NO. SC91098

MISSOURI SPREME COURT

KATHLEEN SCHMITZ, ET AL.,

Appellants-Respondents,

vs.

COMBINED SPECIALTY INSURANCE COMPANY, ET AL.,

Respondents-Appellants.

APPELLANT-RESPONDENTS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This action constitutes an appeal from a final judgment rendered by the Circuit Court of Boone County, Missouri. The matter concerns an appeal from an equitable garnishment action filed against an excess insurer involving disputes related to the meaning and effect of the insurance policy and the ability to enforce a wrongful death judgment against said insurer. After a ruling by the Court of Appeals, Western District, this Court granted transfer.

STATEMENT OF FACTS

On July 15, 2003, Christine Ewing, the daughter of the Appellants Kathleen Schmitz and Craig Ewing, died as the result of a fall from a rock climbing wall the previous day. **R. 245, 246, 254, 256-257.** The incident occurred on premises under the possession and control of Columbia Professional Baseball, LLC, doing business as Mid-Missouri Mavericks (hereinafter referred to as "Columbia Professional Baseball") in Boone County, Missouri. **R. 247, 256, 259.**

The rock climbing wall is an approximately twenty-five foot high portable climbing instrument on which patrons climb up artificial rock outcroppings on the surface of the wall until reaching the top and then descend by either climbing or rappelling down the side. **R. 251, 259.** The patrons are connected to the wall by a hydraulic safety belay cable that retracts as the climber ascends the wall and then slowly extends as the climber descends, thereby slowing any descent and preventing falls. **R. 259; SLF 32.** Christine Ewing died because the safety belay cable on the wall, which was rusted, frayed, and connected by duct tape, broke while Christine Ewing was near the top of the wall, causing her to fall and land on the asphalt pavement. **R.248, 257.**

On July 14 and 15, 2003, Columbia Professional Baseball was the named insured in an insurance policy issued by Combined Specialty Insurance Company, now known as Virginia Surety Company, its successor in interest, (hereinafter referred to as "Virginia Surety"), and a policy of insurance from Respondent Great American Assurance Company, also known as Great American Insurance Company (hereinafter referred to as "Great American"), (together, "the insurance companies"). **R. 180; SLF 32-33, 212.**

Virginia Surety's policy provided primary coverage of One Million Dollars, and Great American's policy provided excess coverage of Four Million Dollars. The insurance policies had been delivered to Columbia Professional Baseball, Columbia Professional Baseball had paid the premiums for the policy, and the policies purported to be in effect on the date of Christine Ewing's fall and the date of her death. **R. 180, 181.**

After Christine Ewing's death, Columbia Professional Baseball repeatedly provided notice to both Virginia Surety and Great American of her death and the resulting claims of Appellants for wrongful death. **R. 181.** Both Virginia Surety and Great American continually denied any duty to defend or indemnify, and refused to defend or indemnify, based on an exclusion of coverage in Virginia Surety's policy that stated:

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

R. 315.

The schedule for this endorsement lists as excluded from coverage "amusement devices**"** and incidents and occurrences "arising out of the ownership, operation, maintenance or use of any amusement device." **R. 315.** The schedule goes on to define an amusement device as:

> Any device or equipment a person rides for enjoyment, including but not limited

to, any mechanical or non-mechanical ride, waterslide (including any ski or tow when used in connection with a waterslide), a bungee operation or equipment. Amusement device does not include any video arcade or computer game.

R. 315.

Appellants filed a wrongful death lawsuit against Marcus Floyd, the operator of the rock climbing wall, on March 19, 2004. **R. 241.** On June 8, 2004, Appellants filed a first amended petition naming Columbia Professional Baseball as a defendant in the wrongful death case. **R. 245.** On June 14, 2004, Appellants settled their case against Marcus Floyd for Seven Hundred Thousand Dollars ($700.000.00). **R. 811.** Boone County Associate Circuit Judge Holt approved the prior settlement between Appellants and Marcus Floyd on March 16, 2005, sitting in Callaway County, Missouri. **S.L.F. 9, 10.**

After Appellants joined Columbia Professional Baseball as a defendant in the wrongful death action, Hamp Ford, counsel for Columbia Professional Baseball forwarded to counsel for Virginia Surety and Great American the First Amended Petition. **SLF 35-36.** Attorney Ford requested that the insurance companies provide coverage for the claims made by Appellants as a result of the death of Christine Ewing. **SLF 36.** Counsel responded for Virginia Surety and again denied any duty to defend or indemnify. **SLF. 36-38.**

On July 29, 2004, Attorney Hamp Ford, on behalf of Columbia Professional Baseball, wrote to Great American providing them with the First Amended Petition and requesting coverage. **SLF 37.** On August 3, 2004, Great American responded that there

was no coverage for the claims against Columbia Professional Baseball in the First Amended Petition because Virginia Surety had declined coverage. **SLF 37-38.**

On or about October 26, 2004, Appellants filed a Second Amended Petition in the wrongful death lawsuit. **SLF 37** Attorney Hamp Ford again forwarded the pleading to the insurance companies requesting defense and indemnity. **SLF 37.** Both companies again denied coverage, with Great American again reiterating, "As there is no coverage for this matter under the Virginia Surety policy, there is no potential for coverage under the Great American Assurance Company policy." **SLF 37.** Neither Virginia Surety nor Great American provided any indemnity or defense despite these notices and the opportunity to do so. **SLF 38.**

On December 28, 2004, Columbia Professional Baseball and Appellants entered into a 537.065 agreement. **SLF 38, 211.** Columbia Professional Baseball and Appellants agreed that if Appellants obtained a judgment against Columbia Professional Baseball then Appellants would restrict any recovery to the insurance policies of Columbia Professional Baseball and Columbia Professional Baseball would cooperate with setting the matter for trial and offer truthful testimony if requested. **SLF 213, 214.** Columbia Professional Baseball and Appellants did not agree that Columbia Professional Baseball was liable for the death of Christine Ewing. **SLF 212.** Columbia Professional Baseball and Appellants did not agree as to any amount of damages, but agreed to submit the matter to the trial court for determination of these issues. **SLF 215, 216.**

