidence. *T.B.G. v. C.A.G,* 772 S.W.2d 653, 654 (Mo. banc 1989). In a court-tried case, the trial court is free to believe or disbelieve all, part, or none of the testimony of any witness. *Id.*

A. Background

This equitable garnishment action follows plaintiffs' wrongful death action, which arose from the death of their daughter Christine Ewing (the "Wrongful Death Action"). Ms. Ewing died on July 15, 2003, after a tragic fall from a portable rock-climbing wall when the cable attached to her harness separated and broke. **Trial Ex. 61.** The wall was operated by Marcus Floyd *d/b/a* Columbia Climbing Gym at Taylor Stadium, on the campus of the University of Missouri in Columbia. **Trial Exs. 62 & 64.** The accident occurred during a minor league baseball game hosted by CPB. **Trial Exs. 62 & 64.**

At the time of the accident, CPB was insured by Combined Specialty Insurance Company, now known as Virginia Surety Company ("Virginia Surety"), as its primary insurer, with a policy limit of $1,000,000 per occurrence. **Trial Ex. 68.** Great American Assurance Company ("Great American") also insured CPB with a policy of pure excess insurance with a liability limit of $4,000,000 in excess of the $1,000,000 primary policy. **Trial Ex. 69.** Great American's excess policy included no duty to defend. **Trial Ex. 69. p 7.**

B. The Wrongful Death Action and CPB's Demands for Defense and Indemnity

Plaintiffs filed the wrongful death action alleging aggravating circumstances in the Circuit Court of Boone County, Missouri, on March 19, 2004, naming Marcus Floyd as the sole defendant. **Trial Ex. 61.** A criminal action was also filed against Marcus Floyd in Boone County for involuntary manslaughter for Christine Ewing's death. On June 14, 2004, the Plaintiffs and Floyd entered into a Settlement Agreement. In exchange for a complete release of all claims against him, Floyd agreed to pay Plaintiffs $700,000 from his total liability policy that provided $1,000,000 in coverage. **Trial Ex. 55.**

Three days earlier, on June 11, 2004, Plaintiffs filed an Amended Petition adding CPB as a Defendant. **Trial Ex. 62.** The sole theory of recovery asserted against CPB was that it was vicariously liable for Floyd's actions. **Trial Ex. 62.** Plaintiffs contended the operation of the climbing wall was inherently dangerous, and because CPB was in possession of the premises where the climbing wall was located, they alleged CPB was

vicariously liable for Floyd's conduct. **Trial Ex. 62.** CPB denied liability and alleged that Floyd was an independent contractor for whom CPB had no legal responsibility.

CPB subsequently requested defense and indemnity from Virginia Surety and Great American for the plaintiffs' claims. **Trial Exs. 31, 33, 36, 37.** As is more fully set forth in later sections, Virginia Surety denied any duty to defend or indemnify CPB, and Great American followed the lead of Virginia Surety as primary insurer for CPB, under the following form excess insurance policy**.**

C. The § 537.065 Settlement Agreement and March 16, 2005 Judgment.

Even before suit was filed against CPB, and before CPB received a copy of Great American's excess policy, Hamp Ford (counsel for CPB) suggested a § 537.065 Settlement Agreement to plaintiffs. **Trial Ex. 23**. In his letter dated July 2, 2004, Ford stated CPB was agreeable to an uncontested judgment against CPB. **Trial Ex. 23.**

On December 28, 2004, Plaintiffs and CPB entered into a Settlement Agreement pursuant to § 537.065. **Trial Ex. 57.** At the time of execution of the § 537.065 Settlement Agreement, Great American had no duty to defend CPB. **Trial Ex. 69.** The Settlement Agreement provided that the plaintiffs would collect on their Judgment only from the Virginia Surety and the Great American policies. **Trial Ex. 57.**

An essential term of the § 537.065 Settlement Agreement was that plaintiffs execute a document stating that they did not hold the Wendt family (the sole owners of CPB) responsible for the accident. **Tr. 54:12-55:6.** CPB never would have agreed to the § 537.065 Settlement Agreement without the exoneration letter. **Trial Ex. 49, p. 78:2 – p. 80:8.** Nevertheless, the exoneration letter was not a part of the written § 537.065

Settlement Agreement. **Tr. 54:12-55:6.** CPB denied all liability to Plaintiffs from the time of the accident through the taking of the Deposition of CPB's President, Wendt. See Trial Ex. 49 (Depo. of Wendt at 43-44, 48, 49, 59, 81).

Once the § 537.065 agreement was signed, CPB no longer had any financial risk, and the amount of the § 537.065 Judgment was irrelevant to CPB. **Tr. 67:2-20.** Although not a part of the written document, CPB agreed to a Judgment in any amount plaintiffs' desired. **Id.**

The § 537.065 Settlement Agreement specifically addressed CPB's conduct and ability to contest evidence at the anticipated hearing. For example, it prohibited CPB from accepting a defense from its insurers on a reservation of rights. **Trial Ex. 57, ¶ 2a.** The parties to the § 537.065 Settlement Agreement concealed the agreement's existence from CPB's insurers. Counsel for CPB specifically instructed the University of Missouri to avoid publicity on the matter because plaintiffs wanted the insurers' first notice of the settlement to be upon receipt of a summons in the subsequent garnishment action. **Trial Ex. 35.** In accordance with that desire, the § 537.065 Settlement Agreement provided that The Mavericks (i.e. CPB) would not oppose the scheduling of the matter for "trial" in Boone County or "such other court as the cause may be properly filed or transferred to." **Trial Ex. 57, ¶ 26.**

D. The March 16, 2005 Hearing in Accordance with the § 537.065 Settlement Agreement.

On March 16, 2005, a hearing was held and Plaintiffs obtained an uncontested Judgment for $4,580,076.00. **Trial Ex. 66.** Apparently, on March 16, Judge Holt also heard evidence and approved the wrongful death settlement between Plaintiffs and Defendant Floyd. **See Appellants' Statement of Facts; Trial Exs. 66, 67.** Counsel for CPB admitted the hearing before Judge Holt was not a contested trial or an adversarial proceeding. **Tr. 72:3-23.**

Although the case was a Boone County Case, the hearing was held before Judge Holt, in Calloway County, Missouri, at the agreement of the parties. **Trial Ex. 66.** The hearing was brief. The transcript of the proceedings was forty, double-spaced, typewritten pages. **Trial Ex. 67.**

Plaintiffs failed to present evidence establishing CPB's liability for Christine Ewing's death. **Trial Ex. 67.** There was evidence that the accident occurred at a CPB baseball game, but no evidence was presented to support liability of CPB or the conclusion that the operation of the climbing wall was inherently dangerous. **Trial Ex. 67, pp. 3-9; Tr. 127:16-131:13, 133:18-135:8.**

Plaintiffs presented evidence of purported "economic losses" through an expert report, which projected the decedents anticipated earning capacity at $1,145,019.00. **Trial Ex. 67, p. 33.** The expert did not appear live and his report was introduced through the testimony of one of the plaintiffs. **Trial Ex. 67, p. 33.** Although the testimony was inadmissible hearsay, the report and testimony regarding the opinions expressed therein

were admitted without objection. **Trial Ex. 67, p. 33.** In addition to consenting to the admission of the report, Counsel for CPB did nothing to challenge the $1.145,019.00 alleged "economic losses" through cross-examination to prove: (a) the $1,145,019.00 was the highest end of a range of projected earning capacities, (b) the low end of the range was $456,247.00, (c) the deduction for personal consumption made by the expert was only 27%, and (d) the $1,145,019.00 assumed decedent had, or was reasonably expected to provide financial support to the plaintiffs. **Trial Exs. 13 & 67.** The Judgment submitted and signed immediately by the Court with no additions or changes was for $4,580,076.00, which is $1,145,019.00 multiplied by 4. **Trial Exs. 13, 66, 67.** The amount of the judgment was written in the judgment by appellants' counsel before the hearing, and before it was furnished to the court for signing. **Tr. 68:17 – 69:8; 322:21 – 234:4.**

Despite the fact that plaintiffs admitted they were not receiving any financial support from the decedent in their depositions, plaintiffs were not cross-examined on the issue. **Trial Exs. 67, 47, p. 29, ll. 16-21, 48, p. 31. l. 10- p. 32, l. 3.** Judge Holt was not advised of the fact that the decedent filed for bankruptcy six months prior to her death, or that as a result of the bankruptcy and her financial difficulties, the deceased had actually become financially reliant upon her mother for support and lodging. **Trial Exs. 67, 48, p. 28, l. 2 – p. 32, l. 3.**

Plaintiffs also presented evidence that the decedent was able to experience pain, fright and suffering after the fall but before she was declared dead. That testimony was introduced through a letter from a doctor - - again testified to by the plaintiffs, not

through live testimony. **Trial Exs. 67, p. 33, & 13.** None of the decedent's medical records were introduced into evidence. **Trial Ex. 67.** The medical records reflected that the plaintiff was immediately unconscious following her fall and declared brain dead shortly after the accident and, therefore, the deceased could not experience conscious pain and suffering. **Trial Exs. 8-11 & 70; L.F. 759.**

CPB appeared at the hearing through Kristen Dickinson, a lawyer with no working knowledge of the case. **Tr. 70:7-22.** CPB only appeared at the hearing so that the record would reflect that CPB was present. **Tr. 70:7-22.** At the hearing, CPB made no argument, did not cross-examine any witnesses, and raised no objections. **Trial Ex. 67.** CPB did nothing to contest the Judgment. **Tr. 72:7-17; Trial Ex. 67.**

CPB effectively consented to a judgment in whatever amount Plaintiffs chose to present to the court in a pre-prepared Judgment for execution at the end of the hearing. When CPB first proposed the § 537.065 Settlement Agreement, counsel for CPB stated:

> In the alternative, we would agree to work toward drafting a § 537.065 agreement under which on behalf of the Ewings action could be brought against The Mavericks under a petition, the language of which we would have to agree on, that would permit an uncontested action on behalf of the Ewings against The Mavericks.

Trial Ex. 21.

Primary counsel for CPB specifically instructed Kristen Dickinson not to contest the judgment. **Tr. 66:9-67:1.** At the conclusion of the plaintiffs' evidence, plaintiffs furnished a Judgment to Judge Holt for signature. **Trial Exs. 66 & 67.** The Judgment

was prepared before the hearing, and counsel for CPB helped prepare the Judgment. **Tr. 68:17 - 69:8.** When furnished to Judge Holt, the amount of the award, $4,580,076.00, was already determined and written on the Judgment by plaintiffs' counsel. **Tr. 322:21 - 324:4.** All the written entries in the proposed judgment, including the amount of the judgment, were written in by Plaintiffs' counsel prior to submission to Judge Holt for signature. **Id.**

When presented with the proposed Judgment form, the following occurred:

Judge: Plaintiff rests, any evidence from Defendants?

Attorney for CPB: No your honor.

Judge: Do we have a judgment?

TKR: Yes your honor.

Judge: All counsel have reviewed this matter?

Attorney for CPB: **Yes your honor**

Judge: Anyone have anything to say before the court signs the judgment as furnished?

TKR: No your honor.

Attorney for CPB: **No your honor.**

Judge: Judgment per formal judgment this date.

Trial Ex. 67, p. 38 (emphasis added).

At that time, Judge Holt immediately signed the Judgment he was furnished with the judgment amount provided by Plaintiffs' counsel with no additions, deletions, or changes. **Trial Exs. 66 & 67.** When Judgment was entered in the wrongful death action,

Great American had no duty to defend CPB. **Trial Ex. 69.** Plaintiffs' counsel admitted Great American received no notice of the § 537.065 Settlement Agreement or the subsequent hearing in accordance with that Agreement. **Tr. 73:9-16.** CPB's counsel admitted that it was his intention to not disclose the § 537.065 agreement or judgment to the insurers until they were served with the garnishment action. Tr. 85:8-14.

At all relevant times, the Great American policy required CPB to provide it notice of claim, and to cooperate in the defense of a claim or suit. **Trial. Ex. 69.** Before suit could be brought against Great American, the policy further required that CPB comply with the terms of the policy, and that any amount sought had to be: (a) a result of a settlement with Great American's consent, or (2) by "actual trial and final judgment." **Trial Ex. 69.**

E. The Instant Garnishment Action & Plaintiffs' Failure to Exhaust the Virginia Surety Policy

On May 20, 2005, plaintiffs filed the instant garnishment action naming Virginia Surety, Great American, and CPB as defendants**. L.F. 26-29.** On December 23, 2005, plaintiffs filed their Amended Motion for Summary Judgment regarding Virginia Surety's coverage defense, which was premised on the exclusion in the policy for designated operations ("the Amusement Exclusion"). **Resp. Supp. L.F. 223-229.** On August 8, 2006, the court granted plaintiffs' Amended Motion for Partial Summary Judgment, and denied defendants' cross-motion for summary judgment, finding the Amusement Exclusion did not apply to the claims Plaintiffs asserted against CPB in the wrongful death action. **Resp. Supp. L.F. 573.**

Upon granting plaintiffs' Amended Motion for Summary Judgment finding that the Amusement Exclusion was not a defense to Virginia Surety's duty to defend CPB in the wrongful death action, Virginia Surety and the Plaintiffs entered into a settlement agreement resolving all plaintiffs' claims against Virginia Surety. **Trial Ex. 59.** Pursuant to the settlement agreement, plaintiffs received a payment of $700,000 of Virginia Surety's $1 million policy limit. However, plaintiffs agreed to give Virginia Surety a $300,000 "credit" to exhaust its policy limits. **Trial Ex. 59.** In light of the Virginia Surety and Floyd settlements, plaintiffs stipulated that Great American is entitled to a combined total credit of $1.7 million. **Trial Ex. 59.** In addition to paying Plaintiffs $700,000, Virginia Surety also entered into another settlement agreement with CPB. **Trial Ex. 60.** As part of that agreement, Virginia Surety paid CPB $50,000 for past and <u>future</u> costs of its defense. Virginia Surety further agreed to pay as much as an additional $25,000 for CPB to defend in the garnishment action and acknowledged its continuing coverage obligations notwithstanding the stipulated "exhaustion" per its agreement with the Plaintiffs. **Trial Ex. 60, ¶ 15.** At no point in the agreement did CPB acknowledge that the "credit" granted by the Plaintiffs would serve to exhaust Virginia Surety's policy limits, or that Virginia Surety had no continuing coverage for future claims on the $300,000 gap between Virginia Surety and Great American's policies. **Trial Ex. 60.**

Great American's policy is a pure excess policy. **Trial Ex. 69.** It only provides coverage for "the amount of 'loss'" in excess of the "Underlying Limits of Insurance."

