NO. SC91098

MISSOURI SPREME COURT

KATHLEEN SCHMITZ, ET AL.,

Appellants-Respondents,

vs.

COMBINED SPECIALTY INSURANCE COMPANY, ET AL.,

Respondents-Appellants.

APPELLANTS-RESPONDENTS' RESPONSE/REPLY BRIEF

DAVID J. MOEN, #39239
621 E. McCarty Street, Ste. A
Jefferson City, Missouri 65101
Phone: (573) 636-5997
Fax: (866)757-8665
ATTORNEY FOR APPELLANT KATHLEEN SCHMITZ

THOMAS K. RILEY, #48988
13 E. Fifth Street
Fulton, Missouri 65251
Phone: (573) 642-7661
Fax: (573) 642-9417
ATTORNEY FOR APPELLANT APPELLANT CRAIG EWING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

RESPONSE TO RESPONDENT'S POINT I

THE TRIAL COURT DID NOT ERRONEOUSLY RULE THAT GREAT AMERICAN WAS BOUND BY THE $4,580,076.00 JUDGMENT BECAUSE GREAT AMERICAN IS BOUND BY THE WRONGFUL DEATH JUDGMENT IN THAT § 537.065 CONTAINS NO CONDITION PRECEDENT REQUIRING A BREACH OF A DUTY TO DEFEND, AND GREAT AMERICAN BREACHED ITS DUTY TO INDEMNIFY AND DECLINED ITS OPPORTUNITY TO DEFEND AFTER NOTICE AND AN OPPORTUNITY TO DO SO.

A. Collateral Estoppel is not based on breach of a duty to defend

Great American makes several arguments that this Court should simply overturn unambiguous legislation and long-standing doctrine to protect the interests of excess insurers. Great American takes issue with the well-established doctrine that an insurer is bound by a final judgment against its insured on a covered claim if it had notice and an opportunity to defend, but did not do so. *See e.g.*, Drennan v. Wren, 416 S.W.2d 229, 234 (Mo. App. 1967). Great American argues that the doctrine of collateral estoppel should no longer be applied to insurers in these cases, but only to insurers who have breached a duty to defend. **Resp. Supplemental Brief, 69**. Great American fails to explain how an excess insurer could ever be forced to pay for an insured claim under the revised doctrine it suggests. The assertion that insurers can be bound by judgments against insureds only if there has been a breach of the duty to defend is without merit.

B. 537.065 is not dependent upon a breach of the duty to defend

If this Court declines the opportunity to protect excess insurers from all judgments against their insureds, then Great American argues that, at least, this Court should force insureds to defend against covered claims despite the clear language of Section 537.065, RSMo. Great American initially asserts that a condition precedent to the application of section 537.065, RSMo, is that the insurer must first breach a duty to defend the insured. The primary problem with this assertion, of course, is that section 537.065 contains no such condition. Section 537.065 makes no mention whatsoever of a duty to defend. There is no language in the statute even referencing such a duty, much less requiring breach of the same before the statute must apply. By its very terms, section 537.065 expressly allows execution against "any insurer which insures the legal liability of the tort-feasor for such damage."

The courts must apply statutes as they are written. State ex rel. Young v. Wood, 254 S.W.3d 871, 872 (Mo. Banc 2008). When the statute's language is unambiguous, the court may not add words by implication. *Id.* To hold that section 537.065 applies only after a breach of a duty to defend, or simply to hold that 537.065 does not apply to excess insurers, would judicially create a new exception to a clear and unambiguous statute and would remove an entire class of insurers from its terms in conflict with the clear legislative language. Alternatively, Great American suggests that this Court ignore Section 537.065 and the well-established precedent thereunder entirely and, instead, adopt Section 57 of the Restatement (Second) of Judgments.

Appellants respectfully suggest that this Court should decline Great American's offer to rewrite settled law. Even in its most limited application, Great American's proposed judicial policy would require an insured, which paid for both primary and excess insurance and then faced a covered claim for which the primary insurer refused to defend, to choose between expending its own money and incurring its own risk to litigate the claim (contrary to its clear rights under section 537.065) or forfeiting any of the excess insurance for which it paid. Such a result is simply inconsistent with Missouri statutes, settled case-law, and sound public policy.

C. The insured did not breach the contract with Great American

Great American's argument is ultimately premised on its claim that it should not be bound by the judgment in this case because Columbia Professional Baseball breached its contractual obligations to Great American in reaching the 537.065 agreement and not contesting the entry of the wrongful death judgment. This claim is not well founded because enforcing Great American's policy as it requests would not only contravene the plain language of section 537.065, RSMo, by prohibiting insured's with an excess insurer from exercising their statutory rights, but it also would ignore the fact that Great American failed either to plead or to prove that Columbia Professional Baseball materially breached its contractual obligations,.