Thereafter, at the request of counsel for Columbia Professional Baseball, and after assignment by the Thirteenth Circuit's Presiding Judge, the case was set for hearing

before Boone County Associate Circuit Judge Joe D. Holt. **SLF 38.** Appellants and Columbia Professional Baseball never reached any agreement as to Columbia Professional Baseball's liability or the value of Appellants' damages. **SLF 38.** Appellants and Columbia Professional Baseball had no agreement as to what evidence would, or would not, be introduced at trial. **Tr. Transcr. 51, 52.** Appellants and Columbia Professional Baseball had no agreement as to the amount of money that Appellants would request. Appellants were unaware of what evidence or arguments Columbia Professional Baseball would make. Columbia Professional Baseball was unaware of what evidence or arguments Appellants would make or what sum of money Appellants would request from the court. **Tr. Transcr. 40-52.**

During the March 16, 2005 hearing, Appellants put on evidence without objection from Columbia Professional Baseball. Columbia Professional Baseball introduced no evidence. **Tr. Transcr. 69, 70.** Judge Holt entered judgment at that time finding that Columbia Professional Baseball was liable for the death of Christine Ewing and finding Appellants' damages to be $4,580,076.00. **R. 811.** The judgment became final on April 16, 2005. **SLF 39.**

On May 6, 2005, Appellants filed a Section 379.200, RSMo., judgment creditor equitable garnishment lawsuit against Virginia Surety and Great American. **R. 1.** Each insurer was represented by counsel. **R. 1.** The trial court first considered the arguments of the insurers that Appellants' claims were not for an insured loss. **R. 7.** On August 8, 2006, partial summary judgment was granted by the trial court finding the loss was covered by the insurance policies. **R. 9.**

Thereafter, Appellants settled their claims with Virginia Surety. **R 362, 364.** On May 30, 2007, Appellants agreed to release claims against both insurers to the full extent of Virginia Surety's policy limits of $1,000,000.00, in exchange for a monetary payment to Appellants of the sum of $700,000.00. **R. 811.** As part of that settlement, Virginia Surety also paid $50,000.00 to Columbia Professional Baseball, which released its claims against the insurers as well. Pursuant to the terms of the settlement, Appellants released their claims against Virginia Surety and credited Great American to the extent of an additional $1,000,000.00. Appellants then proceeded with the garnishment action against Great American only for the remaining liability of $2,880,076.00 **(R. 814, 815)**, reflecting a credit of the $700,000.00 Floyd settlement and $1,000,000.00 Virginia Surety settlement. After entering into the settlement agreement, Appellants filed a partial satisfaction of judgment in the sum of $1,000,000.00 in the wrongful death case, then notified the court in the equitable garnishment action of the settlement, and dismissed Virginia Surety from the equitable garnishment action. **R. 11.**

On October 15 and 16, 2008, the trial court held a hearing on the remaining issues regarding whether Great American was bound by the wrongful death judgment and, if so, to what extent. **R. 16, 17.** The court heard evidence for two days, including the testimony of the witnesses, those being counsel for Columbia Professional Baseball as the sole factual witness, and two expert witnesses who offered testimony as to what they thought was a reasonable settlement value of Appellants' claims against Columbia Professional Baseball. **R. 811, 812.** Afterward, the court entered its final order in this case. **R. 812.** The trial court found that (1) Great American was given numerous notices and

opportunities to litigate the underlying wrongful death case; (2) Great American knowingly and voluntarily chose not to take advantage of those opportunities; (3) the wrongful death trial judge determined the Appellants' damages to be $4,580,076.00; (4) Great American was bound by the wrongful death judgment; but (5) the wrongful death judgment was enforceable only to the extent that the damages were reasonable; (6) the trial court could determine the reasonableness of the damages by considering all the evidence presented at the wrongful death hearing and at the hearing on October 15 and 16, 2008; (7) the reasonable damages were only $2,200,000.00; and (8) Appellants were barred from enforcing the judgment of $2,200,000.00 against Respondent Great American because Appellants were paid only $700,000.00 from the primary insurer, Virginia Surety, and not the full $1,000,000.00 of its limits even though Appellants filed a partial satisfaction and gave credit to Great American for the full policy limits pursuant to the terms of the settlement agreement. **R. 811-815.**

This appeal followed.

POINTS RELIED ON

I. The trial court erred in ruling that Appellants were barred from recovering from the excess insurer, Respondent Great American, due to the fact that the primary insurer paid Appellants only Seven Hundred Thousand Dollars of its One Million Dollars in coverage because Appellants credited Respondent Great American with, and filed a partial satisfaction of judgment for, the full One Million Dollars in that Great American's insurance policy and Missouri law allow Appellants to recover from the excess insurer

even after settling their claim against the primary insurer so long as the excess insurer receives a credit for the primary insurer's full limits of insurance coverage.

Handleman v. U.S. Fidelity & Guar. Co., 18 S.W.2d 532 (Mo. App. 1929)

U.S. Fidelity & Guar. Co. v. Safeco Ins. Co., 555 S.W.2d 848 (Mo. App. E.D. 1977)

Reliance Insurance Company v. Chitwood, 433 F.3d 660 (8th Cir. 2006)

II. The trial court erred in ruling that the judgment entered by the court in the wrongful death action in the sum of $4,580,076.00, following a 537.065 agreement, was unenforceable above the amount of $2,200,000.00 as unreasonably high because the wrongful death court's judgment of $4,580,076.00 was the result of the judge's independent discretion sitting as an independent fact finder and not the product of a settlement agreement in that 537.065 settlement agreements are subject to a reasonableness review, but judgments entered by the court's independent determination become final after thirty days and are not subject to a reasonableness review in a collateral proceeding.

Gulf Insurance Co. v. Noble Broadcast, 936 S.W.2d 810 (Mo. banc 1997)

Betts-Lucas v. Hartmann, 87 S.W.3d 310 (Mo. App. W.D. 2002)

Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64 (Mo. App. W.D. 2005)

Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297 (Mo. App. E.D. 2007)

Mo. Rev. Stat. § 537.065 (2000)

ARGUMENT

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

A. Introduction

The trial court ruled that Appellants are barred from recovering from Respondent Great American's insurance policy because Appellants settled their claim against the primary insurer for $700,000.00 of the primary's $1,000,000.00 coverage even though Appellants credited Respondent with, and filed a partial satisfaction of judgment for, the full $1,000,000.00. The trial court's ruling is a determination of an issue of law and is subject to *de novo* review. Knipp v. Truck Ins. Exchange, 857 S.W.2d 281, 284 (Mo. App. W.D. 1993); Building Owners and Managers Ass'n v. City of Kansas City, 231 S.W.3d 208, 212 (Mo. App. W.D. 2007). The trial court's ruling is in error because it is not supported by the language of Respondent's insurance policy and is flatly contrary to well-established Missouri law directly on point.