Trial Ex. 69, § 1. Great American's policy only applies upon exhaustion of the primary carriers' underlying limits pursuant to § II. B. 4. **Trial Ex. 69.** That section states:

> **B. The Limits of Insurance of this policy will apply as follows:**
>
> **4. ...the "Underlying Limits of Insurance" described in item 5. of the Declarations are either reduced or exhausted solely by payment of "loss".**

Trial Ex. 69, § II. B. 4. (emphasis added).

The policy further defined "loss" as "those sums actually paid in settlement or satisfaction of a claim which you are legally obligated to pay as damages…" **Trial Ex. 69, § V. B. (emphasis added).**

F. Garnishment Action Proceedings Following the Virginia Surety Settlement

On September 28, 2007, Great American filed its Amended Answer. **L.F. 186-192.** Great American asserted several affirmative defenses including: (a) as an excess carrier with no duty to defend CPB, Great American could not be bound by the judgment obtained through § 537.065 settlement, (b) because the Virginia Surety primary policy was not exhausted, Great American had no duty to indemnify CPB for the March 15, 2005 judgment, and (c) the March 15, 2005 judgment was subject to review for reasonableness and was unreasonable in amount. **L.F. 186-191.** On September 28, 2008, the court synthesized the remaining issues for resolution as follows:

- Does Judge Holt's Judgment stand, and if it does, is the excess insurer bound by the amount of the judgment?

- If Judge Holt's judgment doesn't stand, what is the amount of a reasonable judgment?
- Regardless of how this Court arrives at the amount of a reasonable judgment (by Judge Holt's judgment standing [(see 1 above)] or by this Court making an independent determination of a reasonable judgment [(see 2 above)], does the excess insurance cover the judgment, that is, cover the loss.

L.F. 16. The court subsequently set the case for a two-day trial, and a briefing schedule was established. **L.F. 16-20.**

G. The "Reasonableness" Trial

A two-day court trial occurred on October 15-16, 2008. **Tr. 1-343.** The trial commenced with opening statements by each party. Evidence was presented pertaining to the accident facts **(Tr. 108-131, 133-135)**, CPB's lack of liability **(Tr. 108-131, 133-135),** and plaintiffs' damages **(Tr. 136-172, 239-268)**. The trial evidence proceeded as follows:

Plaintiffs and CPB's opening statements **(Tr. 6-30.).** Plaintiffs' evidence – call Hamp Ford, Jr., attorney for CPB – direct and cross-exam (**Tr. 31-106).** Mr. Ford offered no analysis or opinion of the value of the Plaintiffs' case against CPB.

Plaintiffs rest. **(Tr. 106).**

After moving for judgment, Great American provided the following admitted evidence:

Testimony of Sergeant Shawn Spalding, University of Missouri Police Department Investigation Unit, investigator of the Christine Ewing accident **(Tr. 107-136)**. Court received trial exhibits 1, 2A-26 including photos of the climbing wall and the broken strand of belay cable.

Great American next offered the expert testimony of attorney Michael Patton of the Turner, Reid, Duncan, Loomer & Patton firm of Springfield, Missouri **(Tr. 136-200)**.

Great American next offered deposition testimony of Gary Wendt, president of CPB. **Trial Ex. 49.**

Great American next offered the expert testimony of David "Art" Oliver, a respected Boone County lawyer who practiced as a defense lawyer in Boone County, Missouri for over 50 years. **Tr. 239-324.**

Great American offered 104 exhibits at trial. **Tr. iv-viii.**

Evidence showed that CPB had no role in the operation of the climbing wall. **Tr. 121:21-122:2.** Floyd's employees operated the wall, and CPB had no responsibility for inspecting or maintaining the wall. ***Id.*** CPB was not compensated for the wall's operation. **Tr. 89:24-90:18.** Floyd and his employees were independent contractors to CPB. The date of the accident was the first time Floyd had ever set up his wall at a CPB baseball game. **Trial Ex. 45, 77:11-22.**

Unbeknownst to CPB, nine months before the deceased's accident, Floyd was told by the climbing wall's seller that the accident cable was unsafe, and that it needed to be replaced. **Tr. 118:9 – 119:9, 129:13-19.** Although the original list price for the climbing wall was $15,000, Floyd bought it for $13,000 because a replacement cable was

necessary. Floyd never bought the replacement cables. ***Id.*** Floyd was charged with second-degree involuntary manslaughter for his role in Ewing's death. **Tr. 120:20-24.** A trial on that charge resulted in a hung jury, but a plea-bargain and guilty plea to a lesser charge of third-degree assault was reached. **Tr. 123:3-24.**

Ewing's death is believed to be the first fatality involving a portable climbing wall. **Tr. 126:20 – 127:15.** When used in its normal operation, riding a portable climbing wall does not pose an abnormal risk of injury. **Tr. 127:16 – 129:12; 133:19-134:7.**

Two attorneys testified as experts regarding the unreasonableness of the $4,580,076.00 Judgment. **Tr. 136-201, 239-323.** Applying the test set forth in *Gulf Ins. Co. v. Noble Broadcast, Inc.*, 936 S.W.2d 810 (Mo. banc 1997), Attorney Michael J. Patton opined that a reasonably prudent defendant in CPB's position would have been willing to resolve plaintiffs' claims for $350,000 to $420,000. **Tr. 141:13 - 143:10, 163:19 - 165:5.**

In reaching that opinion, he considered several factors including:

a. The status of Marcus Floyd as an independent contractor to CPB **(Tr. 144:18-145:7)**;

b. The lack of any allegation of active negligence against CPB **(Trial Ex. 70);**

c. CPB could only be found liable if the climbing wall was deemed inherently dangerous, and he believed there was a 40-50% a jury would not find the wall inherently dangerous **(Tr. 144:18 - 146:13)**;

d. Because Floyd was found criminally responsible and pleaded guilty and had already settled, there was a possibility the jury would "zero-in" on Floyd as being the sole cause of the accident, allowing CPB to try the case against an "empty chair" (**Tr. 149:2-152:18)**;

e. As it relates to CPB, there were no facts that could create "heat," or anger the jury resulting in a significant verdict (**Tr. 153:24 - 154:17)**;

f. The deceased's age, personality, and her loving relationship with her parents **(Tr. 156:5-25);**

g. Evidence that the decedent had gone through a personal bankruptcy and could not meet her financial obligations **(Trial Ex. 70)**;

h. The deceased provided no significant financial support to plaintiffs, and there was no evidence to suggest a reasonable expectation that she would have provided support to the plaintiffs in the future and, therefore, there was very little evidence of economic damage **(Tr. 157:11 -159:11)**;

i. The fact that plaintiffs' proffered economist and medical evidence through letters was incompetent and inadmissible **(Trial Ex. 70)**;

j. The lack of any wrongful death judgments in excess of $1 million in Boone County for single, adult children under similar facts **(Trial Ex. 70)**;

k. There was evidence of limited period of time when the plaintiff could have theoretically suffered conscious pain and suffering but in his experience, juries typically do not afford extensive awards for short periods of conscious pain and suffering **(Tr. 160:17 - 163:9)**; and

l. Boone County is a relatively middle of the road jurisdiction as it relates to typical jury awards **(Tr. 143:10-17).**

Great American also called David Oliver to testify regarding "reasonableness," and what a defendant would have settled the case for. **Tr. 239.** Oliver has been a member of the Boone County bar since 1956. **Tr. 240:8-14.** Oliver considered similar factors as Patton. **Tr. 246-260.** He believed the outside edge of a possible verdict against CPB was $500,000, and a reasonably prudent defendant would have been willing to settle the case for $250,000. **Tr. 257:13 - 260:20.**

Plaintiffs-Appellants presented no evidence as to what a reasonably prudent defendant would have paid to settle their claims and offered no expert testimony. **Tr. 31-106.** Counsel for CPB, Hamp Ford, also denied ever attempting to assess a probable verdict value or settlement value of the Plaintiffs' claims. **Tr. 33:19 - 34:7.** Great American also provided the live testimony of the University of Missouri detective who investigated the accident and he testified as to the failure of the cable and Marcus Floyd's criminal charges. **Tr. 108-31.**

Finally, Great American offered the deposition testimony of CPB's President Wendt who testified that CPB always disclaimed liability for the accident and that when

he entered into the § 537.065 agreement, he did so at counsel's advise, but really had no understanding of how the agreement operated. **Tr. 232.**

The Court also heard substantial evidence regarding: (1) the negotiations of the §537.065 agreement, (2) the terms and understandings of the parties of the § 537.065 agreement, (3) what occurred between plaintiffs and CPB leading up to the March 15, 2005 hearing, and (4) the proceedings before the wrongful death court on March 15, 2005. **Tr. 31–105.** Following the hearing, there was substantial post-trial briefing, including both parties filing Proposed Findings of Fact and Conclusions of Law. **L.F. 16-20.**

On May 13, 2009, the Court ruled on all pending issues as follows:

1. Great American was bound by the March 15, 2005 Judgment;
2. Judge Holt's March 15, 2005 Judgment was subject to an evaluation for reasonableness under *Gulf Ins. Co. v. Noble Broadcast,* 936 S.W.2d 810-815;
3. Under *Gulf,* plaintiffs' reasonable damages were $2.2 million; but,
4. The Great American policy required exhaustion of the "underlying insurance" by "actual payment" of the full amount of its limits and because that had not occurred, the conditions for payment by Great American had not been met.

L.F. 810-815.

On June 19, 2009, plaintiffs filed the instant appeal and on June 29, 2009, Great American filed its cross-appeal. **L.F. 810-823.**

On June 1, 2010, the Missouri Court of Appeals issued its Opinion affirming the trial court judgment by Judge Oxenhandler.

RESPONSE TO APPELLANTS' POINTS RELIED ON

POINT I

THE TRIAL COURT DID NOT ERRONEOUSLY DECLARE OR APPLY THE LAW IN RULING PLAINTIFFS COULD NOT RECOVER FROM GREAT AMERICAN BECAUSE ITS POLICY PREDICATED EXHAUSTION ON "SUMS ACTUALLY PAID", NOT NEGOTIATED EXHAUSTION, AND PLAINTIFFS FAILED TO EXHAUST VIRGINIA SURETY'S LIMITS BY "ACTUAL PAYMENT," IN THAT VIRGINIA SURETY ONLY PAID $700,000 OF IT'S $1 MILLION POLICY LIMIT.

- *Handleman v. U.S. Fidelity & Guaranty Co.,* 18 S.W.2d 532 (Mo. App. 1929).
- *Comerica, Inc. v. Zurich Am. Ins. Co.,* 498 F. Supp. 2d 1019 (S.D. Mich. 2007).
- *Wright v. v. Newman,* 598 F.Supp. 1178, 1197 (D.Mo. 1984).

POINT II

THE TRIAL COURT DID NOT ERRONEOUSLY DECLARE OR APPLY THE LAW AS SET FORTH IN *GULF INS. CO. V. NOBLE BROADCAST, INC.* 936 S.W.2D. 810 (MO. BANC 1997), BY EXAMINING THE REASONABLENESS OF THE UNDERLYING JUDGMENT, BECAUSE IT FOLLOWED THE SUPREME COURT'S STANDARD FOR JUDGMENTS OBTAINED UNDER § 537.065, IN THAT IT CONSIDERED THE SUM FOR WHICH A REASONABLY PRUDENT DEFENDANT IN THE INSURED'S POSITION WOULD HAVE SETTLED THE CLAIM, AND CONTRARY TO THE PLAINTIFFS' ARGUMENT, THE § 537.065

JUDGMENT WAS NOT THE RESULT OF A CONTESTED TRIAL ON THE MERITS.

- *Murphy v. Carron*, 536 S.W.2d 30 (Mo. Banc 1976).
- *Gulf Ins. Co. v. Noble Broadcast*, 936 S.W.2d. 810 (Mo. Banc 1997).
- *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297 (Mo.App.E.D. 2007).
- *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171 (Mo.App.W.D. 2000).

CROSS APPELLANT'S POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN RULING GREAT AMERICAN COULD BE BOUND BY THE $4,580,076.00 JUDGMENT BECAUSE A CONDITION PRECEDENT TO ENFORCING A JUDGMENT OBTAINED BY § 537.065 AGAINST AN INSURER IS A WRONGFUL DENIAL OF A DUTY TO DEFEND AND GREAT AMERICAN DID NOT WRONGFULLY DENY A DUTY TO DEFEND, IN THAT IT WAS A PURE EXCESS CARRIER WITH NO DUTY TO DEFEND OR INDEMNIFY COLUMBIA PROFESSIONAL BASEBALL UNDER THE TERMS OF ITS POLICY.