Judge Oxenhandler reviewed Great American's claim that it faced no liability because Columbia Professional Baseball breached its contract and properly rejected that claim for several reasons. **L.F. 21-22.** The insured's alleged breach of contract, including the failure to notify or cooperate, is an affirmative defense. Billings Mutual

Ins. Co. v. Cameron Ins. Co., 229 S.W.3d 138, 143 (Mo. App. S.D. 2007). Great American failed to plead the defense of Columbia Professional Baseball's breach of contract. Great American's Answer fails to cite, or even mention, the very provision of its insurance policy upon which it now seeks to rely; in fact, nowhere in Great American's answer does it allege that it is not liable for Appellants' claims because Columbia Professional Baseball breached any contractual duties owed to it. **L.F. 186-191.** A defendant cannot obtain judgment based on an affirmative defense it did not plead. East Attucks Community Housing, Inc. v. Old Republic Sur. Co., 114 S.W.3d 311 (Mo. App. W.D. 2003).

Great American also failed to prove the elements of an insured's breach of contract. An insurer must prove prejudice from an insured's failure to provide notice. East Attucks Community Housing, Inc. v. Old Republic Surety Co., 114 S.W.3d 311, 326 (Mo. App. W.D. 2003). Great American denied coverage based on liability, and, at trial, it offered no evidence whatsoever that it would have done anything different regardless of any notice from, or attempts to cooperate by, Columbia Professional Baseball. Judge Oxenhandler specifically found that after Great American repeatedly denied any liability on the Appellants' claims by asserting those claims were excluded from coverage, any further notice or attempt to cooperate by Columbia Professional Baseball would be a meaningless act. **L.F. 21.**

With respect to the duty to cooperate, the insurer must also prove that it exercised reasonable diligence to obtain the insurer's cooperation. See Smith v. Progressive Casualty Ins. Co., 61 S.W.3d 280, 283 (Mo. App. E.D. 2001). The uncontested evidence

was that Great American did nothing to secure Columbia Professional Baseball's cooperation.

Moreover, an insurer's actions (including, but not limited to, failure to defend) can waive contractual obligations of the insured. An insurer's denial of coverage based on liability waives any obligation of the insured to provide further notice. Cologna v. Famers and Merchants Ins. Co., 785 S.W.2d 691, 700 (Mo. App. S.D. 1990). The insured is not obliged to do a useless act. Hocker Oil Co. v. Barker-Phillips-Jackson, Inc., 997 S.W.3d 510, 519-521 (Mo. App. S.D. 1999). As Judge Oxenhandler found, Great American wrongfully denied liability for Appellants' claim. Great American did not simply assert that it had no duty to defend, but it affirmatively told its insured it would not indemnify the Appellants' claim. **Trial Ex. 37.** As Judge Oxenhandler ruled, "It is clear that Great American knowingly, intelligently and voluntarily chose not to take advantage of those [opportunities to participate in the wrongful death litigation]." **L.F. 21.** By refusing to indemnify and denying any liability on the Appellants' claim, Great American breached its contract with Columbia Professional Baseball and waived its right to assert that Columbia Professional Baseball subsequently breached its contractual duties to the insurer when it exercised its rights under 537.065, RSMo.

Whether a party materially breached a contract, thereby excusing another party's performance, is a question of fact. Classic Kitchen & Interiors v. Johnson, 110 S.W.3d 412, 417 (Mo. App. S.D. 2003). When the trial court makes no specific findings of fact on an issue, all factual issues are considered to be found in accordance with the result reached. *Id.* On appeal from a court-tried case, the appellate court must accept as true

the evidence, and all inference from the evidence, in favor of the trial court's ruling. T.B.G. v. C.A.G., 772 S.W.2d 653, 654 (Mo banc. 1989). In this case, Judge Oxenhandler correctly found that Great American's claim that it was not bound by the wrongful death judgment failed, and both his specific findings and substantial evidence support that judgment.

For these reasons, Great American's attempts to avoid the implications of its denial of coverage and Columbia Professional Baseball's exercise of its statutory rights fail. As such, Appellants respectfully suggest that Great American's First Point on its Cross Appeal be denied.

RESPONSE TO RESPONDENT'S POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FINDING COVERAGE UNDER THE TERMS OF THE VIRGINIA SURETY POLICY BECAUSE THE POLICY'S COVERAGE EXCLUSION DID NOT APPLY IN THAT A ROCK-CLIMBING WALL IS NOT "EQUIPMENT PERSONS RIDE FOR ENJOYMENT."

The rules of construction for exclusions in insurance policies are well established. The insurer bears the burden of proof to establish the application of an exclusion. Legg v. Certain Underwriters at Lloyd's of London, 18 S.W.3d 379, 385 (Mo. App. W.D. 1999). Language in exclusions is to be strictly construed against the insurer. *Id.* Exclusions are exceptions to liability, which "are to be construed to give the protection which the insured reasonably has a right to expect." Arbeitman v. Monumental Life Ins. Co., 878 S.W.2d 915, 916 (Mo. App. E.D. 1994).

