

Summary of SC91098, Kathleen Schmitz and Craig Ewing v. Great American Assurance Company a/k/a Great American Insurance

Appeal from the Boone County circuit court, Judge Gary M. Oxenhandler
Argued and submitted January 12, 2011; opinion issued April 26, 2011

Attorneys: The parents were represented by David J. Moen of David J. Moen PC in Jefferson City, (573) 636-5997, and Thomas K. Riley of Riley & Dunlap PC in Fulton, (573) 642-7661; and Great American was represented by Paul L. Wickens and Kyle N. Roehler of Foland, Wickens, Eisfelder, Roper & Hofer PC in Kansas City, (816) 472-7474.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The parents of a woman who died as a result of injuries sustained after falling from a climbing wall at a baseball game were awarded about \$4.58 million in damages following a trial on their wrongful death claims. They settled all but \$2.2 million of those damages with the owner of the climbing wall and the team owner's primary insurer. They appeal a circuit court's judgment finding that the team owner's excess insurer was not liable for the remaining damages. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirmed the judgment in part; reversed it in part; and remanded (sent back) the case for further proceedings. The circuit court properly found that a policy exclusion did not apply because the climbing wall is not an "amusement device" under the policy. The court also properly found the excess insurer is bound by the \$4.58 million judgment because it unjustifiably refused to defend or provide coverage. The circuit court erred, however, in finding that the excess insurer's obligation to pay the claim was dependent on the primary insurer to exhaust its policy limits; the policy contained no such requirement. The court also erred in applying a reasonableness test that applies only to settlements and not to a judgment entered after a trial at which the excess insurer had an opportunity to present a defense but declined to do so.

Facts: A young woman died as a result of injuries she sustained after falling from a portable rock climbing wall during a minor league baseball game in Columbia. Her parents filed a wrongful death lawsuit against the owners of the rock wall and the baseball team. They settled their suit against the climbing wall owner for \$700,000 but continued their suit against the team, which was insured by Virginia Surety Company for \$1 million in primary coverage and Great American Assurance Company for \$4 million in excess coverage. The team gave both its insurers notice of the woman's death and her parents' lawsuit. Both companies denied any duty to defend or indemnify on the ground that their policies excluded coverage for injuries sustained from the use of an amusement device. The parents and the team subsequently entered into an agreement pursuant to section 537.065, RSMo 2000, providing that if the parents obtained a judgment against the team, the parents would limit any recovery to the insurance policies. At trial, the parents introduced evidence; the team neither objected to the entry of evidence nor offered evidence of its own. The court entered judgment finding the team liable for the woman's death and assessing the parents' damages at about \$4.58 million. There was no appeal.

The parents subsequently filed an equitable garnishment lawsuit against Virginia Surety and Great American to recover the judgment from the team's insurance policies. Virginia Surety and

the parents entered into a settlement agreement under which, in exchange for \$700,000, the parents agreed to release their claims against Virginia Surety for that policy's full amount of \$1 million. The parents subsequently proceeded with their lawsuit against Great American for the remaining liability of about \$2.88 million (the \$4.58 judgment less the \$1 million partial satisfaction from the settlement with Virginia Surety and \$700,000 from the settlement with the climbing wall's owner). Following an evidentiary hearing, the circuit court upheld the trial court's finding that the team was liable, concluded that the \$4.58 million damages award was unreasonable and that \$2.2 million were reasonable damages; and that the Great American policy did not cover the \$2.2 judgment because, given that the parents settled their claim against Virginia Surety for less than the \$1 million limit, the primary policy was not exhausted. The parents appeal, and Great American cross-appeals.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) The circuit court erred in finding that the Great American policy required the underlying limits of insurance to be exhausted before Great American could be liable for excess amounts. Courts must interpret an insurance policy as it is written. The plain language of the Great American policy states that coverage will apply if the insured or insured's underlying insurance "is obligated to pay the full amount" of the underlying limits of insurance and that, once the amount of loss has been determined, Great American "will promptly pay" the amount falling within the terms of the policy. The policy requires only an obligation to pay, not actual payment. The policy further contains language – regarding when the underlying insurance limits "are either reduced or exhausted" and discussing loss that the insured agrees to fund by "means other than insurance" – recognizing that the underlying limits of insurance may be fulfilled by something other than insurance. Here, the underlying limits of insurance were met by a settlement that consisted of a \$700,000 payment from Virginia Surety and a release for the remaining \$300,000 of that company's policy limits. The policy was unambiguous: Great American's obligation to pay claims was not dependent on the underlying insurer exhausting its limits.

(2) The circuit court properly found the amusement device exclusion in the policy does not apply here. The Virginia Surety policy excludes coverage for incidents involving "any amusement device," which the policy defines as "any device or equipment a person rides for enjoyment." The policy does not define "ride," but the dictionary defines it as a verb meaning, in part, "to travel or become conveyed by a vehicle ... become carried." This indicates some force other than the participant creates the movement. A person does not "ride" a portable rock climbing wall but rather supplies the physical exertion for the movement of climbing it. As such, the climbing wall is not an amusement device under the policy.

(3) The circuit court erred in applying the reasonableness test set forth in *Gulf Insurance Co. v. Noble Broadcast*, 936 S.W.2d 810, 815 (Mo. banc 1997), to a judgment entered after a trial. *Gulf Insurance* requires all settlements entered under section 537.065 to be reasonable to be enforceable. As such, it ensures that the insurer will not have to pay a settlement that is unreasonable in proportion to the damages incurred. The *Gulf Insurance* test, however, applies only to settlements made pursuant to section 537.065. Here, damages were awarded following a trial at which Great American had an opportunity to present a defense but declined to do so.

(4) The circuit court properly found that Great American is bound by the \$4.58 million judgment. As the team's insurer, it was bound to protect the team from liability. Although it believed its policy excluded coverage for the accident here, it was incorrect. The trial court's correct finding that the climbing wall was not an amusement device triggering the exclusion renders unjustified Great American's refusal to defend or provide coverage. Once an insurer unjustifiably refuses to defend or provide coverage, the insured may enter an agreement with the plaintiff – without the insurer's consent – to limit its liability to its insurance policies. Here, the team entered into an agreement with the parents pursuant to section 537.065 that limited the collection of any judgment entered against it to the insurance policies. Great American's refusal to defend or provide coverage, while it may have been an honest mistake, was unjustified. As such, Great American is bound by the agreement.