- *Rinehart v. Anderson*, 985 S.W.2d 363 (Mo.App.W.D. 1998).
- *Fred Webber, Inc. v. Granite States Ins. Co.,* 829 S.W.2d 589 (Mo.App.E.D. 1992).
- *Whitehead v. Lakeside Hospital Ass'n,* 844 S.W.2d 475 (Mo.App.W.D. 1992).

POINT II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FINDING COVERAGE UNDER THE TERMS OF THE VIRGINIA SURETY POLICY BECAUSE THE POLICY'S AMUSEMENT EXCLUSION APPLIED IN THAT A ROCK-CLIMBING WALL WITH AN AUTO-BELAY FOR RAPPELLING IS "EQUIPMENT PERSONS RIDE FOR ENJOYMENT."

- *Steffen v. Pacific Mut. Life Ins. Co.,* 442 S.W.2d 142 (Mo.App. 1969).

ARGUMENTS AND AUTHORITIES

RESPONSE TO APPELLANTS' POINT I

THE TRIAL COURT DID NOT ERRONEOUSLY DECLARE OR APPLY THE LAW IN RULING PLAINTIFFS COULD NOT RECOVER FROM GREAT AMERICAN BECAUSE ITS POLICY PREDICATED EXHAUSTION ON "SUMS ACTUALLY PAID", NOT NEGOTIATED EXHAUSTION, AND PLAINTIFFS FAILED TO EXHAUST VIRGINIA SURETY'S LIMITS BY "ACTUAL PAYMENT," IN THAT VIRGINIA SURETY ONLY PAID $700,000 OF IT'S $1 MILLION POLICY LIMIT.

A. Summary of the Argument

Virginia Surety only paid $700,000 of its $1,000,000 liability limits, and was only ever obligated to pay $700,000 of its $1,000,000 liability limits. Great American's policy specifically requires exhaustion through an actual transfer of money to the claimant in an amount equal to Virginia Surety's "Underlying Limits of Coverage," which is undisputedly $1,000,000. The Plaintiffs' agreement to fill the $300,000 gap by giving Virginia Surety a "credit" simply does not comply with the expressed terms of the Great American exhaustion clause. Since *Handleman v. U.S. Fidelity & Guaranty Co.*, 18 S.W.2d 532 (Mo. App. 1929), courts have recognized parties are free to define how an underlying policy is exhausted and an excess carrier can insist on actual payment of the underlying limits as an exhaustion term. *See, e.g., Great American Ins. Co. v. Bally Total Fitness Corp.,* No. 06C04554 (N.D. Ill.); *Comerica, Inc. v. Zurich Am. Ins. Co.,* 498 F. Supp. 2d 1019 (S.D. Mich. 2007); *Qualcomm, Inc. v. Certain Underwriters at Lloyds of*

London, 161 Ca. App. 4th 184 (2008); *Trinity Homes, LLC v. Ohio Cas. Ins. Co.*, 2009 U.S. Dist. Lexis 88697 (S.D. Ind. 2009). The unambiguous intent of Great American's policy may not be circumvented, and the policy terms cannot be altered by a self-serving, "contrived" agreement between Plaintiffs and the primary insurer, who are strangers to Great American's excess policy.

B. Evaluating the Policy as a Whole – There has Been no Exhaustion

In the absence of a statute or public policy dictating insurance coverage, a review of insurance coverage is governed by the terms of the underlying insurance contract. *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. banc 2007). The language of the insurance contract should be interpreted consistent with the meaning that 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). The policy must be evaluated as a whole, and its terms should not be interpreted in isolation. *Id.* at 133.

The context of Great American's policy as an excess policy is also a consideration. *Qualcomm, Inc.*, 161 Cal.App.4th at 184. "Excess or secondary coverage is coverage whereby…liability attaches only after a predetermined amount of primary coverage has been exhausted." *Id.* (citation omitted). "[It] is expressly understood by both the insurer and insured to be secondary to specific underlying coverage which will not begin until after that underlying coverage is exhausted and which does not broaden that underlying coverage." *Id.* Evaluating Great American's policy as a whole, with due consideration for its context as an excess policy, Great American's policy cannot be reached through plaintiffs' "contrived" agreement of exhaustion.

In "Section I. Coverage," Great American grants coverage for "the amount of "loss" in excess of the "Underlying Limits of Insurance," "*subject to* Insuring Agreement Section II., Limits Of Insurance." **Trial Ex. 69, § I (emphasis added).** Section II, "Limits Of Insurance," contains the policy's exhaustion clause. It describes *how* Great American's limits are applied and coverage is triggered. Its limits are reached when the "Underlying Limits of Insurance" are "exhausted[1] solely by payment of "loss." Section II states in relevant part:

> B. The Limits of Insurance of this policy will apply as follows:
>
> 1. This policy applies only in excess of the "Underlying Limits of Insurance…"
>
> 4. ... the "Underlying Limits of Insurance"[2] described in item 5. of the Declarations are either reduced[3] or <u>exhausted solely by payment of "loss"</u>…

[1] Exhausted is not defined by the policy. Exhausted's dictionary definitions include "to draw; to empty; to consume entirely, to draw off or let out completely…." Webster's Ninth Collegiate Dictionary, pg. 434 (Merriam-Webster 1989).

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

[3] The reference to "reduced" is only relevant in the context of a second claim in a policy period where the aggregate limit of the primary policy has been "reduced" but not exhausted by payment of the first claim.

Trial Ex. 69, § II. B. 4. (emphasis added).

The policy clarifies what it means to make payment of "loss" in its definition of "loss."

"V. DEFINITIONS

B. "Loss" means 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.

Trial Ex. 69, § V. B. (emphasis added).

The policy does not define "sum." When a policy term is not defined, the term's plain and ordinary meaning should be used, and reference to dictionary definitions is often appropriate. *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). *Merriam-Webster's* online dictionary 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. [4]

To summarize, Great American's ***coverage*** obligation is triggered when the Underlying Limits of Insurance are "exhausted."[5] **Trial Ex. 69, § II. B.1.4.** In Section II. Limits of Insurance, the policy states the "Underlying Limits of Insurance" are "exhausted ***solely*** by payment of **'loss**.'" **Id.** "**Loss**" is the "[**specified amount of money**] **that is actually paid in settlement or satisfaction of a claim which you are legally obligated to pay as damages….**" **Id.** Under the facts of the instant case, it is clear that the "specified amount of money" that had to be "actually paid" to achieve exhaustion was Virginia Surety's $1,000,000 Underlying Limits of Insurance. **Id.** That never happened. Virginia Surety only "actually paid" $700,000. Thus, Virginia Surety's underlying limits of insurance were never exhausted and Great American's coverage obligation was never triggered. The fact that Virginia Surety's policy was not exhausted, and continues to provide coverage is evidenced by its settlement agreement. **Trial Ex. 60.** Nowhere in that agreement does CPB agree that in light of Virginia Surety's

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

[5] A critical mistake the plaintiffs make in their analysis of the policy is assuming that exhaustion of the primary policy is synonymous with Great American's obligation to pay "loss." Although exhaustion will trigger coverage, it does not trigger an obligation to pay "loss." **Trial Ex. 69, VI. L.,** requiring exhaustion and a "final determination" of "loss."

$700,000 payment and Plaintiffs' $300,000 "credit" that Virginia Surety will have no further obligations for any other claims made for occurrences arising in that policy period. Moreover, the fact that Virginia Surety agreed to pay up to an additional $25,000 to CPB for future defense costs in the garnishment action, clearly acknowledges continuing coverage obligations following the agreement for stipulated exhaustion. **Trial Ex. 60, ¶ 15.** Thus, the suggestion that the Virginia surety policy was exhausted is disingenuine, and contracted by the very release documents on which plaintiffs rely.

C. Plaintiffs and CPB's Own Settlement Documents Belie the Assertion that "Payment" Means Something Different than "Money Actually Paid."

Despite their efforts to suggest **"payment"** means something other than **"money actually paid"**, the releases executed by the plaintiffs, Virginia Surety, and CPB indicate a clear understanding of **"payment"** that is consistent with the Great American policy. For example, the Settlement Agreement and Release between Virginia Surety and plaintiffs stated, in pertinent part:

- "It is the desire of Virginia Surety and [plaintiffs] 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 [plaintiffs]."

- "Virginia Surety hereby agrees to ***pay***… the ***sum*** of Seven Hundred Thousand Dollars ($700,000.00) jointly to [plaintiffs] and, in consideration therefore, [***plaintiffs***] will acknowledge partial satisfaction of the [Wrongful Death judgment]… to the extent of One Million Dollars ($1,000,000)… Further, [plaintiffs] will cause to be filed a dismissal with prejudice of Virginia Surety in the [equitable garnishment] lawsuit."
- "For and in consideration of the ***payment*** of the ***sum*** of SEVEN HUNDRED THOUSAND DOLLARS AND 00/100 ($700,000.00)…

Trial Ex. 59. Similar cases of the term "payment" are found in the agreement between Virginia Surety and CPB. Trial Ex. 60.

Notwithstanding their protests, the plaintiffs clearly appreciate the reasonable interpretation of the key policy terms of exhaustion contained in the Great American policy. Moreover, there can be no doubt that Virginia Surety only ***"actually paid"*** the "***sum***" of $700,000. Under the terms of the release, it was only obligated to "***actually pay"*** $700,000. In return, Virginia Surety ***received*** a release for the full underlying limits of $1,000,000. Because the ***sum*** of $1,000,000 was never ***"actually paid",*** the Virginia Surety policy was never exhausted and Great American's coverage obligation was never triggered.

D. Stipulated Exhaustion has been Rejected by Several Courts When Faced with Similar Policy Language.

Based on the unambiguous language of similar excess policies, courts have frequently rejected attempts at stipulated exhaustion. For example, in *Comerica Inc.*, 498 F.Supp.2d at 1019, the insured settled securities fraud litigation for $21 million. The primary insurer's policy had a $20 million liability limit. *Id.* The primary insurer only actually paid $14 million of the settlement in exchange for Comerica's agreement that the payment would serve to "fully exhaust" its policy. *Id.* Like Great American's policy, the excess policy in *Comerica* attached "only after all such 'underlying insurance' has been reduced or exhausted by payment for loss." On cross-motions for summary judgment, the court held the exhaustion clause unambiguously required *actual payment* of losses by the underlying insurer. The Court held:

> Payments by the insured to fill the gap, settlements that extinguish liability up to the primary insurer's limits, and agreements that give the excess insurer 'credit' against a judgment or settlement up to the primary insurer's liability limit ***are not the same as actual payment***.

Id. at 1032 (emphasis added). In commenting on the agreement reached with the primary carrier, the court noted that plaintiff:

> …could have litigated its dispute with Federal, which of course would have involved the risk of losing all coverage for the securities liability; but it also could have resulted in finding that Federal was liable for the entire $20 million, in which case Zurich's coverage would have been

> triggered. Comerica seeks the certainty that its settlement brought and the benefit of coverage from its excess carrier as if it had won its dispute with the primary insurer, despite language in the excess policy to the contrary. No public policy argument says that Comerica may have its cake and eat it too."

Id.

In *Citigroup, Inc. v. National Union Fire Ins. Co.,* 2010 U.S.Dist.Lexis 60128 (S.D.Tex. May 28, 2010), the insured agreed to "fill the gap" by paying $35 million out of its own pocket to the claimants. It argued that "[the excess carriers]...are left in the same position they would have been had the primary insurer paid the total amount of its liability limit." *Id.* at p. 7. It also claimed the "law…favors settlement, and [Citigroup] should not be punished for settling with the [primary carrier]." *Id.* Nevertheless, the Court concluded:

> The law does not need to supply an answer. The parties' agreed on one. A court may not allow the assured to pay the loss up to the point that it was obliged to have had and used primary coverage because that difference could alter the carrier's underwriting calculation. It cannot know, and we may not assume. Citigroup may have bought and consumed that coverage, but it chose not to. . . .The unambiguous terms of the policies prevent [the insured] from circumventing the payment requirement by functional exhaustion—a label without substance or rigor. Here, because Lloyd's did not pay its limits of $50 million, the excess carriers are not required to pay.

Id. at 7-8.

In *Trinity Homes, LLC v. Ohio Cas. Ins. Co.*, 2009 U.S. Dist. Lexis 88697 (S.D. Ind. 2009), the court interpreted an exhaustion provision and found the underlying policies were not exhausted. The plaintiff settled many of its claims with underlying insurers for amounts less than the underlying policy limits but stated in settlement documents that the payments would "exhaust" their policy limits. *Id.*

The Cincinnati policy was triggered by the "unavailability" of underlying insurance. With respect to the "availability" of underlying insurance, the policy drew a distinction between "full and partial payment of underlying insurance policy limits." *Id.* at 39-40. The policy stated "if the limits of 'underlying insurance' have been reduced by payment of claims, this policy will continue in force as excess of the reduced 'underlying insurance.'" *Id.* However, if "the limits of 'underlying insurance' have been exhausted by payment of claims," then Cincinnati's contractual liability was triggered.

Relying on *Comerica, supra,* the court concluded it was clear that the parties were bound by the agreement they made. The court concluded:

> ***Plaintiffs cannot circumvent that clear intention embodied in the contract simply by branding each settlement with an underlying insurer an "exhaustion" of the policy, when, in fact, it is patently nothing more than a "reduction" of the coverage under that policy.*** As the court in *Comerica* reasoned, to ignore language clearly drawing a distinction between reduction and exhaustion "would essentially require a holding

> that parties simply cannot contract for an excess policy to be triggered only upon full, actual payment by the underlying insurer."

Id. at 40 (emphasis added).