If a term in an insurance policy is defined, the court must look only to the policy for the definition. McManus v. Equitable Life Assurance Society, 583 S.W.2d 271, 272 (Mo. App. W.D. 1979); see also State Farm Mutual Automobile Insurance Co. v. Ballmer, 899 S.W.2d 523, 525-26 (Mo. banc 1995). 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). The plain meaning is the meaning that would ordinarily be understood by the layperson who bought and paid for the policy. *Id.*

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). "'Language is ambiguous if, when viewed in the meaning that would ordinarily be understood by the lay people who bought the policy, it is reasonably open to different constructions.'" Watters v. Travel Guard Intern., 136 S.W.3d 100 (Mo. App. E.D. 2004) (quoting Eagle Boats, Ltd. v. Continental Ins. Co., 968 S.W.2d 734, 736 (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. This Court has applied the rule in the context of an exclusion as follows: "If there are two reasonable constructions of an exclusion, the more narrow of the two must be applied." Columbia Mutual Ins. Co. v. Schauf, 967 S.W.2d 74, 80-81 (Mo. banc 1998).

The designated operations exclusion at issue here excludes injuries arising from an "**amusement device**", which is defined as a **"device or equipment a person rides for enjoyment."** Thus, to determine whether the exclusion applies, the court must determine

whether the rock climbing wall is something one "rides for enjoyment." Stotts v. Progressive, 118 S.W.3d 655 at 663 (Mo.App.W.D. 2003)(stating that if a term is specifically defined in an insurance policy, courts look to that definition to determine its meaning); State Farm v. Ballmer, 899 S.W.2d 523, 525 (Mo banc. 1995)(stating that if a term in an insurance policy is defined, the definition controls).

The rock climbing wall is an artificial, portable unit that, when put in place, stands approximately twenty-five feet high. Climbers are placed in a harness, which is then clipped to a safety belay cable. The climber then ascends the wall by climbing from one artificial rock outcropping to another. The patron cannot move, or use the wall in any manner, unless he or she exerts sufficient physical energy to climb up it. If the patron falls off the wall while climbing, the safety belay cable is intended to stop them from falling. To descend, the climber, while attached to the safety cable, either climbs down from one artificial rock outcropping to another until reaching the bottom or repels down by pushing off from the wall with his or her feet using the safety belay cable. **Resp. Supp. L.F. 298-322.**

Applying the law to the facts of this case, the court must determine whether the rock climbing wall is something one "rides for enjoyment." The court is to give the language its plain and ordinary meaning–the meaning that the average layperson would understand. Stotts, 118 S.W.3d at 662; Shahan v. Shahan, 988 S.W.2d 529, 535 (Mo banc. 1999). Because the clause at issue is an exclusion, it must be strictly construed. Legg, 18 S.W.3d at 385. Further, if it can be reasonably interpreted to deny coverage or to provide coverage, the court must adopt the interpretation that provides coverage.

Columbia Mutual, 967 S.W.2d at 80-81.

Thus, the question before this Court is whether the *only* reasonable interpretation is that a rock climbing wall is a "**device or equipment a person rides for enjoyment**." Plaintiffs respectfully suggest that the Court need only briefly consider how the rock climbing wall is used to realize that the wall is not something a person "rides for enjoyment." Without even parsing the language, it is obvious that a person does not "ride" a rock climbing wall; a person climbs it. The attraction, and the defining characteristic, of a rock climbing wall is the active event of climbing. The average layperson simply would not consider a rock climbing wall as something you ride. The self-evident nature of the conclusion that one doesn't ride a rock climbing wall is illustrated by how odd it sounds when Great American refers to patrons as "riders" of the rock climbing wall or by asking whether anyone would say, "I rode a rock climbing wall this weekend." Thus, even without relying on any rule of construction, the exclusion does not apply.

If the Court does examine in detail the definition in the designated operations exclusion, the same result is warranted. To determine the plain and ordinary meaning of a term, the courts consult standard English language dictionaries. Farmland Industries, Inc. v. Republic Ins. Co., 941 S.W.2d 505, 508 (Mo. banc 1997). The first definition of the verb "**ride**" in *Webster's New Universal Unabridged Dictionary*, excluding one that applies only to animals, is "(2) **to be borne along on or in a vehicle or other kind of conveyance**." In *Webster's International Unabridged Dictionary, 3rd Edition*, "**ride"** definition 1(c), after two definitions again dealing with riding animals, is "**to travel or**

become conveyed by a vehicle (as a carriage, an automobile, or a railroad train): become carried (as in a litter or on men's shoulders)." *The American Heritage Dictionary of the English Language, 3rd Edition,* defines "**ride"** as **"To be carried or conveyed, as in a vehicle or on horseback.**"

Not one of these definitions could be employed to conclude that the rock climbing wall is something you "ride." One is not borne along by the rock climbing wall; one does not travel or become conveyed by the rock climbing wall as in a carriage, car, or train; and one is not carried or conveyed by the rock climbing. The primary attraction of the wall, and the only way to use it, is to move across it by one's physical exertion. In the plain and ordinary sense of the word, a person climbs the wall; he or she does not ride it.