B. Interpretation of Insurance Policy

The rules of construction for insurance policies are well established. The interpretation of insurance policies is a question of law determined by the court in *de novo* review. Eldridge v. Columbia Mut. Ins. Co., 270 S.W.3d 423, 426 (Mo. App. W.D. 2008). The court is to determine the meaning of the policy by the plain and ordinary meaning of its language not in isolation, but in the context of the policy as a whole. *Id*. When interpreting the language in the policy, language is given its plain meaning. Ware v. Geico General Ins. Co., 84 S.W.3d 99, 102 (Mo App. E.D. 2002). If, in viewing the language as ordinarily understood by a layman, the language is reasonably open to different constructions, an ambiguity exists. Hobbs v. Farm Bureau Town & Country Ins. Co., 965 S.W.2d 194, 197-98 (Mo. App. E.D. 1998). If an ambiguity exists, then it is construed against the insurer. Ware, 84 S.W.3d at 102.

Thus, if language, interpreted from the perspective of the insured, is reasonably susceptible to different interpretations, then the interpretation providing coverage must be adopted. Bellamy v. Pacific Mutual Life Ins. Co., 651 S.W.2d 490, 495 (Mo. banc 1983). This rule exists because "[a]n insurance contract is designed to furnish protection and will, where reasonably possible, be construed to accomplish this object." *Id.* at 496; *see also* Ware, 84 S.W.3d at 102. In other words, "[i]f an insurance policy is open to different constructions, the one most favorable to the insured must be adopted." Hobbs, 965 S.W.2d at 198.

Reading Great American's Excess Liability Coverage Form, as a whole, it is apparent that the trial court erred in its ruling that Great American was relieved of any

liability for Appellants' claims because Appellants settled their claims against the primary insurer. Great American's Excess Liability Coverage Form, Section I, entitled "Coverage," plainly states that, subject to the limits of Great American's Insurance, it will "pay on behalf of the Insured the amount of 'loss' covered by this Insurance in excess of the 'Underlying Limits of Insurance." **SLF 145.** It is undisputed that the underlying limits of coverage, provided by Virginia Surety, was One Million Dollars and that Great American's excess liability is limited to Four Million Dollars. Consequently, assuming that, as the trial court found, the Appellants' wrongful death lawsuit was an insured claim that resulted in a binding, final judgment, the question here is: When was Great American liable to pay Appellants for the amount of the judgment remaining after credit for the Floyd and the Virginia Surety's settlements?

Great American's Insurance Policy has a section that plainly addresses when a loss is payable. Section VI(L), "When 'Loss' is Payable" states:

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

SLF. 148.

Thus, under the terms of Great American's policy, it is liable to "promptly pay" the amount of "Loss" falling within the terms of the policy once the Insured or the

Insured's underlying insurance is obligated to pay the full amount of the underlying insurance. Columbia Professional Baseball (and Virginia Surety) became obligated to pay the full $1,000,000.00 of Virginia Surety's policy when the wrongful death judgment for an insured claim became final. *See e.g.*, Farmers Mut. Auto. Ins. Co. v. Drane, 383 S.W.2d 714, 719-20 (Mo.1964), followed in, *e.g.*, Butters v. City of Independence, 513 S.W.2d 418, 425 (Mo.1974); Sexton v. Omaha Prop. & Cas. Ins. Co., 231 S.W.3d 844, 850 n. 6 (Mo. App. S.D. 2007); and Esicorp, Inc. v. Liberty Mut. Ins. Co., 193 F.3d 966, 971 (8th Cir. 1999). Therefore, under the plain language of Great American's policy, Great American was liable for Appellants' claims (after credit for the two settlements) when the final judgment against its insured was entered.

Great American has made two arguments that it claims establish that its liability has not arisen under Section VI(L) of its policy. First, it claims that Virginia Surety has not been "obligated to pay" the full amount of its insurance because it did not, in fact, pay the full amount of insurance when it tendered a check to Appellants for $700,000.00. Initially, it should be noted that this argument simply ignores the fact that Great American's liability arises when the primary insurer **or** the insured becomes obligated to pay at least $1,000,000.00. Further, Great American argues that "obligated to pay" means "paid". Section VI(L) is relatively clear: the excess insurer is under no obligation to pay its coverage until either the insured or the primary insurer is obligated to pay at least the primary's limits, and then Great American must pay the amount of the loss that falls within its policy.

Great American wrote its policy to state that its liability arises upon the primary insurer's (or the insured's) obligation to pay, not its actual payment. Issues with when or how that obligation is enforced against the primary insurer are not determinative of Great American's liability for the loss it has covered. "Obligation to pay" means something different than "payment". Great American used the former term and this Court should give meaning to the language chosen by Great American to describe the circumstances triggering its obligation to pay.

Great American's second argument relates to the definition of "Loss." Throughout Great American's arguments as to the meaning of its policy, it attempts to avoid liability based on the definition of this term. In Section V.B, "Loss" is defined as follows: "'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." **SLF. 146.**

By relying on this definition of "Loss," Great American interprets numerous sections of its insurance policy in a way that virtually guarantees it will never have any liability on a claim because it argues its liability is only for sums that have already been paid. Great American's argument fails, however, because use of the definition of "loss" to mean a sum already paid renders numerous sections of its insurance policy ambiguous and some sections virtually meaningless. For example, if "loss" means "those sums actually paid in settlement or satisfaction of a claim," then Section VI(L), in determining when a "loss is payable" reads as follows:

> When the amount of "[sums actually paid in settlement or satisfaction of a claim which you are legally obligated to pay as damages]" has finally been determined**,** we will promptly pay on behalf of the Insured the amount of "[sums actually paid in settlement or satisfaction of a claim which you are legally obligated to pay as damages]" falling within the terms of this policy.

See **SLF148**

Similarly, using Great American's Section V.B definition of "loss" transforms the coverage provision to the following: "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' . . .." *See* **SLF 146.**

This interpretation produces absurd results. Either Great American is stating that it will pay a sum of money only after it has already paid that sum of money (which, of course, is a circular construction that means Great American could never be forced to pay any money it didn't volunteer to pay) or Great American is stating it will pay a sum of money only after the insured (or some other party) pays it first (which would transform Great American's insurance policy into a reimbursement policy). Assuming Great American would concede that it can't interpret its policy in such a way that only Great American's voluntary act of payment creates a liability, the insurer necessarily is suggesting that its policy is one of reimbursement.