E. <u>Actual Payment by the Underlying Insurer is an Important Benefit to Great American and its Underwriting Calculations are Based on that Benefit.</u>

This case illustrates the precise concern the Great American policy was drafted to prevent. In the primary liability policy, Virginia Surety had a "duty to defend" CPB when claims against CPB fell within the terms of coverage. In contrast, in Great American's excess liability policy, it stated:

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

Trial Ex. 69, § III. A. (emphasis added).

Great American bargained for a benefit in its insurance policy with CPB predicated on the primary insurer's "duty to defend" and obligation to pay its entire limits before excess liability coverage was triggered. Great American bargained not only for a defense of the personal injury litigation by the primary insurer, it bargained for ***<u>the sort of ongoing good faith defense of CPB that one would expect from a primary insurer who has $1,000,000 at stake, not $700,000 or $1.</u>*** To permit the primary insurer to relieve itself of its duty to defend and its responsibility to indemnify its insured for a payment of less than its $1,000,000 underlying limits deprives Great American of the bargained for benefit provided by its policy.

In *United States Fire Ins. Co. v. Lay*, 577 F.2d 421 (7th Cir. 1978), the court refused to allow the plaintiff to stipulate that a primary carrier's policy was exhausted by a payment short of the primary carrier's limit. In so doing, the court noted that insisting on a full payment of the primary policy provided the insurer with an important benefit. It stated:

> We can conceive of good reasons for an excess carrier to be unwilling to accept liability unless the amount of the primary policy has actually been paid. A settlement for less than the primary limit that imposed liability on the excess carrier would remove the incentive of the primary insurer to defend in good faith or to discharge its duty to represent the interests of the excess carrier. Here, the primary insurer had no incentive whatsoever to reach settlement at a figure between $70,000 and $100,000. Moreover, the settlement agreement terminating [the primary insurer's] liability to the [plaintiff] made [the] subsequent wrongful death action against [the primary carrier] a sham.

Id. at 422. For similar holdings, *see Johnson v. Milgo Industrial, Inc.*, 458 F.Supp. 297 (D.Minn. 1978); *Citigroup v. National Union Fire Ins. Co.*, 2010 U.S.Dist. Lexis 60128, at p. 7-8 (S.D.Tex, May 28, 2010); *Comerica, Inc.*, 498 F.Supp.2d at 1019.

In addition to affecting the primary carrier's incentive to handle the underlying claim with appropriate consideration for Great American's interest, allowing the Plaintiffs and Virginia Surety to alter the terms of Great American's excess policy affects Great American's underwriting expectations. Courts have recognized that excess

carrier's set premiums based on the expectation that the underlying carrier will be required to ***actually pay*** its underlying limits before coverage is triggered. *Comerica,* 498 F.Supp.2d at 1034; *Qualcomm,* 161 Cal.App.4th at 200; *Citigroup,* 2010 U.S. Dist. Lexis 60128, at p. 7-8. Thus, it should come as no surprise that Virginia Surety's policy, which provided only $1,000,000 in coverage, required a premium of $8,386, whereas Great American's policy, which provided $4,000,000 in coverage, required a premium of only $4,000. **Trial Exs. 68 & 69.**

Moreover, there is strong public policy against binding an insurer to an agreement between the plaintiffs and Virginia Surety, who are strangers to Great American's excess policy. *Trinity Homes, LLC,* 2009 U.S.Dist.Lexis 24370 at p. 41 fn. 21. As such, the plain and unambiguous language of Great American's policy should be enforced as written. *Handleman v. U.S.F.&G Co.,* 18 S.W.2d 532 (Mo.App. 1929).

F. *Handleman* does not Provide Authority for Ignoring the Plain Language of Great American's Policy

In their brief, plaintiffs argue because of long-standing public policy favoring settlements, it is "settled law" that a party may exhaust a primary policy by stipulation, ***without regard for the terms of the excess policy.*** Plaintiffs fail to come forward with any precedent wherein a third-party claimant's stipulated exhaustion of a liability policy was upheld. Instead, plaintiff relies on *Handleman v. U.S.F.&G Co.,* 18 S.W.2d 532 (Mo.App. 1929), and two other cases relying on *Handleman* that involve first-party insurance. The concerns of collusion and the principals of equity are far different in

third-party cases. *United States Fire Ins. Co. v. Lay*, 577 F.2d 421 (7th Cir. 1978); *Johnson v. Milgo Industrial, Inc.*, 458 F.Supp. 297 (D.Minn. 1978).

In any event, *Handleman* simply does not support plaintiff's allegation that public policy supports stipulated exhaustion *regardless of the expressed terms of the excess policy.* Although the Court in *Handleman* indicated a plaintiff could stipulate to exhaustion in some instances, it held that it was dependent on the language of the policy. *Handleman,* 18 S.W.2d at 534. It also acknowledged that exhaustion was a valid condition precedent of an excess policy, and it was plaintiff's burden to prove compliance with the policy's terms. *Id.* at 534. The Court further acknowledged that policies of insurance must be enforced as written. *Id.* The Court stated:

> …[Q]uite often courts have gone far in the scope of judicial interpretation in aid of an insured. While it is the duty of the courts in proper cases to construe the contracts of the parties, yet they have no power to construct a new contract for them...

Id.

The plaintiff in *Handleman* was in the business of sponging and measuring cloths for manufacturers. After a burglary, he submitted a claim to his primary insurer, which had underlying limits of coverage of $3,000. The defendant also issued plaintiff an excess policy with limits of coverage of $3,000. To trigger coverage, the defendant's excess policy required that the underlying policy be "exhausted in the **payment of claims** to the full amount of the expressed limits." *Id.* at 533. At trial, no evidence of actual payment by the underlying carrier was presented. *Id.* The underlying claim was settled

for an amount less than the expressed limits of the primary policy, but the court disallowed defendant's efforts to introduce the settlement argument into evidence. *Id.*

The trial court instructed the jury that if it found the value of the stolen goods exceeded the primary policy limits of $3,000, then it could return a verdict in favor of the plaintiff to the extent that the value of the goods exceeded that amount. The Court of Appeals, ruled, however:

> This theory of the case in our view is not in accordance with the law. The policy sued on was issued and accepted subject to the express provision that it should recover and apply only after the prior $3,000 policy was exhausted in the payment of claims to the full amount of the expressed limits thereof, and in our view this provision is a condition precedent. **Its terms are plain and unambiguous as written.**

Id. at 534 (emphasis added). As such, the verdict for plaintiff was reversed, and the case remanded to the trial court for further proceedings. *Id.*

In *dictum,* in an apparent attempt to provide direction to the trial court on remand, the *Handleman* court cited *Zeig v. Mass. Bonding & Ins. Co.*, 23 F.2d 655 (S.D.N.Y. 1928)(which contained an identical exhaustion clause) for the proposition that "exhaustion" of a "claim" can occur through compromise of a "claim" and that "payment" of a "claim" was not necessarily restricted to a payment in cash. *Id.* It is that *dicta* on which the plaintiffs rely to make their public policy argument.

The gratuitous discussion about how the trial court ***might*** dispose of the case upon remand was clearly 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 (Mo.banc 1994).

Furthermore, just as *Handleman* did, the *Zeig* decision on which the *Handleman* dicta was based also acknowledged that an exhaustion clause may be written which requires actual payment of money.

> 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). Courts discussing the *Zeig* opinion have recognized that *Zeig* was decided on its policy language, not on any overarching public policy, and have distinguished *Zeig* when faced with different policy language. *See e.g., Wright v. Newman*, 598 F.Supp. 1178, 1197 (D.Mo. 1984)(stating *Zeig's* reasoning did not apply when the policy's exhaustion clause was unambiguous); *Qualcomm, supra*, at 198; *Comerica, Supra* at 1030.

Moreover, even within that dicta, the *Handleman* court clearly indicated the proof of payment plaintiff would have to provide was "…[1] that he compromise his claim for an alleged loss in an amount equal to the full expressed limit,…and [2] that such compromise was a settlement of any and all liability on the part of said company under said policy, and [3] left no further insurance therein in effect." *Handleman*, 18 S.W.2d at

535. I this case, Plaintiffs certainly cannot come forward with any proof that its "credit left no further insurance in effect." If there was another claim within submitted by CPB to Virginia Surety for an occurrence within its policy period, undoubtedly Virginia Surety would have $300,000 in remaining aggregate liability coverage. **Trial Exs. 59, 60.** Thus, even if we were to apply the *Handleman* dicta, Plaintiffs could not recover from Great American.

Plaintiffs also cite *U.S.F.&G Co. v. Safeco Ins. Co. of Am.,* 555 S.W.2d 848, 853 (Mo.App. 1977), and *Reliance Ins. Co. v. Chitwood,* 433 F.3d 660, 664 (8th Cir. 2006), which rely on *Handleman* for the proposition that a primary policy may be exhausted by stipulation *regardless of the expressed provisions of the exhaustion clause.* As is discussed above, that is simply not the holding of *Handleman.* Furthermore, *Reliance* and *U.S.F&G* do not discuss the policy terms that were before the court. As such, those decision are of limited guidance in the instant matter, particularly in light of *Handleman's* instruction that the permissiveness of stipulated exhaustion is controlled by the language of the policy. *Handleman,* 18 S.W.2d at 534.

Comparing the *Handleman* policy to the policy at issue also reveals crucial differences in their definitions of exhaustion. The policy in *Handleman* required exhaustion by "the payment of **claims** to the **full amount of the expressed limits**." No further guidance on exhaustion was contained in the *Handleman* policy.

In contrast, Great American's policy states the "'Underlying Limits of Insurance'…**are either reduced or exhausted solely by payment of 'loss.'" Trial Ex. 69, § II. B. 4. "Loss"** clearly denotes something different than **"claims."** Whereas a

"claim" is an "assertion of an **alleged right"**, **"loss"** is defined as "those **sums actually paid** in settlement or satisfaction of a claim which you are **legally obligated** to pay as damages…" Random House Webster's College Dictionary 2d. Edition. (1997); **Trial Ex. 69, § VI. L.** Thus, the *Handleman* policy focused on the *extinguishment of alleged* ***rights*** in defining exhaustion. In contrast, the Great American's policy focused on the ***"sums [per its dictionary definition – 'specified amount of money'] actually paid."***

Handleman refers to the payment of something that is unliquidated and contingent -- an "*alleged* right." In contrast, the Great American policy refers to a fixed amount that is liquidated -- "money *actually paid* in satisfaction of a claim which you are legally obligated to pay as damages…" Clearly, the differences between the provisions are stark, and *Handleman* does not support plaintiffs' invitation to define exhaustion in variation of the terms of Great American's excess policy.

G. Plaintiffs' Resort to Section VI. L. is of No Avail

Despite the policy's instruction that the "coverage provided by this policy" is granted by Section I., Coverage, "*subject to* …Section II., Limits of Insurance," plaintiffs resort to Section VI., Conditions, in search of coverage for their claim. Specifically, they assert their claim is covered pursuant to Section VI. L., which provides:

> **L. When "Loss" is Payable**
>
> 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.

Trial Ex. 69, § VI., L.

By its very title, it should be clear that Section VI. L. does not define exhaustion. It sets forth when "loss" is payable. Moreover, exhaustion, which triggers coverage, is not co-extensive with Great American's obligation to pay "loss." Two conditions must clearly be met before "loss" is payable. First, the "insured or the insured's 'underlying insurance' must be obligated to pay the 'full amount of the Underlying Limits of Insurance.'" Second, the amount of "loss" must be "finally determined." When both conditions are met, Great American will "promptly pay on behalf of the Insured the amount of "loss" falling within [its] policy." Moreover, from the definition of "loss" we know the judgment rendered in the wrongful death suit is not the type of determination to which the policy is referring. It is only those judgments that make a "final determination" of "loss" – i.e. determines the **"[specified amount of money] *actually paid*** in satisfaction of a claim you are legally obligated to pay…"

CPB clearly did not have an obligation to **actually pay** $4,586,076.00 after the wrongful death judgment was entered. Pursuant to, the Section 537.065 agreement, which was executed ***before*** the judgment, Plaintiffs expressly released and forever discharged CPB for any and all claims of the plaintiffs. **Trial Ex. 59.** Under that agreement, the only amount CPB had an obligation to ***"actually pay"*** was $100.00. **Id.**

The wrongful death judgment also did not "finally determine" the amount Virginia Surety, and Great American would be required to "**actually pay**" either. Although an uncontested judgment was rendered in the amount of $4,580,076.00, plaintiffs could not enforce or execute on that judgment against Virginia Surety. On the contrary, the instant garnishment action pursuant to V.A.M.S. § 379.200 was necessary to obligate Virginia Surety and Great American.[6] As we know, there were, ***and still are*** serious disputes as to

---

6 Plaintiffs cite *Farmers Mut. Ins. v. Drane*, 383 S.W.2d 714 (Mo. 1964) and cases following it for the proposition that a tortfeasor and its insured have obligations to a plaintiff, although inchoate until judgment, to a plaintiff at the moment causally related injuries are incurred. That general principle of law may be true, but it is not relevant. Again, parties are free to contract as to the conditions of exhaustion, or when loss is payable, under whatever terms they choose so long as the terms do not violate existing law. *Handleman*, 18 S.W.2d at 534. Great American's policy based exhaustion on a different obligation than the generalized, unliquidated duty to compensate covered claims. **See Trial Ex. 69, § II. B. 4.** It requires a legal determination that a liquidated sum, i.e. the underlying policy limits, must be "actually paid." **Trial Ex. 69, § V. B.** Applying Colorado law, a Missouri district court found no exhaustion after execution of a § 537.065 agreement and default judgment when the policy required payment of a "final judgment" for exhaustion in *Wright v. Newman*, 598 F. Supp. 1178 (D.Mo. 1984). Clearly then, Great American's exhaustion and payment of "loss" provisions relate to a different obligation than referenced by *Drane* and its progeny.

whether the plaintiffs' claim is covered by the Virginia Surety policy in light of the Amusement Exclusion. A "final determination" as to the applicability of the Amusement Exclusion has never been made. Until this court rules on that issue, a "final determination" of the "[amount of money] that is actually paid in satisfaction of a claim you are legally obligated to pay…" will not be made. *Reid v. Reid,* 879 S.W.2d 796, 797 (Mo.App.E.D. 1994).

