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

REPLY BRIEF

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:

REPLY

RESPONDENT'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.

A. The Fact that Great American did not Breach a Duty to Defend is Relevant to Plaintiffs' Ability to Enforce the Judgment Obtained Through a Settlement Reached Without its Consent.

Plaintiffs contend Great American's lack of a duty to defend is irrelevant because § 537.065 does not mention "duty to defend." Plaintiffs' argument ignores the fact that the instant case is a garnishment action pursuant to Mo. Rev. Stat. § 379.200 (2010). An injured party/garnishee under § 379.200 "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. Wren*, 416 S.W.2d 229, 233 (Mo. App. 1967); *see*

also, Butters v. City of Independence, 513 S.W.2d (Mo. 1974). Great American is entitled to assert any defense against plaintiffs that it could assert in a direct action brought by CPB. *Drennen,* 416 S.W.2d at 233.

Moreover, it is undisputed that: (1) Great American's policy required CPB to obtain its consent to settlement, and (2) Great American did not consent to CPB's settlement with the plaintiffs. As was more fully set forth in Great American's original brief, an insured's failure to comply with the policy requirement of consent to settlement may be excused if the primary carrier has unjustifiably refused to assume its duty to defend. *Rinehart v. Anderson,* 985 S.W.2d 363, 371 (Mo. App. 1998). The primary carrier's unjustified refusal to defend is treated as a ***preceding*** *breach of contract* and a waiver of the primary carrier's policy defense that the insured failed to obtain its consent. *Id; see also Whitehead v. Lakeside Hospital Ass'n,* 844 S.W.2d 475, 481 (Mo. App. 1992); *Truck Ins. Exch. v. Prairie Framing, LLC,* 162 S.W.3d 64 (Mo. App. 2005). As a matter of common sense, a duty to defend is a necessary predicate of an unjustified refusal to defend. In the absence of a duty to defend, there is no ***preceding*** breach of contract which excuses the insured from complying with the policy requirement of obtaining consent to settlement. Thus, Great American's lack of duty to defend is clearly relevant to the enforceability of plaintiffs' § 537.065 Judgment in a § 379.200 garnishment action. Because Great American had no duty to defend, CPB

was never justified in entering into the settlement in derogation of the consent to settlement provision.

B. A Finding that Great American is not Bound by the Judgment is Clearly Consistent with the Requirements of Collateral Estoppel.

Contrary to plaintiffs' bald assertion, there is no "well-established doctrine that an **[excess insurer without a duty to defend]** is bound by a final judgment against its insured on a covered claim if it had notice and opportunity to defend, but did not do so." The *Drennen* decision unequivocally states it is only those insurers with a duty to defend that are bound by a judgment obtained after being afforded an opportunity to defend. 416 S.W.2d at 234.

Moreover, the Restatement (Second) of Judgments § 57 - which was relied on by *Drennen* - is clear that an indemnitor is only bound by those judgments against its indemnitee if the indemnitee defended the action. *Id.* Clearly, CPB did not defend in the instant matter. Therefore, plaintiffs' consent judgment is not enforceable against Great American, and such a result is consistent with the requirements of collateral estoppel.

C. Great American did not Breach Any Duty Thereby Allowing CPB to Enter into the § 537.065 Agreement.

Plaintiffs assert the preceding breach which justified CPB's settlement with the plaintiffs was Great American's breach of its duty to indemnify. According to the plain language of Great American's policy, it had no duty to indemnify CPB at the time of execution of the § 537.065 settlement agreement. An excess carrier's duty to indemnify is only triggered upon exhaustion of the primary carrier's limits. As Judge Oxenhandler correctly found, Virginia Surety's policy was never exhausted, and certainly was not exhausted when the plaintiffs and CPB settled the case. Even under plaintiffs' own arguments, the earliest that Great American had even an arguable duty to indemnify was when the settlement was reached with Virginia Surety in June 2007, which occurred over two years after the § 537.065 settlement was reached.