Any argument that Great American's policy is one of reimbursement is inconsistent with the insurance agreement as a whole, contrary to the arguments made by the insurer to date, creates public policy problems if the insurer can be liable only if the

insurer could somehow first afford to pay for a loss, and also creates ambiguities throughout the remainder of the policy. Throughout the policy, Great American states that it will make payments "on behalf" of the insured, which would not be the case if Great American is liable only to reimburse the insured for payments made (*e.g.*, Sections I and VI(L). Section VI(F) specifically authorizes suit against Great American if the amount the insured owes has been determined. **SLF 147.** Section VI(F) is meaningless if Great American's liability doesn't arise until that amount it is liable for has actually been paid.

Therefore, the only reasonable interpretation of Great American's insurance policy is that it is liable when there is a final, binding judgment against its insured for an amount above the primary insurer's limits. Any attempt to interpret the policy so that Great American's liability arises only after someone else has paid the claim fails to comport with the insurance policy as a whole or Missouri law. Great American cannot fairly rely on this interpretation of the obligation to pay.

The trial court below held that the wrongful death judgment was a valid, final judgment for an insured claim. That being the case, Great American was liable to Appellants (apart from interest) either for $2,880,076.00 if Appellants are correct that the entire judgment is enforceable ($4,580,076.00 minus the $700,000.00 Floyd settlement and the credit of $1,000,000 for the Virginia Surety settlement), or for $500,000.00 if the judgment of the trial court below is affirmed ($2,200,000.00 minus the $700,000.00 Floyd settlement and credit for the $1,000,000 Virginia Surety settlement).

Great American argues that if it has any liability for Appellants' claims, then that liability is negated by Section II(B),4, under "LIMITS OF INSURANCE," which states:

> **Subject to [the preceding two paragraphs], if the 'Underlying Limits of Insurance' described in Item 5 of the Declarations are either reduced or exhausted solely by payment of "loss," such insurance provided by this policy will apply in excess of the reduced underlying limit or, if all underlying limits are exhausted, will apply as "underlying insurance."**
>
> *** * ***
>
> **However, we will not pay that portion of a "loss" that is within the "Underlying Limits of Insurance" which the Insured has agreed to fund by self-insurance or means other than Insurance.**

SLF 145. II, B, 4 (alterations added).

Great American argues that this section means that it has liability if, and only if, the primary insurer makes actual payment, in cash, of a sum of money equal to its policy limits.

This argument fails on numerous, independent grounds. First, this section is drafted as an alternative if/then proposition setting forth when Great American's insurance will apply in excess of reduced underlying limits (if the underlying limits are reduced or exhausted solely by payment of loss) or as underlying insurance (if all underlying limits are exhausted). In no place does the policy state that the **only** instance in which Great American will have liability or that Great American's policy will **not**

apply is when the underlying insurance has paid its limit. Great American's argument is the logical error of denying the antecedent included by it in the insurance agreement.

In fact, Great American's policy not only fails to state that it will **not** apply as excess (or underlying) insurance in the absence of full payment, in cash, of the underlying insurer's entire policy limits, this very provision expressly contemplates that there are instances in which Great American would still be liable even when the primary insurer does not pay its full limits. The second paragraph of this section directly states that Great American will not pay that portion of a loss within the underlying insurer's limits that the insured agreed to fund by self-insurance or other means. This paragraph is rendered meaningless if Great American is relieved of liability unless the primary has paid that portion of the loss. Consequently, one cannot infer that Great American's provision setting forth two means by which it would apply as excess or underlying insurance to be the exclusive means of doing so.

Second, Great American's argument which relies on the language, "either reduced or exhausted solely by payment of 'loss,'" ignores the fact that Section II(B)4 is written in the disjunctive. This language, "solely by payment of 'loss,'" is not contained in the final clause of this sentence—the one that applies to exhaustion of all underlying insurance.

Finally, Great American's interpretation of this section relies on a definition of "loss" that creates ambiguities throughout the entire policy and it ignores the other sections (captioned "Coverage" and "When Loss is Payable;" **SLF 148**) that provide that Great American is, in fact, currently liable for Appellants' claims. Thus, even if the

logical errors in Great American's reading of Section II(B)4 are overlooked, Great American has failed to establish that Appellants' interpretation of their policy is unreasonable. At best, therefore, Great American can establish an ambiguity about whether exhaustion of the primary policy is required before Great American is liable and, if so, whether the primary insurance policy can be exhausted by settlement. As a result, the trial court's ruling that Great American has no liability because the primary insurance was not properly exhausted is in error based on the language of the insurance policy.

C. Missouri Precedent

Great American's argument also fails because it attempts to persuade this court to overturn nearly 100 years of settled Missouri law. Insurance policies in Missouri are enforceable only to the extent they are consistent with Missouri law. Farmers Ins. Co. v. McFarland, 976 S.W.2d 559, 565 (Mo. App. W.D. 1998). To the extent a provision in an insurance policy is contrary to the public policy or judicial pronouncements of this state, that provision is unenforceable. *Id.* Missouri law is absolutely clear that an excess insurer cannot condition its own liability on the primary insurer's actual payment of the primary's full limits of coverage because the primary insurance is exhausted if the claimants, as part of the settlement with the primary insurer, reduce their claims by the full amount of the primary's limits. *See e.g.*, Reliance Insurance Company v. Chitwood, 433 F.3d 660 (8th Cir. 2006); Handleman v. U.S. Fidelity & Guar. Co., 18 S.W.2d 532 (Mo. App. 1929); and U.S. Fidelity & Guar. Co. v. Safeco Ins. Co., 555 S.W.2d 848 (Mo. App. 1977).

In Handleman, the Court of Appeals addressed the claim of an excess insurer that it would be liable for the insured's loss only if the primary insurer actually paid the full amount of its policy limits. Handleman, 18 S.W.2d at 534. The excess policy contained an express provision that it would apply only after the primary's limit of insurance of $3,000 "was *exhausted in the payment of claims to the full amount of the expressed limits thereof*." *Id.* (italics in original). The Court of Appeals held that it would not enforce any provision allowing the excess insurer to require the primary insurer to actually pay its full limits, but instead said the primary policy would be exhausted so long as the insured proved that it settled its claim with the primary insurer and had fully discharged all of the primary insurer's liability. *Id.*

> [W]e cannot agree with the contention of the appellant that under said clause plaintiff, as one of the predicates for liability on the part of the defendant, must prove that he has actually collected $3,000 in cash, the full face of the primary policy of insurance. Such suggested construction is harsh and unreasonable, and particularly so in light of the fact that to so hold would be of no rational advantage to the insurer. Such condition is complied with when the insured proves that claims aggregating the full amount of the specific policy have been settled thereunder and full liability of the insurer discharged.