Furthermore, even if for the sake of argument the applicability of the Amusement Exclusion was finally determined, it still did not resolve the issue of the "[amount of money] actually paid…" because the wrongful death judgment was subject to review for reasonableness under *Gulf Ins. Co. v. Noble Broadcast, Inc.* 936 S.W.2d. 810 (Mo. Banc 1997). After Virginia Surety settled, and on May 13, 2009, Judge Oxenhandler found the reasonable judgment to be $2,200,000. **(A 65)** Even that judgment, however, did not "finally determine" the amount of money that had to be "actually paid" to satisfy the legal obligation because of the instant appeal.

Thus, it is clear for several reasons that Section VI. L. is not the exhaustion clause and does not determine the issue of whether the exhaustion requirement of the policy was met. Even if that section did define exhaustion, which it does not, it is clear that Great American has, and has never had, an obligation to pay "loss" under its policy.

H. <u>Plaintiffs' Ambiguity Contentions Must Also Fail</u>

In their brief, plaintiffs use the term "ambiguous" sparingly. However, the unmistakable thrust of their arguments on pages 14-19 is that the policy is ambiguous. For example, plaintiffs allege the definition of "loss"- (a) "virtually guarantees [Great

American] will never have any liability", (b) would render "numerous sections of its insurance policy ambiguous and some sections virtually meaningless", and (c) "produces absurd results." Plaintiffs' ambiguity argument is not properly raised by their Point Relied On, and was not raised at the trial court level. At the trial court level, the only arguments made by the plaintiffs were: (1) their claim was covered because Virginia Surety's policy was "exhausted" according to their incorrect reading of Section VI. L., and (2) one may exhaust a primary policy by stipulation, regardless of the excess policy's terms, under *Handleman* and its progeny.

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;
>
> (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 maters 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 the 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)). Moreover, 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. Std. Ins. Co. of Wis. v. May*, 972 S.W.2d 595, 601 (Mo.App.W.D. 1998).

Ultimately, many of the plaintiffs' ambiguity arguments are based on the plaintiffs' reading of policy terms in isolation, as opposed to reading the policy as a whole, or on a mechanical approach to reading policy definitions which disregards the context in which the defined term is being used. *Seeck*, 212 S.W.3d at 133. Such an approach does not comport with the reading an ordinary person would give the policy. *Id.* at 132.

For example, the policy defines the term "Loss" as:

> Those sums actually paid in settlement or satisfaction of a claim <u>which you are legally obligated to pay as damages</u> after making proper deductions for all recoveries or salvage.

Trial Ex. 69, § V. B. 4. (emphasis added).

On page 15 of the appellants substitute brief, it argues that if one inserts ***select portions of the*** definition of "loss" into Section I., Coverage, ***without regard for context***, the provision is transformed into:

> We will pay on behalf of the Insured the amount of [sums actually paid in settlement or satisfaction of a claim] in excess of the 'Underlying Limits of Insurance'…"[7]

Plaintiff claims the above interpretation is "absurd" because it effectively states that "Great American….will pay a sum of money only after it has already paid that sum of money [] which, of course, is a circular construction…."[8] On the absurdity of the interpretation of the provision, the parties agree. However, the problem is not the language of the Coverage provision, or the definition of "loss." It is the unreasonable manner in which plaintiffs have chosen to selectively read the definition of "loss", and the manner in which plaintiffs have attempted to give meaning (or not give meaning) to the Coverage provision in light of the definition of "loss."

A more reasonable interpretation of the grant of Coverage which *does not selectively edit* the policy is that Great American: "…will pay on behalf of the insured the amount of [the specified money actually paid in settlement or satisfaction of a claim <u>which you are legally obligated to pay as damages</u>] covered by this insurance in excess of the 'Underlying Limits of Insurance'. " Such a construction is far more consistent with

---

7 Appellant-Respondents Substitute Brief, pp. 14-15.

8 Appellant-Respondents Substitute Brief, p. 15.

terms and definitions of the policy. A reasonable interpretation of that language is that of the amount that must actually be paid, Great American will pay that portion in excess of the underlying policy limits. The policy is not saying it will only pay what it has "**already** paid." It is clarifying that it will only pay its portion of the money that is "**actually** paid" and within its policy limits.

Plaintiff also apparently argues that Section II. B.4., the exhaustion clause, allows for exhaustion by some means other than "solely by payment of loss."

Section II. B. 4. Reads as follows:

> ….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 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," except for the terms, conditions, definitions and exclusions of this policy.

Precisely why they claim the above allows for exhaustion by some means other than "solely by payment of loss" is unclear. Plaintiffs claim the provision is in the disjunctive, which is true, but ignores the fact that it has three clauses, and the first clause is clearly applicable to either part of the disjunction. The first clause begins by establishing the overarching rule that the "Underlying Limits of Insurance" are "reduced or exhausted solely by payment of "loss." In other words, the underlying policy is

reduced or exhausted only by the underlying insurer's actual payment in money, its policy limits.

In the event that the underlying insurer's "payment of "loss" merely reduces the underlying limit, the second clause (but first part of the disjunctive) provides that Great American's policy "will apply in excess of the underlying limit." In other words, if the primary carrier only actually pays $700,000 of its $1 million policy limit, the Great American policy will apply in excess and will remain in excess until the remaining $300,000 is "actually paid."

The third clause (but second part of the disjunctive) assumes the circumstances of the first two clauses have *already occurred, i.e. that the underlying policy was already exhausted*. "If all underlying limits are exhausted", the second clause states the insurance provided by Great American's policy "will apply as 'underlying insurance." In other words, if the primary carrier actually pays its limits in settlement of a legal obligation of the insured, then Great American's policy will apply as "underlying insurance."

Although Great American's policy will apply as "underlying insurance" after exhaustion of the primary carrier's limits, that does not mean a payment obligation is triggered. In clear liability cases, primary carriers frequently choose not to litigate the underlying tort claim to its conclusion because of the cost of defense. When the primary carrier makes that decision, Great American's policy applies as "underlying insurance." However, Section VI. L. explains Great American will not pay "loss" until the amount that must be "actually paid" is "finally determined." For two examples of similar

exhaustion clauses and how they work, see *Comerica*, 498 F.Supp.2d at1022; *Trinity Homes*, 2009 U.S.Dist. Lexis 88697 at p. 36.

Plaintiffs raised other alleged ambiguities but those alleged ambiguities clearly demonstrate an effort to create an ambiguity where there is none. As such, Great American will not spend any additional time on the issue. Ultimately, the policy is unambiguous, and should be enforced as written. Under the unambiguous language of the policy, Virginia Surety's payment of $700,000 did not exhaust the policy limits and, therefore, no recovery may be had on Great American's policy.

RESPONSE TO APPELLANTS' POINT II

THE TRIAL COURT DID NOT ERRONEOUSLY DECLARE OR APPLY THE LAW AS SET FORTH IN *GULF INS. CO. V. NOBLE BROADCAST, INC.* 936 S.W.2D. 810 (MO. BANC 1997), BY EXAMINING THE REASONABLENESS OF THE UNDERLYING JUDGMENT, BECAUSE IT FOLLOWED THE SUPREME COURT'S STANDARD FOR JUDGMENTS OBTAINED UNDER § 537.065, IN THAT IT CONSIDERED THE SUM FOR WHICH A REASONABLY PRUDENT DEFENDANT IN THE INSURED'S POSITION WOULD HAVE SETTLED THE CLAIM, AND CONTRARY TO THE PLAINTIFFS' ARGUMENT, THE § 537.065 JUDGMENT WAS NOT THE RESULT OF A CONTESTED TRIAL ON THE MERITS.

A. Standard of Review

Plaintiffs misstated the applicable standard of review. A judgment entered in a court- tried case is governed by the following rules:

The judgment is presumed correct. *Smith-Scharff Paper Co., v. Blum*, 813 S.W.2d 27, 28 (Mo.App.E.D. 1991). On appeal, the Court's concern is whether the trial court reached the right result, and not whether the trial court's assigned reasons for the judgment were correct. *Kopp v. Franks,* 792 S.W.2d 413, 419 (Mo.App.S.D. 1990). The Court is obliged to affirm the trial court's judgment if the trial court reached the right result, regardless of its reasons. *Id.*

Appellate review of a court-tried case is further governed by the rule in *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976), which provides that a trial court's judgment will be affirmed unless it is not supported by substantial evidence, against the weight of the evidence, erroneously declares the law, or erroneously applies the law. When reviewing findings of fact in a court-tried case, the appellate court must accept as true the evidence, and all inferences from the evidence that are favorable to the prevailing party, and disregard any contrary evidence. *T.B.G. v. C.A.G.,* 772 S.W.2d 653, 654 (Mo. banc 1989). The appellate court must give due regard to the trial court's opportunity to judge the credibility of the witnesses. *Id.* In a court-tried case the trial court is free to believe or disbelieve all, part, or none of the testimony of any witness. *Id.*

B. Summary of the Argument

The plaintiffs claim the trial court erroneously declared or applied the law when it evaluated the reasonableness of the $4,580,076.00 Judgment pursuant to *Gulf Ins Co. v. Noble Broadcast, Co.,* 836 S.W.2d 810 (Mo. banc 1997), because they assert the Judgment was a product of a trial. Judge Oxenhandler determined that what happened on March 16, 2005 was not a trial. The parties completely deprived Judge Holt of an

opportunity to exercise his best judgment as to plaintiffs damages because what transpired on March 16, 2005 lacked any semblance of a truly adversarial proceeding. CPB did nothing at the hearing. It presented no evidence, cross-examined no witnesses, and made no objections. CPB consented to plaintiffs' proposed judgment. The parties "left no issues in dispute" for Judge Holt to resolve. *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297, 303 (Mo.App.E.D. 2007). Thus, "[t]he judgment was the result of a settlement, rather than a trial on the merits." *Id.* As such, plaintiffs' argument should be rejected as it is based on a factual premise that the trial court correctly rejected.

C. The *Gulf Ins. Co.* Standard Governs this Case

Because reasonableness is a condition precedent to the enforceability of a § 537.065 settlement, the insurer's right to challenge the reasonableness of a settlement is "absolute." *Gulf Ins.*, 936 S.W.2d at 815-816; *Borgard v. Integrated Nat. Life Ins. Co.*, 954 S.W.2d 532, 537 (Mo.App.E.D. 1997). Judge Holt did not determine the amount of the judgment. Even if he had, the "absolute" right to challenge the § 537.065 settlement for reasonableness would nevertheless apply. *See e.g., Rinehart v. Anderson*, 985 S.W.2d 363, 372 (Mo.App.W.D. 1998).

To determine the reasonableness of a § 537.065 settlement the Supreme Court of Missouri prescribed the following test:

> The test of whether the settlement amount is reasonable is what a reasonably prudent person in the position of the defendant would have settled for on the merits of the plaintiff's claim.

Gulf Ins. Co., 936 S.W.2d at 816. The test "involves a consideration of the facts bearing on liability and damage aspects of plaintiff's claim." *Id.* The test also involves consideration of the risks of going to trial. *Id.*

The reasonableness examination is not limited to a review of the evidence presented to the trial court at the time judgment was entered. In *Gulf Ins. Co.*, the Supreme Court considered detailed evidence regarding the settlement negotiations leading up to the entry of judgment, and evidence from the insured's defense counsel regarding his evaluation of the case. *Gulf Ins. Co*, 936 S.W.2d at 816. In *Norris v. Nationwide Mut. Ins. Co.*, 55 S.W.3d 366, 370 (Mo.App.W.D. 2001), this Court considered expert testimony from a personal-injury attorney who opined that the settlement was reasonable based on his experience and other similar settlements in Missouri. The Court also considered comparative fault. *Id.* at 369-70.

Guided by those authorities, Judge Oxenhandler applied the proper reasonableness test. At the two-day trial, defendants presented substantial evidence regarding liability and damages. Defendant presented testimony both by deposition designations and videotaped testimony from CPB. Defendant also called the investigating police officer to testify regarding his investigation. By deposition designation, the testimony of Marcus Floyd was received by the trial court.

Defendant called two pre-eminent defense attorneys who offered their opinions as to what a reasonably prudent defendant would have paid to settle plaintiffs' claim. In response, Plaintiffs failed to present any expert legal testimony applying *Gulf Ins. Co.*,

and they did virtually nothing to otherwise demonstrate the reasonableness of the $4,580,076.00 Judgment.

The plaintiffs' strategy was, and continues to be, to argue that the *Gulf Ins. Co.* test does not apply because the March 16, 2005 Judgment was obtained by trial. However, at trial in the garnishment action, Judge Oxenhandler heard substantial testimony regarding the negotiation of the § 537.065 Agreement and the terms of the agreement. Hamp Ford, counsel for CPB, appeared and testified regarding the agreement and the settlement hearing. Defendant's expert witnesses also testified regarding the §537.065 agreement and the settlement hearing of March 16, 2005. He also heard testimony and evidence about the proceedings of March 16, 2005. Judge Oxenhandler clearly rejected the plaintiffs' characterization of the March 16, 2005 proceedings as a trial.