Both a common-sense consideration of the wall as a whole and a detailed analysis of the definition of the word "ride" lead to the same conclusion (that the wall is not something you "ride") for a simple reason. The commonly-accepted definition of "ride" means being carried along by another force, not moving based on your own physical exertion. Hence, roller coasters, bumper cars, ferris wheels, slides, merry-go-rounds, and the like would be excluded because someone rides them. On the other hand, a jungle gym, a balance beam, a haunted house, a climbing rope or net, monkey bars, and a rock climbing wall would not because you don't "ride" them.

Judge Oxenhandler found the Appellants' claim to be covered not only because the Appellants' above interpretation of the exclusion was reasonable, but also because he found it to be the *only* reasonable interpretation. **L.F. 9**. Even if this Court would find that Great American's arguments establish that a reasonable lay-person might conclude

that a rock-climbing wall is something a person "rides for enjoyment," those arguments would create only an alternative, reasonable interpretation and the trial court's ruling must be affirmed. To prevail on this point, Great American must establish that not only would it be reasonable to conclude that the rock-climbing is a device that a person rides for enjoyment, but that it would be unreasonable to conclude otherwise.

Plaintiffs respectfully suggest that there is no narrow or strict construction (or, actually, any legitimate construction at all) of the phrase "device or equipment a person rides for enjoyment" that is broad enough to encompass a rock climbing wall. Great American's reliance on the American Society of Testing and Materials F24 Committee, rather than a dictionary, establishes only that the engineers at "ASTM" regulate rock-climbing walls in the same category as other devices people actually do ride (and, one should note, air-supported bounce houses). **Resp. Supp. L.F. 324-326**. This argument does nothing to establish that a reasonable layperson would conclude that a rock climbing wall is something you ride for enjoyment.

Moreover, Great American bases its argument exclusively on the fact that the rock-climbing wall at issue here used a safety-belay cable. Great American asserts that the safety belay system transforms the rock-climbing wall into something that a person rides because it assists in raising and lowering the patron. In fact, Great American expressly states that the person on the wall "is attached to a harness which 'supports and carries' the rider to the top of the wall." **Resp. Substitute Brief, 80**. The only citation to support this claim, however, is **Resp. Supp. L.F. 298-322**, which is the patent for an auto-belay rock climbing device. Not only does the patent fail to assert that its belay

system exerts sufficient pressure to carry a person to the top of the wall (who is referred to throughout the patent as a "climber" not a "rider"), but it also specifically states that the belay system operates "to only gently pull on [the harness] without significantly assisting the climber up the tower." **Resp. Supp. L.F. 317.** Contrary to the assertions in Great American's brief, the patent repeatedly states that the purpose of the belay system is the "climber's" safety and that, while the climber ascends, the belay system operates only to withdraw slack from the harness and cable. **Id.** In reality, the only way a person can even begin to use the wall—and the only way a person participates in the primary attraction of the wall—is to physically exert the energy necessary to climb up it.

Great American next argues that a rock-climbing wall with an auto-belay cable is excluded from coverage because it is like things such as ski slopes and waves, that people are said to "ride." Initially, it should be noted that 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 insurance for mountains and oceans. Even if Great American's contention would be accepted, however, it is inapposite to the instant case because people don't say they "ride" a rock climbing wall for the simple reason that no one rides them.

Great American's arguments are creative examples of how one could say that rock-climbing walls are similar to things people ride, but they fail to establish that the average lay-person would conclude that a rock-climbing wall is something that a person actually does ride. Moreover, the trial court's ruling must be affirmed so long as the interpretation Appellants have suggested is reasonable. "If there are two reasonable

constructions of an exclusion, the more narrow of the two must be applied." Columbia Mutual, 967 S.W.2d at 80-81 (Mo. banc 1998); "If 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. Because it cannot be said that it is unreasonable for an insured to conclude that one does not ride a rock climbing wall for enjoyment, the trial court's judgment should be affirmed.

REPLY TO RESPONDENT'S RESPONSE TO APELLANTS' POINT 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, AFTER BEING BOUND BY A FINAL JUDGMENT, 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. Appellants Properly Raised the Meaning of Great American's Policy

Great American asserts that Appellants' interpretation of Great American's policy should not be considered because Appellants insufficiently raised the assertion that Great American's policy was ambiguous in its Point Relied On and before the trial court. Appellants have always claimed that Great American's policy, when properly read as a whole, clearly establishes that Great American is liable for Appellants' wrongful death judgment in excess of the One Million Dollars of primary coverage and that Great American's policy fails to extinguish that liability if the Appellants subsequently settle the claim for the primary coverage with the primary insurer. Appellants' rights to recover under Section I "Coverage," Section VI(L) "When Loss is Payable", and Section II "Limits of Insurance" are clear when those provisions are read together, giving reasonable construction to all the terms. **Trial Ex. 69.** Appellants also argue that their right to recover is established by the case of Handleman v. U.S.F.&G Co., 18 S.W.2d 532 (Mo. App. 1929) and its progeny.