Id.

In U.S. Fidelity & Guar. Co., the Missouri Court of Appeals in St. Louis considered a claim of an excess insurer that it was not liable for sums sought by a claimant because the primary insurance policy had not been exhausted. U.S. Fidelity &

Guar. Co., 555 S.W.2d at 853. Again, the Court of Appeals considered the exact issue as in the instant case:

> Basically, Safeco maintains that as an excess carrier, it has no liability for the interest until USFG, the primary carrier, has discharged its responsibilities by paying the full policy limit. According to Safeco, only payment and not settlement, can discharge a carrier's liability.
>
> * * *
>
> Therefore our first question is *Was USFG's liability exhausted by settlement or can it only be exhausted by payment of its full coverage as Safeco argues*.

Id. (alterations added). The U.S. Fidelity & Guar. Co., Court found that Handleman "clearly held" that a primary policy could be exhausted by settlement and that full payment of the primary policy limits was not required. *Id.*

Finally, in Reliance Insurance Company v. Chitwood, 433 F.3d 660 (8th Cir. 2006), the United States Court of Appeals, Eighth Circuit, reviewed a claim from an excess insurer predicated on the theory that a primary insurer's policy can be exhausted only through payment of its full policy limits, and not through settlement. *Id.* at 663-664. In Reliance Insurance, the primary insurer had policy limits of $750,000.00, but settled the claims against it for $600,000.00 with the stipulation that the settlement discharged $750,000.00 in liability on the claim and that the claimant could seek recovery from the excess insurer only above that $750,000.00 amount. *Id.* at 664.

The Eighth Circuit, in Reliance Insurance, rejected the excess insurer's argument based on the precedent of Handleman and U.S. Fidelity & Guar. Co.

> The details of the settlement agreement confirm that [the primary insurer] fulfilled its obligation. Had [the excess carrier] elected to proceed to trial, it could have done so with the assurance that it would not be required to pay the first $750,000 of any adverse judgment. This is precisely what [the excess carrier] bargained for as the excess insurer. . . . [The excess carrier's] contention that [the primary carrier] was obligated to pay its $750,000 policy limit is inconsistent with the holdings of Handleman and U.S. Fidelity.

Reliance Insurance, 433 F.3d at 664 (alterations added).

All of these cases reach the unremarkable conclusion that an excess insurer has exposure only above the limits of the primary insurer's liability. As each case holds, however, there is no justification for the excess insurer to mandate that the primary insurer must actually pay 100% of its limits. So long as the primary's resolution of its liability results in a credit of its full limits, the excess insurer gets exactly what it bargained for—liability only above the primary's limits—and it is irrelevant whether that credit is the result of a full cash payment or a settlement.

The trial court did not distinguish any of these cases, and neither the litigants nor the trial court below found even one case reaching a different conclusion. Great American has, however, argued that the instant case is distinguishable from the above cases because its policy expressly requires actual payment of the primary's policies before Great American can be liable. Again, it should suffice to note that all of the cited

cases have language in the policy that purports to require the exact same thing, *i.e.*, full payment of the primary insurer's limits. The holding of each of the appellate cases is that such language requiring full payment of the primary insurer's limits is unenforceable. Moreover, the excess policy in Handleman, the seminal Missouri case, actually has much clearer language requiring exhaustion through payment than the language in Great American's policy. In Handleman, the excess policy clearly states that the excess insurer would be liable only after the primary "was *exhausted in the payment of claims to the full amount of the expressed limits thereof*." Handleman, 18 S.W.2d at 853 (italics in original). By contrast, as explained above, Great American's policy is, at best, ambiguous when it comes to determining when Great American is liable for an insured claim.

Great American argues that Handleman is simply wrong and that, in some cases, the excess insurer does gain a "rational advantage" by preventing the primary insurer from settling its claim so that the excess insurer can then attempt to force the primary insurer to investigate and defend the insured or pay its policy limit. If there may be instances in which such an exhaustion requirement might be enforceable to benefit an excess carrier, this case is not it. Great American's policy contains no requirement that the primary insurer defend the insured; in fact, Section VI(G) even provides that Great American's policy would remain in effect even if the insured failed to maintain the primary policy. More importantly, this is a case where both the primary and the excess insurer have claimed (and the excess still does claim) that the Appellants' wrongful death action is not for an insured loss and, consequently, both insurers have taken the position

that there is no duty to defend or indemnify. Most importantly, however, the settlement with the primary insurer took place in this case after final judgment against the insured and during the equitable garnishment action, when there was no duty to defend at all. Consequently, even if this Court has to reach the question posed in Handleman, there is no justification for overturning settled precedent here.

Finally, Great American argues that this Court must interpret the language in its policy to protect it against the risk of Appellants' settling the primary insurer's liability. Great American argues that allowing Virginia Surety to settle would negate Virginia Surety's obligation to defend the insured and expose Great American to its own defense costs. This is simply, and demonstrably, untrue in the context of an equitable garnishment action. Great American is not entitled to require that Virginia Surety pay defense costs at this stage of the litigation. Great American faces no additional "risk" if the primary insured is allowed to settle his liability. If the Appellants in this case reached no settlement with the primary insurer, then the Appellants would still be litigating the remaining issues against both the primary and the excess insurer and Great American would face liability for the judgment above one million dollars. If the Appellants in this case reached a settlement with the primary insurer by which it paid one million dollars, then the Appellants would be litigating the remaining issues against the excess insurer and Great American would face liability for the judgment above one million dollars. If the Appellants in this case reached a settlement with the primary by which it paid less than one million dollars, then the Appellants would be litigating the remaining issues

against the excess insurer and Great American would face liability for the judgment above one million dollars, which is what happened in the instant action.

Thus, allowing Appellants to settle with the primary insurer does not affect Great American's liability at all; in every situation, Great American faces liability only above one million dollars, which it can litigate or settle. Thus, as Missouri courts have unanimously held, the excess insurer faces liability only for what it bargained for—liability above the primary's limits of insurance. The effect of the controlling precedent only allows the primary and the claimants to settle the primary's exposure within that one million dollars. Considering the language of Great American's policy and the nature of the settlement between Appellants and the primary insurer during the equitable garnishment action, there is no justification for allowing Great American to prevent settlement on an insured claim.