Counsel for CPB admitted the March 16, 2005 hearing was not an adversarial or contested matter. **Trial Exs. 22, 57 and 62; Tr. 72:3-23.** From the earliest stages of negotiation of the § 537.065 Settlement Agreement, the parties agreed CPB would not contest the judgment. **Trial Exs. 22, 57 and 62.** CPB appeared through counsel with no working knowledge of the case. **Tr. 70:2-22.** Counsel for CPB was specifically instructed to take no action at the hearing. **Tr. 66:9 – 67:1.**

CPB appeared solely as an accommodation to plaintiffs. **Tr. 70:7-22.** CPB made no argument, cross-examined no witnesses, presented no evidence, and interjected no objections. **Trial Ex. 67.** CPB took no action despite the fact that some of the evidence

plaintiffs introduced was inadmissible, and much of the testimony was ripe for vigorous cross-examination. **Trial Ex. 67**.

CPB participated in the drafting of the Judgment, and it even consented to entry of the Judgment presented to Judge Holt. **Tr. 68:17 – 69:8.** When presented with the Order, the following occurred:

Judge: Plaintiff rests, any evidence from Defendants/

Attorney for CPB: No your honor.

Judge: Do we have a judgment?

TKR: Yes your honor.

Judge: All counsel have reviewed this matter?

Attorney for CPB: Yes your honor.

Judge: Anyone have anything to say before the court signs the judgment as furnished?

TKR: No your honor.

Attorney for CPB: No your honor.

Judge: Judgment per formal judgment this date.

Trial Ex. 67, p. 38 (emphasis added)**.** The Judgment presented to Judge Holt had the damages already determined and written-in by plaintiffs' counsel, which "left no issues in dispute at the wrongful death hearing.[]" *Auto-Owners Ins. Co.,* 231 S.W.3d at 304. Judge Holt immediately signed the judgment with no additions, deletions, or changes. **Trial Exs. 66 & 67.** After consideration of the above, Judge Oxenhandler correctly saw

the proceedings of March 16, 2005 and their resulting judgment for what they really were, a settlement, not a trial on the merits.

Plaintiffs claim because there was no agreement with CPB regarding the precise amount of plaintiffs' damages, the March 16, 2005 Judgment was not the product of a settlement. Plaintiffs' statement simply is not true. The record is clear CPB was agreeable to *whatever amount of judgment plaintiffs desired*, so long as it received the protection of § 537.065. **Tr. 67:2-20.** Moreover, after plaintiffs decided what amount they wanted and wrote that amount on the judgment they submitted to Judge Oxenhandler, it is clear from all of the aforementioned circumstances that CPB consented to that specific amount.

Plaintiffs also contend that even though they submitted the judgment with the amount already determined, Judge Holt was free to enter a judgment in a different amount. Thus, they argue the judgment was a product of Judge Holt's "independent judgment." As a factual matter, however, Judge Holt did not enter judgment in an amount different than the parties requested. He immediately executed the judgment as it was presented to him.

Furthermore, it was also theoretically possible that the trial court would reject the parties' proposed judgment in *Auto-Owners Ins. Co,* 231 S.W.3d at 297. Notwithstanding that possibility, the *Auto-Owners* Court found that the judgment was the product of a settlement. In so ruling, the Court stated the parties "left no issue in dispute at the wrongful death hearing…" *Id.* at 304.

Finally, there is simply no authority for the plaintiffs' contention that all a plaintiff must do to avoid review for reasonableness is provide the Court an opportunity to exercise "independent judgment". In *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171 (Mo.App.W.D. 2000), plaintiffs settled with several stove manufacturers under § 537.065 in connection with personal injury claims from carbon monoxide exposure. A hearing was held as a part of a § 537.065 settlement to determine plaintiffs' damages. Plaintiffs' counsel offered over 200 exhibits, including corporate documents of defendants, videotapes, pictures, numerous depositions, and evidence of decedents lost earnings and medical expenses. *Id.* at 173. As in the present case, defendants did nothing to oppose judgment being entered against them. *Id.* at 173-174. However, unlike the present case, the parties left it to the court to decide the amount of damages. *Id.* Plaintiffs argued for a judgment of $73,045,000.00, but the court awarded $30 million. *Id.*

The plaintiffs filed an equitable garnishment action against the stove manufacturers' insurer. The insurer lost on its coverage defense, but the trial court found that the insurer was entitled to a hearing on the reasonableness of the $30 million judgment under *Gulf Ins. Co.* *Id.* Before the reasonableness hearing, the insurer settled with plaintiffs for $9 million of its $10 million policy limits, and assigned plaintiffs its subrogation and contribution rights against Ferrellgas.

Plaintiffs subsequently filed suit against Ferrellgas, and asserted Ferrellgas had no right to conduct discovery on the reasonableness of the $30 million judgment. Although the trial court in the wrongful death action determined the plaintiffs' damages, this Court

nevertheless held Ferrellgas had an absolute right to challenge the judgment's reasonableness under *Gulf Ins. Co.* stating:

> [E]ven in the case of a garnishment action against an insurer, the insurer is entitled to the discovery necessary to determine whether the damages awarded were the product of collusion and whether they were reasonable from the point of view of a *reasonably prudent defendant. Gulf Ins. Co,* 936 S.W.2d at 816.

Id. at 182 (emphasis in the original). This Court added:

> *The fact that the trial court awarded damages is not dispositive of this issue, for he did so based on one-sided evidence not contested by defendant, not based on the type of cross-examination and presentation of contrary evidence which would have been offered if a Section 537.065 proceeding were not occurring…*

Id. (emphasis added). Thus, even if Judge Holt had determined plaintiffs' damages, which he did not, the $4,580,076.00 Judgment was nevertheless correctly subject to review by Judge Oxenhandler for reasonableness.

Plaintiffs suggest *Ferrellgas* is of no relevance because its context was a discovery dispute in a contribution action, not a garnishment action against an insurer. However, plaintiffs ignore what the Western District said about garnishment actions against insurers:

> [E]ven in the case of a garnishment action against an insurer, the insurer is entitled to the discovery necessary to determine whether the damages

> awarded were the product of collusion and whether they would be reasonable from the point of view of a *reasonably prudent defendant. Gulf Ins. Co.*, 936 S.W.2d at 816.

Id. at 182 (emphasis in original). The appellate court recognized the differences in context, but it ruled a defendant is entitled to have the judgment reviewed for reasonableness *regardless of the context. Id.* Consistent with *Rinehart*, 985 S.W.2d at 363, it affirmed a garnishment court's decision to review a wrongful death court's judgment entered in connection with a § 537.065 settlement under *Gulf Ins. Co.*, even though the wrongful death court determined the plaintiffs damages. *Id.* at 365.

Moreover, plaintiffs' counsel's arguments completely fail to give appropriate deference to Judge Oxenhandler's role as the finder of fact. As Judge Oxenhandler was the one who had an opportunity to assess the credibility of the witnesses, the appellate court must accept as true the evidence, and all inferences from the evidence that are favorable to the prevailing party, and disregard any contrary evidence. *T.B.G.*, 772 S.W.2d at 654. Viewing the evidence and all inferences from the evidence in favor of Great American, there was substantial direct and circumstantial evidence to support Judge Oxenhandler's conclusion that CPB agreed to the amount of damages sought by plaintiffs, and that Judge Holt merely executed the judgment to facilitate the settlement of the parties. *Auto-Owners*, 231 S.W.3d at 304.

D. Examining the Reasonableness of the Judgment is Consistent with *Betts-Lucas*

The case principally relied upon by the plaintiffs to support their argument that Great American was not entitled to have the March 16, 2005, Judgment examined for reasonableness is *Betts-Lucas v. Hartmann*, 87 S.W. 3d 310 (Mo. App. W.D. 2002). That case does not stand for the proposition that a court-determined judgment obtained at a lay-down proceeding is entitled to greater deference than a stipulated judgment.

In *Betts-Lucas*, this Court affirmed the trial court's order granting plaintiff's motion for summary judgment, finding that the court-determined damages were "reasonable" under *Gulf Ins. Co.* The issue in *Betts-Lucas* was that defendant failed to come forward with any *affirmative evidence* disputing the plaintiffs' compensatory damages. *Id.* at 326. Instead, the defendant simply disputed the proper characterization of the evidence presented to the trial court. For example, defendant argued the evidence presented to the trial court did not indicate: (1) plaintiff had experienced any conscious pain and suffering and (2) because the evidence indicated decedent was extremely limited verbally, the plaintiffs' loss of companionship was open to question. *Id.* In rejecting these arguments this Court stated:

> Beyond these two somewhat distasteful arguments, the Commissioner does nothing more than argue that his opinion of the value of Betts-Lucas' wrongful death claim is different than the trial judge who hear the evidence...No **affirmative evidence** has been presented in opposition to Betts-Lucas' motion disputing the compensatory damages. As such, the

> Commissioner presented no genuine dispute of material fact. Under such circumstances, the rule of *Gulf* Insurance Co., does not allow the relitigation of the reasonableness of the judgment.

Id. (emphasis added). Stated differently, the reasonableness challenge in *Betts-Lucas* did not fail because the wrongful death court proceedings were deemed an adversarial trial on the merits, but because the Commissioner failed to establish a genuine issue of material fact in response to a summary judgment motion. The Commissioner did nothing to create a genuine issue as to whether a different result would have occurred if something other than an uncontested proceeding occurred.

Plaintiffs also cite *Truck Ins. Exchange v. Prairie Framing, LLC,* 162 S.W.3d 64 (Mo. App. W.D. 2005). As in *Betts-Lucas*, in *Truck Ins. Exchange* this Court affirmed the plaintiffs' summary judgment motion on the underlying judgment's reasonableness. *Id.* at 96. However, contrary to the plaintiffs' argument, this Court's decision did not render the *Gulf Ins. Co.* standard inapplicable. Rather, as in *Betts-Lucas,* the *Truck Ins. Exchange* decision reflected nothing more than the insurer's failure to establish a disputed fact question on reasonableness in the face of the plaintiffs' summary judgment motion. *Id.* Also, *Truck Ins. Exchange* is factually much different from the instant action because in *Truck Insurance*: (1) defendant in the underlying tort action argued for a contrary damage amount, (2) defendant cross-examined the damage witnesses, and (3) the award entered by the Court was less than requested by plaintiff. *Id.*

Great American did not attack Judge Holt's assessment of the evidence as the Commissioner did in *Betts-Lucas.* On the contrary, Great American pointed to

"affirmative evidence" that established the $4,580,076.00 Judgment reflected an amount greater than what a "reasonably prudent defendant" would have paid to settled the plaintiffs' claim. Great American's "affirmative evidence" included:

a. Evidence that CPB was not actively negligent;

b. Evidence that there was a significant chance a court or a jury would find that the operation of a portable rock climbing wall was not inherently dangerous;

c. Evidence that before plaintiffs would recover $1 dollar from CPB, plaintiffs had to prove its damages were in excess of $700,000

d. Evidence that plaintiffs' damages were based upon evidence of economic losses that were wholly unsupported by the facts;

e. Evidence that the decedent suffered little or no conscious pain and suffering; and,

f. Evidence that $4,580,076 was far in excess of what a reasonably prudent defendant would have paid to settle plaintiffs' claim.

Thus, Great American did precisely what the Commissioner in *Betts-Lucas* failed to do. Great American came forward with affirmative evidence to create a genuine issue of material fact as to the reasonableness of the judgment.

Betts-Lucas did recognize a judgment that is a product of a trial is not subject to the *Gulf Ins. Co.* "reasonableness" test. However, *Betts-Lucas* does not state if the plaintiff holds a one-sided presentation of evidence and allows the judge to determine the damages, then the judgment is not subject to *Gulf Ins. Co.* scrutiny. Again, the

importance of the posture of *Betts-Lucas* cannot be overstated. The case was before the Court on plaintiffs' motion for summary judgment. *Betts-Lucas*, 87 S.W.3d at 326. ***The Commissioner did nothing to create a genuine issue of fact on the issue of whether the proceedings in the wrongful death case constituted a contested trial.*** *Id.* In fact, plaintiffs' motion for summary judgment was submitted on *a stipulated set of facts. Id.* at 315. ***Thus, the Commissioner did not dispute the judgment was obtained by trial.***

Even if we were to accept the plaintiffs' contention that, a judgment from a hearing in the nature of *Betts-Lucas* is entitled to the same deference as a judgment from a truly adversarial trial, the trial court's decision in this case was still correct. There are critical distinctions between the hearing in *Betts-Lucas* and the instant matter. First, Great American had no notice of the March 16, 2005 hearing or the settlement. In contrast, the Commissioner in *Betts-Lucas* was apprised of the settlement and trial. *Id.* at 317. Second, unlike the plaintiffs in the present case, plaintiffs in *Betts-Lucas* presented substantial evidence to prove liability, and plaintiffs presented conflicting testimony from the defendants. *Id.* at 317-318. Third, plaintiffs in *Betts-Lucas* argued for an award substantially greater than the amount the court ultimately awarded. *Id.* at 325. Fourth, the trial court in *Betts-Lucas* did not immediately sign an agreed upon judgment at the end of the hearing. Instead, the court issued its ruling a week after the hearing. *Id*. at 317-318. That clearly suggests the Court made an evaluation of the evidence as opposed to rubber-stamping a stipulated judgment. Fifth, the defendants in *Betts-Lucas* clearly did not agree to the plaintiffs' damages, as CPB did. *Id.* at 325. All of those factors clearly indicate the judgment in the instant matter was a product of a settlement, while the

judgment in *Betts-Lucas* was not. Thus, *Betts-Lucas* simply does not support plaintiffs' contention that the trial court erred in subjecting the March 16, 2005 Judgment to reasonableness review under *Gulf Ins. Co.*

There was substantial direct and circumstantial evidence to support Judge Oxenhandler's determination that plaintiffs' judgment was the product of a settlement, not a trial. Thus, the decision to review the $4,580,076.00 Judgment for reasonableness was correct. It is very significant that plaintiffs did nothing to dispute Great American's trial evidence and Judge Oxenhandler's determination that plaintiffs' reasonable damages were $2.2 million. As such, the trial court's ruling should be affirmed.