While Great American's insurance policy is hardly a model of clarity, the ambiguity with respect to exhaustion arises due to Great American's attempt to interpret its policy in such a way that it has no liability. As Great American's reply brief makes evident, the insurer simply cannot reconcile all of the provisions of its policy with the result it desires to obtain. Appellants are unaware of any authority that states they must raise in their Point Relied On to rebut the Respondent's unsupported interpretation of an insurance policy.

With respect to the allegation that this issue was insufficiently raised at the trial court, Great American raised its contention of non-exhaustion in a post-trial motion for

summary judgment. Appellants' filed their response on or about December 18, 2008, a copy of which is attached in the Appendix to this Brief. Both Great American and Appellants subsequently argued the meaning of Great American's insurance policy and the effect of *Handleman* extensively before the trial court. Appellants preserved the issue as to the meaning of Great American's policy and *Handleman* and believe they have the right to be heard on all arguments where the parties have joined issue.

B. Great American's Explanation of Its Policy

Great American asserts that its policy bars any liability for an insured claim unless the primary insurer has actually paid the sum of $1,000,000 to Appellants. Great American asserts that such a result creates no inconsistencies or ambiguities in its policy. Yet, even taking Great American's extended explanation of how its policy is intended to work, it is immediately evident that such a contention is unsustainable.

Great American begins by explaining how it believes its coverage obligations (as opposed to its obligation to pay a loss) are triggered. **Resp. Brief, 25-27.** Great American asserts that Section II of the policy "describes *how* Great American's limits are applied and coverage is triggered." **Resp. Brief, 25.** After reviewing Section II and the definition of Loss, Great American states, "Great American's **coverage** obligation is triggered when the Underlying Limits of Insurance are 'exhausted.'" **Resp. Brief, 27** (emphasis in the original)**.** Great American continues to then state exhaustion could occur only when the entire $1,000,000 in primary insurance limits was "<u>actually paid</u> in settlement of or satisfaction of a claim which you are <u>legally obligated</u> to pay as damages." **Id.** (emphasis in original). So, Great American's contention is that it has the

obligation to cover (though not pay) a claim only when the $1,000,000 in primary limits is actually paid in satisfaction or settlement of an amount which the insured was legally obligated to pay. It then asserts that the critical mistake Appellants make is to believe the obligation to pay "loss" in Section VI(L) is connected with the obligation to provide coverage for the claim. **Id., FN 5.**

Great American asserts that Section VI(L) does not state when coverage is triggered, but only when loss is payable. Under its interpretation of this section, Great American asserts that two conditions must 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." **Resp. Brief, 41.** Great American asserts, "When both conditions are met, Great American will 'promptly pay on behalf of the Insured the amount of 'loss' falling within [its] policy.'" **Id.**

Thus, by Great American's own interpretation, it will promptly pay the loss falling within its policy once that loss has been finally determined and the underlying insurance is "obligated to pay" its full limits. In other words, Section VI(L), according to Great American, requires it to pay insured claims within its limits when the underlying insured is "obligated to pay" its full limits (not after it has "already paid" them). This is exactly the contention made by Appellants. Great American, in its brief before this Court, has just recited the two conditions to its obligation to "promptly pay" its liability and those conditions include no requirement that the primary insurer exhaust its limits (much less exhaust them through full payment and not settlement). Appellants respectfully suggest

that such an interpretation, by itself, is sufficient to show that it is reasonable to interpret Great American's policy as requiring it to pay Appellants' insured claim above the primary's limits.

Nevertheless, Great American's own argument also illustrates numerous other irreconcilable problems with its proposed interpretation of the insurance policy. Since there is no way even to argue that exhaustion has been written into the policy as a condition to Great American's obligation to pay under Section VI(L), Great America has entirely separated what it says is the definition of when it has a coverage obligation (when the primary insurance is exhausted through actual and full payment of its limits) and what it says is the definition of when it has the obligation to pay (when (1) the underlying insurer is obligated to pay its full limits and (2) there has been a final determination of the specified amount of money actually paid in satisfaction of a claim the insured is legally obligated to pay). **Id.**

In doing so, Great American has defined its policy so that its obligation to pay would actually precede its obligation to provide coverage. In all cases without a settlement, it is axiomatic that there is a final determination of the amount of loss before there is an actual payment of it. A policy interpreted where the insurer must promptly pay a claim before it is even obligated to cover it could hardly be more ambiguous.