Moreover, one cannot anticipatorily breach a duty to indemnify. No such authority exists in Missouri, and plaintiffs fail to cite any authority for the proposition that an excess insurer can "anticipatorily repudiate" a duty to indemnify. In the context of other similar unilateral insurance contracts, such as disability or life insurance policies where an insurer's only duty is the payment of money at a specified time, the courts have ruled that the concept of "anticipatory repudiation" does not apply. *See e.g., Allen v. Nat. Life & Acc. Ins. Co.,* 67 S.W.2d

534 (Mo. App. 1934); *Parks v. Maryland Cas. Co.,* 59 F.2d 736 (W.D. Mo. 1932); *Merrick v. Allstate Ins. Co.,* 349 F.2d 279 (8th Cir. 1965).

The "issue of the duty to indemnify must await final resolution in court." *Truck Ins. Exch.*, 162 S.W.3d at 80; *see also Superior Equip. Co., Inc. v. Maryland Cas. Co.*, 986 S.W.2d 477, 484 (Mo. App. 1998)(stating the "resolution of the duty to indemnify must await facts"). Based on that principle, courts have dismissed declaratory judgment actions as premature where the parties seek a determination on the issue of whether there is a duty to indemnify. *Id.* at 484; *see also Amerisure Mut. Ins. Co. v. Paric Corp.*, 2005 U.S.Dist.Lexis 30383 (E.D. Mo. 2005). Clearly then, plaintiffs' efforts to justify the settlement notwithstanding Great American's lack of consent must fail. There was no preceding breach of a duty to indemnify because that duty did not exist at the time of the settlement agreement.

D. The Suggestion that § 537.065 is not a Useful Tool if Great American is not Bound by the Settlement at Issue is Unfounded.

Plaintiffs misstate the purpose of § 537.065 and present a false conflict when they ask how an excess insurer without a duty to defend could ever be "forced to pay for an insured claim" obtained by § 537.065 judgment. Contrary to plaintiffs' suggestion, § 537.065 is not designed to force anyone to do anything. Instead, it is designed as a means for an insured defendant to protect itself from a garnishment of personal assets. Furthermore, plaintiffs ignore the obvious fact that

a plaintiff can still enforce a judgment against an excess carrier (without a duty to defend) if the plaintiff actually tries the case on the merits.

Plaintiffs contend if a plaintiff must try a case on the merits, there is no incentive for parties to execute a § 537.065 agreement. Of course, in the ordinary case involving a primary carrier (or an excess carrier) *with a duty to defend*, settlement pursuant to a § 537.065 remains a viable option. Even if the insured has an excess policy, settlement pursuant to § 537.065 may be a viable option. If the plaintiff's damages are not substantial, the plaintiff and insured might agree to a § 537.065 settlement agreement at or below the primary carrier's limits. Such an agreement would allow the plaintiff to recover on an expedited manner through a garnishment action against the primary carrier. The only issues in the garnishment action would be whether the primary carrier had coverage and the reasonableness of the settlement amount.

Moreover, even if a plaintiff must try a case on the merits to enforce a judgment against an excess carrier, a § 537.065 agreement is still a viable option. For example, a § 537.065 agreement is a viable option when a primary carrier's refusal to defend is in bad faith, and results in a judgment that is in excess of the excess carrier's policy limits. In the absence of an assignment from the insured, the plaintiff is limited to recovering from the insured's carriers up to the combined policy limits. Recovery of the remainder of the judgment would have to be from

the insured's personal assets. Under such a scenario, a full recovery is unlikely because the assets of the average insured are frequently limited. However, after a trial and a judgment in excess of the insured's excess carrier's limits, the plaintiff can propose a § 537.065 agreement to the insured (which would thereby insulate the insured from personal liability) in exchange for an assignment of the bad faith claim. By trying the case and executing a § 537.065 agreement, the plaintiff can obtain a full recovery from the insured's carriers. Thus, it is simply not true that § 537.065 does not serve a valuable purpose if the plaintiff must try the case to execute against an excess carrier.