CROSS APPEAL

POINT I

THE TRIAL COURT ERRED IN RULING GREAT AMERICAN COULD BE BOUND BY THE $4,580,076.00 JUDGMENT BECAUSE A CONDITION PRECEDENT TO ENFORCING A JUDGMENT OBTAINED BY § 537.065 AGAINST AN INSURER IS A WRONGFUL DENIAL OF A DUTY TO DEFEND AND GREAT AMERICAN DID NOT WRONGFULLY DENY A DUTY TO DEFEND, IN THAT IT WAS A PURE EXCESS CARRIER WITH NO DUTY TO DEFEND OR INDEMNIFY COLUMBIA PROFESSIONAL BASEBALL UNDER THE TERMS OF ITS POLICY.

A. Standard of Review

Whether an excess carrier with no contractual duty to defend is bound by a settlement negotiated by its insured when the insured has a contractual obligation to obtain the excess carrier's consent to any settlement, presents an issue of law, and is reviewed *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

B. Argument

Neither § 537.065 nor § 379.200 create liability for an insurer where there is none. The injured party "stands in the shoes of the insured with rights no greater or less than the insured in a direct action against the insurer." *Drennen v. Willet*, 416 S.W.2d 229 (Mo.App. 1967); *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974). Great American is entitled to assert any defense against plaintiffs that it could assert in a direct action by CPB. *Id.*

After a material breach, an insurer may deny liability coverage under the terms of the policy. *Kearns v. Interlex Ins. Co.*, 231 S.W.3d 325 (Mo.App.S.D. 2007); *Hendrix v. Jones*, 580 S.W.2d 740, 742 (Mo. banc 1979). In the policy Great American issued to CPB it was explicit that there was no right of action against Great American unless:

> ...the amount you owe has been determined by settlement with our consent or by actual trial and final judgment.

Trial Ex. 69.

CPB had additional duties to provide notice, and to cooperate with Great American. *Id.* It is undisputed that Great American did not consent to the settlement reached between plaintiffs and CPB. In fact, plaintiffs and CPB affirmatively concealed the § 537.065 Settlement from Great American. By failing to obtain Great American's consent, CPB materially breached its duties under the contract.

What allows an insured/plaintiff to enforce a judgment obtained by settlement under § 537.065, notwithstanding its contractual obligations, is an insurer's waiver of its policy defenses by unjustifiably refusing to defend. *Rinehart*, 985 S.W.2d at 371. When the insurer refuses to defend notwithstanding a contractual duty to defend, the insurer's refusal is unjustified, and the insurer cannot expect the insured to fulfill its contractual obligations. Essentially, courts treat an insurer's refusal to defend as a breach of contract – thus allowing the insured to go forward with settlement as an appropriate response to the insurer's preceding breach.

> [T]he premise of § 537.065 is that, where an insurer unjustifiably declines to provide coverage and refuses to defend, its insured is justified in reaching a settlement which enables the insured to be released from personal liability. [The insurance company] cannot have its cake and eat it too by both refusing coverage and at the same time continuing to control the terms of settlement in defense of an action it refused to defend.

Rinehart, 985 S.W.2d at 371.

The Court in *Whitehead v. Lakeside Hospital Ass'n,* 844 S.W.2d 475 (Mo.App.W.D. 1992) also explained that it is the refusal to defend when the policy requires a defense that serves as a waiver of policy defenses and allows the plaintiff to settle without the insurer's consent:

> Where the claim comes within the policy coverage, and so within the duty of the insurer to defend, the refusal of the insurer to do so is unjustified, and the insurer is guilty of a breach of contract. That the refusal of the insurer to defend on the ground that the claim is outside the policy is an honest mistake, nevertheless constitutes an unjustified refusal and renders the insurer liable to the insured for all resultant damages from that breach of contract. <u>The legal consequences to the insurer from the breach of contract for a unjustified refusal to defend on the ground of noncoverage include the loss of its contractual right to demand that the insured comply with certain prohibitory as well as affirmative policy provisions.</u>

Whitehead, 844 S.W.2d at 481.

Relying upon *Whitehead*, the Western District in *Prairie Framing, LLC,* 162 S.W.3d at 64, held a primary insurer that had a duty to defend but failed to defend was bound by the § 537.065 settlement agreement. It stated:

> *Having breached the contract, TIE "is treated as if it waived any control of the defense of the underlying tort action." Ballmer, 923 S.W.2d at 369. TIE's breach also "relieved [Prairie Framing] from [the] contractual obligation not to settle" so that it was free to go its own way, and "to make a reasonable settlement or compromise without losing [the] right to recover on the policy." Cologna, 785 S.W.2d at 701.*

The equities are entirely different in the context of an excess insurer. A pure excess carrier ordinarily has no duty to defend, and it certainly has no duty to defend when the primary carrier has a duty to defend. *National Union Fire Ins. Co. v. Travelers Ins. Co.,* 214 F.3d. 1269, 1273-1274 (11th Cir. 2000). Therefore, it cannot be said that an excess carrier's decision not to defend is "unjustified."

An excess insurer's obligation to defend is defined by its policy. In Missouri, where the policy language is clear and unambiguous, an excess insurer has no duty to defend or indemnify upon the failure of the primary insurer to meet its contractual obligations. *Fred Webber, Inc. v. Granite States, Ins. Co.,* 829 S.W.2d 589, 592 (Mo. App. E.D. 1992); *U.S. Fire Ins. Co. v. Coleman*, 754 S.W.2d 941, 945 (Mo. App. E.D. 1988); *Chase Resorts, Inc. v. Safety Mut. Cas. Corp.,* 869 S.W.2d 145 (Mo.App.E.D. 1993*); Hocker v. N.H. Ins. Co.*, 922 F.2d 1476, 1481-1483 (10th Cir. 1991); *Ticor Title*

Ins. Co. v. Employers Ins. of Wasau, 48 Cal.Rptr.2d 368, 374 (Ct. App. 1995)*;* Douglas R. Richmond, "Rights & Responsibilities of Excess Insurers," 78 Den.U.L.Rev. 29, 49 (2000).

It is undisputed that Great American's policy did not provide a duty to defend CPB. Thus, although Virginia Surety's decision not to defend may have been "unjustified," the same certainly cannot be said of Great American's decision.

Nowhere in Great American's policy does it state Great American agreed to defend CPB in the event that Virginia Surety unjustifiably refused to defend. The Court would effectively rewrite Great American's policy if it were to find Great American had a duty to defend CPB. Given the fact that CPB's premium was calculated on the assumption that Great American would have no such duty, such a ruling would be terribly inequitable. *Guar. Nat'l Ins. Co. v. Am. Motorists Ins. Co.*, 981 F.2d 1108, 1109 (9th Cir. 1992); *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 701 (Tex. 2000).

Perhaps more troubling than the rewriting of the duty to defend clause is the effect that forcing Great American to defend would have on its duty to indemnify. With the primary carrier refusing to indemnify, Great American's dropping down would essentially affect first dollar indemnity obligations. Again, such a result is wholly unjust. Because excess insurers do not have first dollar indemnity obligations, the premium charged is generally lower than a primary policy. *Reliance Nat'l Indemn. Co. v. Gen. Star Indem. Co.,* 85 Cal.Rptr.2d 627, 638-639 (Cal.Ct.App. 1999*); Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65, 81 (Kan. 1997).

Great American's refusal to defend was not "unjustified". Without an "unjustified" refusal to defend, there was no preceding breach by Great American that excused CPB from its contractual duty to obtain Great American's consent to settlement. As such, the March 16, 2005, judgment is not enforceable against Great American.

Plaintiffs cite *Drennen v. Wren*, 416 S.W.2d 229, 234 (Mo. App. 1967) for the proposition that an insurance company is bound by collateral estoppel for a judgment entered against its insured any time it is provided an opportunity to defend, and that opportunity is declined. Plaintiffs' reliance on Drennen is misplaced for several reasons. First, the insurer in Drennen had a contractual duty to defend, and as a pure excess carrier, Great American never had any such duty. *Id.* Furthermore, the fact that the insurer in Drennen had a contractual duty to defend was clearly relevant to the court.

> Our Missouri cases refine and enunciate this general principle in somewhat more restrictive and demanding terms: "<u>where one is bound to protect another from liability</u>, he is bound by the result of the litigation to which such other is a party, provided he had…opportunity to control and manage it."

Id.

Thus, the holding of *Drennen* is narrower than suggested by the plaintiffs. Only insurers who neglect their duty to "protect [their insured] from liability," and not insurers who merely have a contingent duty to indemnify if the insured is ultimately found liable, may be bound by the result of litigation when they possessed and rejected the opportunity to control and manage it. *Id.*

Furthermore, the *Drennen* decision relies on the Restatement of Judgments in reaching its decision. *Id.* at 234. As it relates to this case, the Restatement (Second) of Judgments § 57 specifically states an indemnitor is only bound by judgments against its indemnitee **provided the indemnitee defended the action**. It provides:

> (1) Except as stated in subsection (2), when one person (the indemnitor) has an obligation to indemnify another (the indemnitee) for a liability of the indemnitee to a third person, and an action is brought by the injured person against the indemnitee and the indemnitor is given reasonable notice of the action and an opportunity to assume or participate in its defense, a judgment for the injured person has the following effects on the indemnitor in a subsequent action by the indemnitee for indemnification:
>
> (a) the indemnitor is estopped from disputing the existence and extent of the indemnitee's liability to the injured person; and
>
> (b) the indemnitor is precluded from relitigating issues determined in the action against the indemnitee if:
>
> (i) the indemnitor defended the action against the indemnitee; or
>
> (ii) the indemnitee defended the action with due diligence and reasonable prudence.

Restatement (Second) of Judgments § 57.

There is no dispute that the preconditions of the Restatement (Second) of Judgments § 57 were not met in this case. CPB did not defend the action and took no action that resembles "due diligence" in defending itself. Thus, the plaintiffs' assertion of estoppel is simply not supported.

CROSS APPEAL

POINT II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FINDING COVERAGE UNDER THE TERMS OF THE VIRGINIA SURETY POLICY BECAUSE THE POLICY'S AMUSEMENT EXCLUSION APPLIED IN THAT A ROCK-CLIMBING WALL WITH AN AUTO-BELAY FOR RAPPELLING IS "EQUIPMENT PERSONS RIDE FOR ENJOYMENT."

A. Standard of Review

The trial court's grant of summary judgment included a finding that the rock-wall was not a ride and that the policy's Amusement Exclusion could not apply. This finding was reached in error.

Summary judgment is Ruling made purely as a matter of law. *Lindell Trust Co. v. Lieberman*, 825 S.W.2d 358, 360 (Mo. App. 1982). A trial court's determination of summary judgment is reviewed de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

B. Facts Relevant to Cross Appeal Point II

From the start, Great American's position has been that the Amusement Exclusion precludes any and all claims stemming from the death of Christine Ewing. Moreover, this is the narrowest ground on which this case can be decided. If this Court finds that the Amusement Exclusion applies – and it does – this Court need not address any other issue raised by the parties.

1. The Accident

Christine Ewing died on July 15, 2003, after falling from a portable rock-climbing wall when the cable attached to her harness snapped. **(Trial Ex. 61).** Marcus Floyd, doing business as Columbia Climbing Gym, was the owner and operator of the wall. **(Trial Exs. 61 and 62).** The wall on which Ewing was climbing was configured with a tower, climbing surface and was controlled by an auto-belay system. **(Resp. Supp. L.F. 298-322).**

On a properly maintained wall, as a rider ascends a climbing wall, the auto-belay pulls upward and assists the rider as he or she climbs up the wall. **(Resp. Supp. L.F. 298-322).** When a rider reaches the top of the wall, he or she pushes away from the wall and slowly descends with the assistance of the auto-belay which regulates the speed that at which the rider descends. **(Resp. Supp. L.F. 298-322).** In this case, the cable extending from the auto-belay system to Ewing snapped as she descended and caused her fatal fall. **(Trial Exs. 61 and 62).**

2. The Amusement Exclusion

Virginia Surety denied CPB's request for coverage based on an exclusionary endorsement for designated operations:

> This insurance does not apply to "bodily injury or "property damage" arising out of operations described in the Schedule of this endorsement, regardless of whether such operations were conducted by you or on your behalf or whether the operations are conducted for yourself or others.

(Trial Ex. 31, 36, and 68).

The Schedule of Excluded Designated Operations included an Amusement Device Exclusion, which precluded coverage for claims arising out of the ownership, operation, maintenance or use of any amusement device:

> Description of Designated Operation(s):
>
> * * *
>
> Amusement Device – Arising out of the ownership, operation, maintenance or use of any amusement device
>
> * * *
>
> For the purpose of this exclusion, amusement device means any device or equipment a person rides for enjoyment including, but not limited to, any mechanical or non-mechanical ride, water slide (including any ski or tow when used in connection with a water slide), bungee operation or equipment. Amusement device does not include any video arcade or computer game.

(Trial Ex. 31, 36, and 68).