Another insurmountable problem with Great American's interpretation is that when it uses the definition of "loss" as it is written in the past tense (sums "actually paid") to interpret what it says is the exhaustion requirement, then that same definition must be used to interpret its own obligations to cover and pay a claim. By this very

language, as well as Great American's explanation of it, Great American is only obligated to pay money after there has been a final determination of the amount that has been "actually paid." So, the only reasonable way to apply the definition of loss on which Great American's relies is that it requires that the insured (or, possibly, some third party) actually pay an insured claim before Great American has to do so. Such a requirement is not only void due to section 537.065, RSMo, but it creates a clause found in reimbursement policies that is inconsistent with any reasonable interpretation of its policy (or any excess insurance policy) as a whole.

These issues with Great American's proposed interpretation validate Appellants' reading of the policy without even considering the problems with Section II(B)4. To start, it is helpful to note how easy it would have been for the insurance policy to expressly condition its obligation to pay on exhaustion through full payment of the primary's limits: "We will have no obligation to pay any 'loss' until after the underlying insurer has made actual payment of its entire limits on your behalf." By contrast, Great American's policy contains no exhaustion condition to its obligation to pay, and even the section on the limits of its insurance describe how the limits are applied "if the [primary's limits] are either reduced or exhausted solely by payment of 'loss'" or "if all underlying limits are exhausted." Not even this section purports to state what will happen if those conditions are not met. **Trial Ex. 69, Sec. II.B.1.4.**

Moreover, Great American's interpretation of this section not only misconstrues the plainly disjunctive nature of its conditions, rendering one or the other reference to "exhaustion" duplicative, but it also means that the entire second paragraph of the section

is meaningless. If Great American never has to pay a claim (or, as it argues, even cover it) until after the primary insurer has actually made full payment of its entire limits, then it would be impossible for an insured to agree to fund any portion of the primary's limits and the policy would have no need to follow the alleged exhaustion requirement with, "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." **Id.** Not only does Great American's interpretation render this section surplusage, but it actually contradicts it; according to Great American, if the insured agrees to fund any portion of the underlying limits by self-insurance or other means, then Great American not only does not have to pay that amount, it does not have to pay anything at all. This section is obviously not the clear and unambiguous exhaustion provision that is relied on in the cases Great American cites.

Finally, even if one narrows consideration of the policy to the one phrase in the one section on which Great American relies, its interpretation is still flawed because the purported exhaustion requirement, as Great American construes it, requires the primary insurer to exhaust its limits solely by payment of "loss." Yet, the definition of loss includes sums paid "in settlement or satisfaction of a claim which [the insured is] legally obligated to pay as damages." **Trial Ex. 69, Sec. V,B.** How is payment of $700,000 in settlement of the primary's entire limits of $1,000,000 not an actual payment of sums in settlement of the insured's obligations?

C. Precedent and Public Policy

Great American's remaining arguments are irrelevant to the disposition of the question in this appeal. It is true that other jurisdictions considering much different language in other insurance policies have examined exhaustion in contexts other than the instant one in which a third-party creditor settles with the primary after final judgment against the insured. Some of those jurisdictions held that the excess insurer was not liable under the specific language in the policies before them. Those cases are not determinative of how Great American's policy should be interpreted in this case.

Similarly, Great American's arguments as to public policy are insufficient to warrant overturning *Handleman* because they do not apply here. Appellants concede that some cases could arise in which allowing the primary insurer to settle its exposure with a claimant or an insured prior to a final judgment against the insured could adversely affect the excess insurer (being cases in which a duty to defend the insured existed), but that is not the case here. Appellants settled their claim against the primary insurer in a post-judgment enforcement action against the primary insurer (for its limits of $1,000,000) and the excess insurer (for the extent of its exposure above that $1,000,000). Great American's attempt to prevent the Appellants and the primary insurer from settling is not only inconsistent with Great American's policy language, but it also would discourage (if not completely prevent) parties from settling an independent claim in furtherance of no legitimate interests.

REPLY TO RESPONDENT'S RESPONSETO APPELLANTS' POINT II

THE TRIAL COURT ERRED IN RULING THAT JUDGMENT ENTERED BY 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 AFTER THE COURT'S INDEPENDENT DETERMINATION BECOME FINAL AFTER THIRTY DAYS AND ARE NOT SUBJECT TO A REASONABLENESS REVIEW IN A COLLATERAL PROCEEDING.

Great American's argument that the trial court correctly applied the Gulf Insurance test is primarily premised on its claim that Judge Oxenhandler found that the Appellants and Columbia Professional Baseball agreed on damages in the sum of $4,580, 076 and, thus, this amount was part of the parties' 537.065 settlement. This is incorrect. While neither party requested findings of fact and conclusions of law prior to the close of evidence, nothing prevents the trial court from voluntarily entering findings of fact. Abeles v. Wurdack, 285 S.W.2d 544, 547 (Mo. 1956). Section 510.310, RSMo, provides that, for issues on which no specific findings are made, facts should be deemed found in accordance with the result reached. In other words, where "the record does not show upon what facts the trial court based its judgment," the judgment must be sustained if it can be justified by the evidence. Ward v. Gregory, 305 S.W.2d 499, 503 (Mo. App. S.D.