D. <u>Conclusion</u>.

Appellants received $700,000.00 from Marcus Floyd, which is a credit against the wrongful death judgment. Appellants then credited $1,000,000.00, which was Virginia Surety's policy limits, as part of a settlement with the insured and the primary carrier. Thus, Appellants are entitled to recover the remaining portion of the wrongful death judgment (plus post-judgment interest) from Great American.

II. The trial court erred in ruling that the judgment entered by the court in the wrongful death action in the sum of $4,580,076.00, following a 537.065 agreement, was unenforceable above the amount of $2,200,000.00 as unreasonably high because the wrongful death court's judgment of $4,580,076.00 was the result of the

judge's independent discretion sitting as an independent fact finder and not the product of a settlement agreement in that 537.065 settlement agreements are subject to a reasonableness review, but judgments entered by the court's independent determination become final after thirty days and are not subject to a reasonableness review in a collateral proceeding.

A. Introduction

Columbia Professional Baseball provided Great American with numerous notices of Appellants' claims and numerous opportunities (and demands) to defend and indemnify the insured against these claims, but Great American refused, asserting that Appellants' claims were not insured. After both the primary insurer and Great American repeatedly, and independently, refused to defend or indemnify Columbia Professional Baseball, Appellants and Columbia Professional Baseball entered into a 537.065 agreement in which Columbia Professional Baseball admitted neither liability for Appellants' loss, nor the amount of the loss, but agreed to allow the case to be set for trial and to pay $100.00 in exchange for Appellants' agreement to seek collection of any judgment only from insurance proceeds.

After a hearing was subsequently held on Appellants' claims in the wrongful death case, the wrongful death trial court issued judgment in favor of Appellants in the amount of $4,580,076.00. This judgment was entered by Judge Holt on March 16, 2005. The judgment became final and was never appealed.

This equitable garnishment action followed. In this case, the trial court rejected Great American's claims of fraud, collusion, lack of notice, and other defenses in

attempting to avoid the effect of the judgment entered against Columbia Professional Baseball and specifically held that "Great American was bound by the Holt Judgment." **R. 812.**

The trial court in the garnishment action did not find that Appellants and Columbia Professional Baseball reached any settlement agreement in the case or any agreement as to liability or damages. Instead, the trial court's judgment below specifically refers to "Judge Holt's findings as to damages" and even enters a finding as to how it appears "Judge Holt reached the [judgment amount]." The trial court then determined, however, that Great American was bound to the wrongful death court's judgment only to the extent the damages determined by the judge were reasonable. In applying this reasonableness test, the trial court concluded that Appellants' reasonable damages were only $2,200,000.00 (not $4,580,076.00). Thus, the trial court below held that Great American would be liable (if the primary insurance company's policy is found exhausted pursuant to Point I) for only $500,000.00, plus interest from the date of judgment, after application of the credits for Appellants' previous settlements. **R. 811, 812.**

Appellants contend that the trial court erred in applying a reasonableness test to the wrongful death court's final judgment. The determination of the trial court in an equitable garnishment as to what test to apply to the enforceability of the underlying judgment is a determination of law, and is reviewable by this Court *de novo*. Building Owners and Managers Ass'n, 231 S.W.3d at 212. Specifically, the legal issue is whether a reasonableness test applies when the trial court in the underlying lawsuit determines the

amount of damages. Appellants contend that the trial court erred in subjecting the wrongful death judgment to any reasonableness test because the final judgment of $4,580,076.00 was the result of the wrongful death court's determination, not the result of a settlement agreement or consent judgment.

As explained below, Missouri law provides that a reasonableness test applies to the amount of a parties' settlement agreement in a 537.065 case, but not to damages determined by the court. If the parties reach an agreement and consent judgment, then the equitable garnishment court can determine whether the agreed-upon damages were reasonable. If, however, a trial court itself determines the damages, then there is no basis for an insurance company, who had notice and an opportunity to argue its case before the trial court but declined to do so, to collaterally attack and re-litigate the final judgment in the equitable garnishment proceeding based on a claim the first trial court was "unreasonable."

B. Traditional Approach to Judgments against an Insured

An analysis of the law applicable in the instant case begins with the proposition that the judgment against Columbia Professional Baseball the insured, applies to Respondent Great American, the insurer, based on collateral estoppel. *See* Drennen v. Wren, 416 S.W.2d 229, 234 (Mo. App. S.D. 1967) (stating "where an indemnitor had notice of the suit against the indemnitee and has been afforded the opportunity to appear and defend, the judgment against the indemnitee, if obtained without fraud or collusion, is conclusive against the indemnitor in respect to all questions and facts therein determined"). As the trial court correctly found, since Great American had notice and an

opportunity to defend, but declined to do so, it is bound by the judgment against Columbia Professional Baseball for the insured risk of Christine Ewing's death.

The trial court's application of a "reasonableness" exception to collateral estoppel derives from the judicial decisions involving section 537.065, RSMo. Section 537.065, RSMo., allows an insured, whose insurance company has refused to defend or indemnify, to enter an agreement with the claimant to limit the claimant's recovery to the insured's insurance policies (thereby protecting the insured from the cost and risks of litigation and shifting the risk of the insurance coverage question to the claimant). *Id.*

Missouri's traditional approach to 537.065 agreements is exemplified by one of the earliest Missouri Supreme Court rulings regarding such agreements. In Eakins v. Burton, 423 S.W.2d 787 (Mo. 1968), the Court rejected an insurance company's challenge to a 537.065 agreement and a subsequent judgment "based upon the fact that the agreement dispensed with the necessity of defendant making a defense to Appellants' claims in order to protect his personal interests." *Id* at 790. The Eakins court noted that "[a]lthough the defendant did not contest Appellants' claims, we see nothing to indicate that the judgments were obtained by fraud or collusion." *Id.* Because the judgment was free of fraud or collusion, the court upheld the judgment, but noted that the defendant still had the right to litigate the coverage questions. *Id.* In subsequent cases, the Missouri Supreme Court continued to subject the collateral application of a judgment following a 537.065 agreement to the collateral estoppel rules of fraud and collusion. *See e.g.*, Butters, 513 S.W.2d at 425.