Great American also denied any duty to indemnify or defend CPB because, as an excess carrier, coverage could not be triggered unless and until the underlying policy was triggered and exhausted. **(Trial Ex. 69).** Here, there was no possibility of exhaustion because the Amusement Exclusion precluded *any* coverage for claims stemming from Ms. Ewing's death. **(Trial Ex. 33, 37 and 69).**

3. Amusement Ride and Device Standards, Bulletin and Warnings

The American Society of Testing and Materials F24 Committee ("ASTM") promulgates standards for the design of amusement rides and devices. **(Resp. Supp. L.F. 324-31).** ASTM is the only recognized committee for such standards in the United States. **(Resp. Supp. L.F. 324-26).** ASTM categorizes mobile climbing walls as an amusement ride or device and places such walls in the same category for design standards as go karts, bumper cars, dry slides, coin operated rides, water slides, lazy rivers and air-supported structures. **(Resp. Supp. L.F. 324-26).**

The United States Consumer Product Safety Commission ("CPSC") works with ASTM in the development of design standards for such rides and devices. **(Resp. Supp. L.F. 324-26).** CPSC also serves as a clearinghouse for safety information on ride incidents. **(Resp. Supp. L.F. 324-26).** Following Ewing's death, CPSC issued an "Amusement Ride Safety Bulletin" to "all ride safety officials," which included an inspection warning that denominated climbing walls as a ride:

> Mobile climbing walls are customarily used at fairs, carnivals, festivals, sporting events, and promotional events. The mobile climbing walls can also be operated at private fairs and parties through rental agencies . . .
>
> * * *
>
> Inspection procedures and guidelines for safe set-up and operations of "rock walls and climbing walls" may vary from ride to ride, state to state or from manufacturer to manufacturer . . .
>
> * * *

> ...we recommend that state inspectors provide this bulletin to rental companies within their state and to owners and operators of these rides.

(Resp. Supp. L.F. 324-26).

4. The Circuit Court's Rationale Denying Summary Judgment

After Plaintiffs obtained the uncontested judgment and initiated the garnishment proceeding, Plaintiffs filed a motion for summary judgment in support of its garnishment action against Great American. **(L.F. 175).** Great American filed a cross-motion for summary judgment arguing that the Amusement Exclusion precluded coverage and that, as a result, Plaintiffs could not maintain the garnishment action. **(L.F. 175).**

The Court granted Plaintiffs' motion and found that the Amusement exclusion is not applicable in this case. **(L.F. 175).** The Court arrived at two conclusions to support its ruling. First, the Court ruled that the Amusement Exclusion was unambiguous:

> Though the parties disagree over the interpretation of the policy exclusion, the exclusion provision is not ambiguous.

(L.F. 175) (See also Appellant's Appendix at 45-46).

Second, the Court determined that a rock climbing wall is not a "ride," and that the Amusement Exclusion does not apply to the facts of this case:

> In the case at bar, the exclusion applies to []amusement device(s),[] which is further defined as any []ride[] mechanical or non-mechanical. In common parlance, a rock climbing wall is not a []ride.[] Therefore, the exclusion does not apply.

(L.F. 175) (See also Appellant's Appendix at 45-46).

C. The Rock-Climbing Wall is an Amusement and is Excluded by the Plain Language of the Policy.

When interpreting an insurance contract, a court must read the contract as a whole and determine the intent of the parties, giving effect to that intent by enforcing the contract *as written*. *Auto Club Family Ins. Co. v. Jacobsen*, 19 S.W.3d 178, 181 (Mo. App. 2000). The interpreting court must give the language used in the insurance contract its plain and ordinary meaning. *Id.* If the intent of the parties is clear an unambiguous from the plain and ordinary meaning of the language used, there is no need to resort to rules of construction to interpret the contract. *Id.*

The policy covering CPB precludes coverage for claims arising out of the ownership, operation, maintenance or use of any amusement device. **(Trial Ex. 31, 36, and 68).**

The Circuit Court correctly determined that the Amusement exclusion is not ambiguous. The Circuit Court's analysis went awry, however, when it determined that the rock-climbing wall at issue was not a ride.

The question for de novo review is whether the rock wall with an auto-belay is a "device or equipment that a person rides for enjoyment." In other words, was the rock wall a ride and was its purpose the enjoyment of the rider. The answer to both questions is yes.

1. The Wall is a Ride.

The term "ride" as used in the policy is not defined. It should be given its plain and ordinary meaning. *Jacobsen*, 19 S.W.2d 178, 181 (Mo. App. 2000). The common

characteristic of an amusement ride is that it has mechanical components that allow a rider to be raised, pushed, lowered or conveyed through mechanical force or a combination of mechanical force and a rider's own physical exertion. **(Resp. Supp. L.F. 324-26).** Unambiguously, the wall is a ride.

Even when interpreting an unambiguous provision, the interpreting court may consider the circumstances of the parties, the risk insured and the loss at issue. *Steffen v. Pacific Mut. Life Ins. Co.*, 442 S.W.2d 142 (Mo. App. 1969). The purpose of such consideration is not to modify, enlarge or curtail the terms of the policy, but to aid and determine the meaning to be given to the policy language. *Id.*

Mobile climbing walls are configured with a tower and climbing surface and a belay system that is controlled by an auto-belay device. **(Resp. Supp. L.F. 298-322).** As a rider ascends a climbing wall, the auto-belay pulls upward and assists the rider as he or she climbs up the wall. **(Resp. Supp. L.F. 298-322).** When a rider reaches the top of the wall, he or she pushes away from the wall and slowly ascends. **(Resp. Supp. L.F. 298-322).** Rappelling down is part of the thrill and experience of riding the ride. **(Resp. Supp. L.F. 298-322).**

Because a rock-climbing wall with an auto-belay assists in raising and lowering a person during the climb, it constitutes a ride. **(Resp. Supp. L.F. 324-26).** Great American is not alone in reaching this conclusion. As noted above, ASTM and CSPC both characterize a mobile climbing wall as a ride. **(Resp. Supp. L.F. 324-26).** Ultimately, the wall is like any other amusement "ride" in that its purpose is to amuse

patrons, it is inspected like any other amusement ride and it is built in accordance with standards applicable to amusement rides. **(Resp. Supp. L.F. 324-26)**. The wall is a ride.

In previous briefs, Plaintiffs claimed that the rock-climbing wall was not a ride because it was not something that a person "rides." Plaintiffs suggested that a ride includes only those instances where one is carried by another force and not your own power. A "ride" certainly includes conveyances where one is moved along by another force, but plaintiffs' suggestion that it only includes conveyances that do not include personal exertion is simply not consistent with the practical use of the term in common vernacular. For example, when one operates a bicycle, we refer to that as "riding" a bicycle. Snowboarders frequently refer to their trip down the slopes as a "ride." Similarly, surfers "ride" a wave. In all three scenarios, the "rider" is not being conveyed without a significant degree of personal exertion. The same is true of the rock-climbing wall.

Dictionary definitions also support defining the climbing wall as a "ride." When a term is not identified in a policy of insurance, resorting to dictionary definitions is often appropriate. *Dibben v. Shelter Ins. Co.*, 261 S.W.3d 553, 557 (Mo. App. W.D. 2008). "Ride" is defined as "to become supported on a point or surface," (Merriam-Webster Online Dictionary, defn. 4), "to travel over a surface," (Merriam-Webster Online Dictionary, defn. 5a), "to be sustained or be supported on a pivot, axel or other point," (American Heritage Dictionary of the English Language, 4th Ed., defn. 6), "to travel over, along, or through,"(Id. (transitive verb) defn. 2), and "to be supported or carried on." (Id. (transitive verb) defn. 3).

The Circuit Court's determination that the wall was not a ride completely ignores the realities of the operation of a climbing wall. As noted above, the rider is attached to a harness which "supports and carries" the rider to the top of the wall. After the rider reaches the top of the wall, the rider begins a controlled rate of descent; the rider is conveyed to the ground by the auto belay system at an even and gradual rate that is much slower than gravity.

The contrast between how the climbing wall is supposed to operate, and what happened during the decedent's tragic accident illustrates that a climbing wall is a "ride." When the cable snapped, the decedent was not conveyed slowly to the ground by the auto-belay system. Instead, the full force of gravity pulled her to the ground. In ordinary operation, the descent is so gradual as to be safe for novices and young children.

As set forth above, the ASTM includes rock-climbing walls in its definition of a "ride." Plaintiffs have previously suggested that the ASTM's standard's scheme is not the same as the definition of an ordinary layman. The truth is the ASTM develops consensus technical standards based on the understanding of a broad based international group of engineers, which considers the experiences of the common user. Clearly, to the extent that the ASTM chooses to regulate a climbing wall within the same testing standard as other "rides" is strong evidence that the wall is a ride.

2. The Ride was for Enjoyment

Second, there can be no debate that the wall/ride was for riders' enjoyment. Riders were charged a fee for the privilege of riding the wall to the top, ringing its bell, and riding back down. **(Resp. Supp. L.F. 265-69).** The wall was at Tyler Stadium for the

purpose of entertaining visitors – it was located in the "fun zone." **(Resp. Supp. L.F. 265-69).** The wall's owner/operator owned similar walls and used those walls to entertain riders at county fairs, birthday parties and fundraising events. **(Resp. Supp. L.F. 265-79).** The wall's owner/operator could not conceive of any other purpose of the wall other than the "enjoyment" or amusing of riders. **(Resp. Supp. L.F. 265-79).**

D. The Amusement exclusion precludes coverage for claims resulting from Ms. Ewing's fatal accident

The Circuit Court erred in granting summary judgment to Plaintiffs because it is clear that the rock wall was a ride and its purpose was the enjoyment of the rider. Based on the above analysis, the Amusement Exclusion clearly applies and Plaintiffs' claims is not covered by Great American's policy.

CONCLUSION

The trial court was correct in finding Great American's policy unambiguous, and ruling plaintiffs failed to exhaust the limits of the Virginia Surety policy. Virginia Surety only paid $700,000 of its $1 million policy limit. Virginia Surety was never "obligated to pay" its full policy limits, and the language of the Great American policy precludes negotiated exhaustion. To permit stipulated exhaustion would not only violate the clear and unequivocal language of the Great American policy, but would encourage claimants and primary carriers to negotiate settlements which may be a small percentage of the primary's policy limits to the detriment of an excess insurer.

The trial court was also correct in reviewing the $4,580,076 Judgment for "reasonableness" under *Gulf Ins. Co.* Viewing the evidence and all inferences from the

evidence in the light most favorable to the judgment, there was substantial evidence to support Judge Oxenhandler's conclusion that the wrongful death court's judgment was the product of a settlement, not a trial. Judge Oxenhandler heard two days of contested evidence, with cross-examination and extensive adversarial briefing before finding the §537.065 judgment unreasonable.

The trial court erred, however, in finding Great American was bound by the Judgment obtained by § 537.065. Great American had no duty to defend CPB. As such, its refusal to defend CPB was justified. Only an unjustified refusal to defend absolves an insured of its duty to obtain consent to a settlement. As such, plaintiffs' settlement is subject to Great American's policy defenses and defendant seeks this Court's ruling that the judgment was unenforceable against Great American.

Finally, the trial court erred in granting plaintiffs' Motion for Summary Judgment on the Amusement Exclusion. The evidence was clear that a portable rock-climbing wall with an auto-belay is something persons "ride" for "enjoyment" and, therefore, defendant seeks this Court's ruling that the trial court erred in denying its Motion for Summary Judgment premised on the Amusement Exclusion.

Great American seeks this Court's judgment affirming Judge Oxenhandler's Judgment of May 13, 2009.

Respectfully submitted,

FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.

Paul L. Wickens #23549
Kyle N. Roehler #51727
911 Main Street, 30th Floor
Kansas City, Missouri 64105
Phone: (816) 472-7474
Fax: (816) 472-6262

ATTORNEYS FOR RESPONDENT AND CROSS-APPELLANT GREAT AMERICAN ASSURANCE COMPANY

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief fully complies with the provisions of Rule 55.03; that it contains 20,616 words / 1934 lines and complies with the word/line limitations contained in Rule 84.06(b) and Western District Rule XLI; that a diskette of the Brief is included herewith in Microsoft Word format; that the diskette was scanned for virus using Norton Antivirus and found to be free of virus; and that one copy of the diskette and one copy of Brief of Respondent / Cross-Appellant was sent via U.S. Mail, postage prepaid, this 11th day of November, 2010, to:

David Moen
613 East McCarty Street
Jefferson City, MO 65102
Phone: (573) 636-5997
Fax: (573) 636-3799
ATTORNEY FOR PLAINTIFF / APPELLANT KATHLEEN SCHMITZ

Hamp Ford
FORD, PARSHALL & BAKER, LLC
3210 Bluff Creek Drive
Columbia, MO 65201-3525
Phone: (573) 449-2613
Fax: (573) 875-8154
ATTORNEY FOR DEFENDANT COLUMBIA PROFESSIONAL BASEBALL, LLC d/b/a MID- MISSOURI MAVERICKS

Thomas K. Riley
RILEY & DUNLAP, P.C.
13 East 5th Street
Fulton, MO 65251
Phone: (573) 642-7661
Fax: (573) 642-9417
ATTORNEY FOR PLAINTIFF APPELLANT CRAIG EWING

Respectfully submitted,

FOLAND, WICKENS, EISFELDER, ROPER & HOFER, P.C.

Paul L. Wickens #23549
Kyle N. Roehler #51727
911 Main Street, 30th Floor
Kansas City, Missouri 64105
Phone: (816) 472-7474
Fax: (816) 472-6262

ATTORNEYS FOR RESPONDENT AND CROSS-APPELLANT GREAT AMERICAN ASSURANCE COMPANY