1957). Appellants respectfully suggest that such a doctrine does not mandate that this Court ignore the findings actually made by the trial court, presume the Court found facts that it did not find, and then ignore the trial court's application of the law. Judge Oxenhandler found that Judge Holt determined the wrongful death damages, **L.F. 22,** because there was no evidence of any settlement between Appellants and the Insurer. Judge Oxenhandler then applied the *Gulf Insurance* test to the wrongful death court's "findings" as to damages. This is the basis of Appellants' contention that the trial court below erroneously applied the law.

Regardless of the standard to be applied to the trial court's judgment, the issue is whether the parties in the wrongful death case reached a settlement (in which case the *Gulf Insurance* test would apply) or not (in which case the *Gulf Insurance* test is inapplicable), and there is no substantial evidence to support the claim that the parties reached a settlement. The only fact witness examined by either party as to whether a settlement was reached was the attorney for Columbia Professional Baseball, Hamp Ford. Neither party attempted to impugn Mr. Ford's credibility at the trial, and his testimony was clear and consistent.

Mr. Ford unequivocally stated that Columbia Professional Baseball did not agree that they were liable for Appellants' wrongful death claim; in fact, they disputed any liability. **Tr. 49:14-24**. He also unequivocally stated that there was no agreement between the Appellants and Columbia Professional Baseball as to liability or as to damages. **Tr. 50:4-7**. Mr. Ford testified that he could recall no negotiation as to how the trial would be conducted and there was certainly no agreement as to what either side

would do. **Tr. 51:8 – 52:5**. Mr. Ford repeatedly testified that no agreement was reached as to the Appellants' damages or even as to what damages Plaintiffs would request from the court. **Tr. 50:7; 52:6-12; 56:8-13; 61:25 – 62:9**.

These assertions were never challenged. Instead, in Great American's cross-examination, Mr. Ford testified that, after the 537.065 agreement was reached, it was irrelevant to his client what damages were entered. **Tr. 67:2-20**. He directed counsel for Columbia Professional Baseball to appear at the trial, but do nothing. **Tr. 66: 20 – 67:1**. He could not recall whether he reviewed the judgment prior to the trial, though it looked familiar. **Tr. 68:17 – 69:8**. He also stated that he wouldn't classify what happened as a "contested trial." **Tr: 72:3 – 23**. Thus, there was absolutely no evidence at the trial below that Columbia Professional Baseball reached a settlement or any agreement as liability or damages.

While the evidence at the trial from Mr. Ford's testimony is consistent and clear, Great American's representation of it is not. Great American says that "counsel for [Columbia Professional Baseball] helped prepare the Judgment," but the citations to the transcript show only that Mr. Ford says he can't recall whether he saw it or perhaps had input into it, but that he is certain he was not involved as to the amount of damages sought. **Tr. 52:6-12; 69:5-8**. Great American claims the evidence shows Columbia Professional Baseball consented to the entry of the wrongful death judgment when both the transcript of the wrongful death trial and Mr. Ford's testimony show that the attorney present only would have seen a copy of the judgment before it was handed to Judge Holt, but otherwise did nothing. **Trial Ex. 67, p. 38; Tr. 69:13-19**.

Great American stops short of attempting to point to any evidence it claims supports the assertion that the parties reached an agreement on damages, but does attempt to side-step what should be the fundamental factual question by claiming that Columbia Professional Baseball "was agreeable to *whatever amount of judgment plaintiffs desired*, so long as it received the protection of section 537.065." **Resp. Substitute Brief, page 55** (emphasis in the original). The evidence Great American cites to support even that contention, however, is only Mr. Ford's testimony that, after the 537.065 agreement was entered, it was irrelevant to his client what damages were ultimately found. **Tr. 67:2-20**. This evidence falls short of establishing that Columbia Professional Baseball was "agreeable" to any amount of damages, much less that it did agree to damages.

In the end, Great American's arguments establish nothing more than that the evidence shows that Columbia Professional Baseball exercised its rights under section 537.065, RSMo and did not contest Appellants' evidence or arguments at the wrongful death trial. Great American suggests, then, that because Columbia Professional Baseball did not aggressively litigate the underlying wrongful death case, the underlying judgment is subject to the *Gulf Insurance* test. In other words, if an insured party is facing an insured claim that neither the primary nor excess insurer will defend or indemnify, the insured must strenuously (and at its own expense) litigate the case to protect the insurers and, if it does not, then the insurers liability is limited to what they would have paid to settle the case, had they taken responsibility for the claim. This conclusion is inconsistent with both the law and common sense.