In 1990, the first dicta in a 537.065 case arose that mentioned any requirement of

reasonableness. Cologna v. Farmers and Merchants Ins. Co., 785 S.W.2d 691 (Mo. App. S.D. 1990). In Cologna, the Court of Appeals, Southern District, noted that the American Law Reports ("A.L.R.") state that to bind an insurer, an insured's settlement "must be reasonable." *Id* at 701. With respect to the "judgment," however, the court applied the standard of whether the same was "collusive or fraudulent." *Id.* It also rejected the insurer's attempt to characterize the proceedings as "a species of confession of judgment." *Id.* The court found the 537.065 agreement to be reasonable and the judgment to be free of fraud or collusion. *Id.*

C. Gulf Insurance Test

It is within this context that the case of Gulf Insurance Co. v. Noble Broadcast, 936 S.W.2d 810 (Mo. banc 1997) arose, which is the genesis of the "reasonableness" test at issue in the instant matter. In Gulf Insurance, the Missouri Supreme Court considered whether an exception to the binding effect of a 537.065 agreement and resulting judgment should be created where the parties, though not acting fraudulently or collusively, stipulate to damages that are unreasonably high. Gulf Insurance, 936 S.W.2d at 816.

In Gulf Insurance, the parties agreed to a $1,000,000.00 consent judgment for an injured leg where medical expenses and lost wages were only $12,072.79. *Id.* The Supreme Court held that, in such situations:

> a reasonableness standard is appropriate in determining the enforceability of section 537.065 **settlements**. Requiring a **settlement** to be reasonable strikes an appropriate balance between the interests of the insured and the interests of the

> insurer. . . . 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 Appellant's claim.

Id. at 815-816 (emphasis added). If the settlement is unreasonable, the court is to hold a hearing and determine a reasonable damage amount. *Id*. at 816-817. By its very terms, then, the Gulf Insurance test applies to "settlements."

The issue of law in the instant case, then, is whether the Gulf Insurance reasonableness test applies to any judgment obtained after a 537.065 agreement, as Respondent Great American claims, or whether the reasonableness test is confined only to settlement agreements and consent judgments, as Appellants claim. Appellants assert that any doubt about the scope of the reasonableness test in Gulf Insurance, has been resolved by three recent cases.

D. Scope of Gulf Insurance Test

In Betts-Lucas v. Hartmann, 87 S.W.3d 310 (Mo. App. W.D. 2002), the Court of Appeals affirmed summary judgment in an analogous case because the State, in that case, "points to no evidence or document suggesting that the trial court in the wrongful death action did anything more than view the evidence as an impartial judicial officer and make his own best judgment as to the amount of damages." *Id.* at 326. Because the award was the subject of judicial discretion, the Gulf Insurance test was held inapplicable. *Id.*

This distinction between stipulated damages and judicially-determined damages was again relied upon by the Court of Appeals, Western District, in Truck Ins. Exchange v. Prairie Framing, LLC, 162 S.W.3d 64 (Mo. App. W.D. 2005). In response to an

insurance company's defense that the judgment was unreasonable, the court noted that the parties did not agree on the amount of damages. The court then reviewed the trial court's record and concluded "[t]he record does not reflect that the trial judge 'did anything more than view the evidence as an impartial judicial officer and make his own best judgment as to the amount of damages.'" *Id.* at 96 (quoting Betts-Lucas, 87 S.W.3d at 326). Therefore, the court affirmed summary judgment, holding that the insurance company's defense failed as a matter of law. *Id.*

In 2007, the Court of Appeals, Eastern District, affirmed the distinction between stipulated damages and damages determined by the judge. Auto-Owners Ins. Co. v. Ennulat, 231 S.W.3d 297, 300 (Mo. App. E.D. 2007). In Ennulat, the court found that the parties had agreed on the damage award because they had negotiated and drafted the judgment together, which set forth an award of ten million dollars. *Id.* at 303-304. Because the parties had agreed on the amount of the judgment, the court found that the Gulf Insurance test applied. *Id.*

Thus, the distinction between judicially determined damages, which constitute a binding final judgment, and an insured's settlement, which is enforceable only if reasonable, could not be more clear. A judicially determined finding, such as damages determined after a judge has "view[ed] the evidence as an impartial judicial officer and [made] his own best judgment as to the amount of damages" is a final judgment and is enforceable. Betts-Lucas, 87 S.W.3d at 326; *see also* N.W. Electric Power Coop., Inc. v. American Motorists Ins. Co., 451 S.W.2d 356, 365 (Mo. App. W.D. 1969). On the other hand, a settlement agreement (or a consent judgment entered pursuant thereto) is the

result of the agreement of the parties, and that agreement is subject to the Gulf Insurance reasonableness test. Ennulat, 231 S.W.3d at 304.

Despite these holdings directly on point, Respondent has argued that the determination of damages by Judge Holt in this case is subject to a reasonableness test because Columbia Professional Baseball did not offer any evidence or cross examine witnesses. In support of its position, Respondent relied on Ferrellgas, L.P. v. Williamson, 24 S.W.3d 171 (Mo. App. W.D. 2000). Although Ferrellgas does contain dicta that suggests a reasonableness test can be applied to judicially determined damages, this case has never been followed by the Western District, or any other district of the Court of Appeals, in this context because it was a **discovery** dispute based on **contribution**.

In fact, the court in Ferrellgas expressly, and repeatedly, stated that the facts in that case differed from those in most 537.065 cases.

> The issue before this Court is a narrow one: Did the trial court err in ruling that Relator Ferrellgas was not permitted to conduct discovery as to the amount of the Augspurger Plaintiffs' damages?

Farrellgas, 24 S.W.3d at 175.

> We note that, uniquely in this case, due to the fact that the Augspurger Plaintiffs were assigned Federal's and the Wood Stove Defendants' contribution rights, and thus the Augspurger Plaintiffs are also the Contribution Plaintiffs, his means that Ferrellgas was precluded from inquiring of the Contribution Plaintiffs about the extent of their own damages.

Id at 176.

> The rights of Ferrellgas and of the Contribution Plaintiffs are thus not determined by the law set out in Gulf Insurance relative to suit by an injured party against a defendant's insurer. Rather those rights are determined by Missouri law regarding contribution among joint tortfeasors.

Id at 177. There is law on point regarding the application of the Gulf Insurance test, but Ferrellgas is not it.