Analyzed objectively, the sequence of this case demonstrates the § 537.065 settlement worked as the statute intended. Plaintiffs settled with the primary tortfeasor with aggravated liability for $700,000 of his existing $1 million limits. Thereafter, plaintiffs recovered an additional $700,000 when they settled with Virginia Surety, which was $300,000 less than Virginia Surety's primary policy limits. That settlement occurred because Virginia Surety, who had a duty to defend, lost on the Amusement Exclusion. After losing the coverage battle, Virginia Surety settled immediately. Plaintiffs never had to prove liability, and Virginia Surety did not dispute the damages. Plaintiffs received a substantial recovery without the risks of a trial. Thus, contrary to Appellants' assertions, the purpose of § 537.065 was not compromised in that the primary tortfeasor (Marcus

Floyd) and the primary insurer (Virginia Surety), who had the duty to defend and indemnify, paid amounts that are collectively 3-4 times the value of CPB's exposure according to the expert testimony offered in this case. (Tr. 136-200; 239-324).

RESPONDENT'S POINTS RELIED ON

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."

In plaintiffs'/appellants' response, they do not dispute that the rock climbing wall was for purposes of "enjoyment." Instead, their only argument is that the rock climbing wall was not something a person "rides." Plaintiffs suggest a "ride" only includes those instances where one is "carried along by another force, **not your own power**." While a ride certainly includes conveyances where one is moved along by another force, plaintiffs' suggestion that it only includes or is limited to conveyances that do not include personal exertion is simply not consistent with a layman's definition of the term.

In Great American's original brief, it cited several examples of how the term "ride" is used by the average person in connection with activities and conveyances which require personal exertion such as "riding" a bicycle, Snowboarders "riding" down the slopes, and surfers "riding" a wave. In response, plaintiffs were

completely unable to reconcile their unreasonably limited definition of "ride" with the examples presented by the defendant. Instead, plaintiffs choose to mischaracterize defendants' argument stating "it is difficult to fathom how an exclusion for a 'device or equipment a person rides for enjoyment" could be narrowly construed and still exclude [sic] insurance for mountains and oceans."[1] The reason for plaintiffs' failure to directly respond to the inherent weakness in their definition of ride is clear: there is no justification for the unduly limited definition.

Plaintiffs' reliance on dictionary definitions is similarly unavailing because, again, Plaintiffs choose to ignore several dictionary definitions that belie their unduly narrow approach. For example, "ride" is also 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).

Plaintiffs'/Appellants' strained argument and selective dictionary definitions ignore the undisputed facts in this case. At the time of the accident in question,

[1] Plaintiffs ignore that "mountains and oceans" are not "device[s] or equipment."

Christine Ewing had completed her ascent of the wall. In descending the wall, Ms. Ewing's entire weight was supported by the harness device which was totally supported by the cable connected to the auto belay device, which controlled the rate of descent by a hydraulic system. Ms. Ewing was descending without exertion in the supported harness, when the auto belay cable broke. The auto belay system, in descent, requires no exertion by the rider, as gravity and the weight of the rider activate the hydraulic auto belay system to control the rate of descent. **[Resp. Supp. L.F. 298-322]** At the time the cable broke, Ms. Ewing had descended in the foregoing manner approximately one-third the height of the wall.

As set forth in defendant' s original brief, the ASTM includes rock climbing walls in its definition of a "ride." While plaintiffs suggest 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 that 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 of what a layman would define as a ride.

In any event, a mere disagreement over the meaning of a term does not render the term ambiguous. *Sanders v. Wallace*, 884 S.W.2d 300, 302 (Mo. App. 1994). Although plaintiffs would prefer a more narrow definition, their suggested

definition cannot be accepted because it would effectively exclude from the term's definition acts which are ubiquitously considered to be a "ride" within the term's meaning by an ordinary layman.

Conclusion

The trial court erred in finding that Great American was bound by the Judgment entered as a result of an agreement pursuant to § 537.065. The trial court also erred in granting plaintiffs' Motion for Summary Judgment on the Amusement Exclusion.

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 2,834 words /300 lines and complies with the word/line limitations contained in Rule 84.06(b) and Western District Rule XLI; that a CD-R of the Reply Brief is included herewith in Microsoft Word format; that the CD-R was scanned for virus using Malwarebytes' Anti-Malware and found to be free of virus; and that one copy of the diskette and one copy of the Reply Brief was sent via U.S. Mail, postage prepaid, this 22nd day of December, 2010, to:

David Moen
613 East McCarty Street
Jefferson City, MO 65102
Phone: (573) 636-5997
Fax: (866) 434-5576
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