Great American's contention that the *Gulf Insurance* test should apply if the insured exercises its rights under 537.065 and does not go to the expense of aggressively litigating the case would render the statutory rights under 537.065 meaningless. The benefit of section 537.065 is to allow an insured to enter into the agreement contemplated by the statute and avoid the costs and risk of defending an insured claim. The claimants obviously cannot force the insured to litigate the case aggressively (or, worse, put forth some bare minimum of evidence, objections, or arguments). Under Great American's argument, however, if the claimants allow the insured to exercise those rights, then they either forego any right to collect against the excess insurer (which is Great American's argument under Point I of its Cross Appeal) or they forego the right to collect anything more than the amount the insurer would pay to settle the claim if the insured had not breached its duty under the insurance agreement (which is the argument Great American makes here).

If that would be the law, then an insurance company only has the incentive to deny coverage for an insured claim. The claimants would have to obtain a judgment, file an equitable garnishment, prove that coverage existed, and then the most they would be entitled to receive is what the insurance company should have paid to settle the case. For example, in a case where an injured party has a claim against an insured (that is a covered by insurance) with a 95% chance of obtaining a plaintiff's verdict of $1,000,000 claim, the plaintiff would have every right to proceed to trial and obtain that $1,000,000 claim. Yet, under Great American's argument, if the insurance companies declined to defend or indemnify the insured and the insured exercised its rights under 537.065, a judge's

verdict of $1,000,000 based on the same evidence from plaintiff would actually be overturned because a reasonably prudent defendant would settle for something between $950,000 and $1,000,000. By that logic, an insurer should always deny defense and indemnity coverage because it never will face more liability than its settlement point. Appellants respectfully suggest this is not what the law is or should be.

Great American's argument also would create legal standards that make the *Gulf Insurance* test impossible to apply. If an insured enters a 537.065 agreement, should the claimants attempt to force the insured to still litigate when it has no financial risk? If not, do the claimants appear before the judge and put on the evidence they think the insured would use if it were litigating the case?

If the claimants cannot force the insured to litigate, or pretend to do so themselves, should they appear before the judge and try to admit evidence as to what amount the insured should pay if it were to settle the case? How would the claimants even have access to evidence that might be relevant to what the insured would pay to settle the claim? Why would a settlement amount be relevant considering the fact that the insurance company is offering nothing to settle the claim?

If, alternatively, the parties follow the process Appellants did here and present their own evidence and arguments to the judge, how is the *Gulf Insurance test* to be applied to the judgment entered in the underlying case? Should the judge in the equitable garnishment case examine whether the judge in the first case acted like a reasonable, settling defendant? Should the inquiry be limited to the evidence actually presented to the first judge or to evidence that the insurance company subsequently developed?

Appellants respectfully suggest that the only answer to the problems raised by Great American is that, if Great American's suggestions are adopted, the courts will have judicially overturned section 537.065, RSMo. No claimants would ever agree to enter a 537.065 agreement because they would accomplish nothing except increasing their risk and limiting their right of recovery.

If section 537.065, RSMo, is to have any meaning, then it has to be available to allow all insureds (especially ones who paid for both primary and excess insurance) to eliminate their exposure for an insured claim when the insurers wrongfully deny coverage. If the insured then reaches a settlement agreement with the claimants as to damages, then that settlement agreement is subject to the *Gulf Insurance* test as to whether the settlement was reasonable. When, as here, the insured reaches no settlement, but simply allows the claimants to seek the judgment they can rightfully obtain (without fraud or collusion) from the trial court, then the trial court's judgment when final should be free from collateral attack.

In this case, Great American was afforded notice and an opportunity to defend an insured claim, but it opted not to do so, claiming, as it still does before this Court, that no coverage exists for Appellants' claims. If that coverage determination is wrong, Great American should not be allowed to re-litigate a final judgment and to limit its exposure to what it would have settled for had it accepted its indemnity obligations when it should have.

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DAVID J. MOEN, #39239
621 E. McCarty Street, Ste. A
Jefferson City, Missouri 65101
Phone: (573) 636-5997
Fax: (866)757-8665
ATTORNEY FOR APPELLANT
KATHLEEN SCHMITZ

_____
THOMAS K. RILEY, #48988
13 E. Fifth Street
Fulton, Missouri 65251
Phone: (573) 642-7661
Fax: (573) 642-9417
ATTORNEY FOR APPELLANT
APPELLANT CRAIG EWING

CERTFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT THE FOREGOING Brief fully complies with the provisions of Rule 55.03; that it contains 8,364 words/695 lines and complies with the word/line limitations contained in Rule 84.06(b); 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 the Brief was sent via U.S. Mail, postage prepaid, this 10th day of December, 2010 to:

Paul Wickens
Foland, Wickens, Eisfelder, Roper & Hofer, P.C.
911 Main Street, 30th Floor
Kansas City, MO 64105

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David J. Moen

APPENDIX