The Respondent also cited Rinehart v. Anderson, 985 S.W.2d 363 (Mo. App. W.D. 1998) to the trial court. Rinehart addressed a settlement agreement between the Appellants and one insurance company where the insurance company agreed to pay one-half its limits, the insured agreed to liability, the Appellants agreed to collect any judgment against the alleged excess insurance company (unless it was determined to have no coverage, in which case the remainder of the first insurance company's policies would be payable). *Id.* at 365. Pursuant to the parties' settlement agreement, they submitted the issue of what a reasonable settlement figure would be to the court (presumably because the participating insurance company still faced exposure if the excess were deemed to have no coverage) and the court determined the damage figure. *Id.* at 366. Based on the unique approach the litigants took in that case, that court affirmed the damage award finding "the amount of the settlement was not unreasonable." *Id* at 372.

The dicta in these two cases are simply inapplicable because the factual context of the cases is distinguishable from ours where the parties did not agree to any issues with respect to liability or damages. There has not been one case to Appellants' knowledge where a damage award that was determined by the judge, and not the parties' agreement,

has been overturned, and the two most recent cases from the Court of Appeals, Western District, both affirmed summary judgment enforcing judicially determined damages because they were the result of judicial discretion and not the parties' agreement. Truck Ins. Exchange, 162 S.W.3d at 96; Betts-Lucas, 87 S.W.3d at 326.

No court has held that insurance companies that refuse to defend or indemnify an insured risk may attack collaterally, and thus re-litigate, a binding final judgment determined by the court. Such an argument is not only without a legal basis, but is also directly contrary to the legislative intent of 537.065, RSMo. This statute was passed so that an insured whose insurer wrongfully denies coverage does not have to bear the costs and risks of litigation simply because the insurance company wrongfully refuses to indemnify. *See e.g.*, State ex rel. Rimco, Inc. v. Dowd, 858 S.W.2d 307, 308 (Mo. App. E.D. 1993). The insured is expressly authorized to limit its exposure to the insurance policies if the claimants are willing to take the risk that the insurance company's coverage determination is wrong. *Id.* The statute was designed, specifically, to allow the insured to protect its own rights and not incur the expense or risk of litigating the case.

If insurance companies are allowed to expand the scope of the Gulf Insurance test, the insured would be stuck in the catch-22 that the statute was specifically designed to avoid. If the insured reaches the legislatively-sanctioned 537.065 resolution of its potential liability and, consequently, does not litigate the case, then the claimants would subsequently not only have to prove that the insurance company was wrong on the coverage issue, but the claimants would actually have to re-litigate the entire case. Even if, as here, the claimants reached no agreement with the insured regarding liability and

damages and allowed the court to determine the same, they would be forced to let the insurance company decline to defend the first time and then re-litigate what proper damages should be in a subsequent collateral attack on a final judgment. Under Respondent's novel interpretation of Gulf Insurance, no claimant would accept a 537.065 agreement in that it accomplishes nothing but limiting the assets from which it could recover; consequently, insureds would lose the very protection section 537.065, RSMo. was designed to afford. Established law and sound public-policy support the rule that a "reasonableness" test applies only to the damages determined by the parties, not those determined by the judge.

E. Application of Precedent in This Case

As applied to the instant case, the Gulf Insurance test, properly construed, is inapplicable to the wrongful death court's judgment. As the trial court in this instant garnishment determined, the Appellants and Columbia Professional Baseball, LLC, only entered a 537.065 agreement that contained nothing about Columbia Professional Baseball's liability and nothing about the amount of Appellants' damages. There was absolutely no evidence of any agreement reached, at any time, between Appellants and Columbia Professional Baseball about the damages to be requested in the wrongful death court, or even about whether Columbia Professional Baseball would be liable. In fact, the only evidence adduced during the hearing, which is now the subject of this appeal, was the uncontroverted testimony of Hamp Ford, counsel for Columbia Professional Baseball, LLC, that there was never any agreement about damages of any kind. The trial court below correctly made no finding of any settlement agreement or agreement as to

damages or even liability.

A settlement agreement is a form of contract that binds the trial court either to accept or reject the parties' agreement. *See* Landau v. St. Louis Public Service Co., 273 S.W.2d 255, 263 (Mo. banc 1954); Kansas City Area Transp. Auth. v. 4550 Main Associates, 893 S.W.2d 861, 868 (Mo. App. W.D. 1995); and Wenneker v. Frager, 448 S.W.2d 932, 935 (Mo. App. E.D. 1969). By the admission of every witness, Judge Holt was free to enter any order he thought proper because Appellants and Great American reached no agreement at all regarding liability or damages; consequently, Judge Holt was free to award any damages he determined to be correct or even no damages at all. As the trial court below found, in fact, the judgment in the wrongful death case was not part of any agreement found to have been entered by Appellants and Columbia Professional Baseball and, instead, was the product of "Judge Holt's findings as to damages."

Consequently, unlike the situation in Gulf Insurance or Ennulat, the parties never reached a settlement agreement or negotiated a consent judgment. Instead, as in Truck Insurance Exchange and Betts-Lucas, the amount of damages was determined by Judge Holt at the wrongful death hearing itself. Thus, because the damages were the result of the independent determination of the wrongful death judge sitting as an impartial fact-finder, it is not subject to the Gulf Insurance test. The insurer may well believe that a different judgment would have been rendered had it taken its opportunity to defend the case and produce its own evidence and arguments; that, however, does not change the fact that, as in our case, Great American had notice and an opportunity to litigate the case and refused to do so. The damages in the underlying wrongful death action were

determined by the court in a valid, final judgment. As such, that judgment is binding on Great American and not subject to its collateral attack after its coverage determination has been proven incorrect.

F. Conclusion

Appellants request that this Court reverse the trial court's ruling that Appellants are prohibited from collecting from Great American's insurance policy above $2,200,000.00 and remand the case with directions to enter judgment in favor of Appellants and against Great American for the sum of $2,880,076.00 (the full judgment of $4,580,076.00 minus credits of $1,700,000.00) together with post-judgment interest of nine percent (9%) per annum, on such sum, from March 16, 2005, until paid in full.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that he did on the 13 day of October, 2010, serve a copy of the foregoing document upon Paul L. Wickens and Kyle N. Roehner, 911 Main Street, 30th Floor, Kansas City, MO 64105, by depositing same in the United States Mail at Fulton, Missouri, and bearing sufficient First Class Postage prepaid, and that the foregoing Appellant's Substitute Brief complies with the limitations set forth in Rule 84.06(b), contains 10,285 words and 867 lines, as counted by the word-processing software used, Microsoft Office 2007, and that the floppy disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

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David J. Moen