IN THE SUPREME COURT OF IOWA
No. 18-1550
Polk County Equity No. CVCV054654

T.H.E. INSURANCE COMPANY,

Plaintiff/Appellee,

v.

ESTATE OF STEPHEN PAUL BOOHER; GLADYS F. BOOHER, Administrator, and GLADYS F. BOOHER, INDIVIDUALLY,

Defendants Booher/Appellants,

STUART R. GLEN,

Defendant (Not appearing or participating at trial court level).

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. JEANIE VAUDT, JUDGE

DEFENDANTS'-APPELLANTS' BOOHER REPLY BRIEF AND RENEWED REQUEST FOR ORAL AGRUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Iowa Statute:

Iowa Rules:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Plaintiff T.H.E. incorrectly asserts Section II of the CGL Policy does not define covered risks. It does, however, as even a cursory reading makes clear. The trial court improperly followed T.H.E.'s lead.

II. The Plaintiff T.H.E. wrongfully claims the language of "expected or intended bodily injury or property" exclusionary language of Section I of the CGL Policy bars reliance on the risk coverage acceptance by the carrier in Section II. The trial court wrongfully adopted that same approach in releasing the carrier from responsibility below.

Cases:
National Sur. Corp. v. Westlake Inv., LLC, 880 N.W.2d 724, 734 (Iowa 2016)

Iowa Rules:
Iowa R. App. P. 6.904(3)(j)

III. The trial court erred in concluding that the Defendant Booher claims for injury and damage can only arise from and through Steve Booher's bodily injury. In so doing, the court wrongfully adopted T.H.E.'s position on that issue.

Cases:
National Sur. Corp. v. Westlake Inv., LLC, 880 N.W.2d 724, 734 (Iowa 2016)

Iowa Rules:
Iowa R. App. P. 6.904(3)(j)

IV. When the allegations in the pleadings are compared to the policy language, an issue of potential or possible liability against Defendant Glen is generated under the policy provisions. The trial court committed reversible error in concluding otherwise.

Cases:
Boelman v. Grinnell Mut. Ins. Co., 826 N.W.2d 494, 501-02 (Iowa 2013)

Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443, 445 (Iowa 1970)

City of Cedar Rapids v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 304 N.W.2d 228, 231 (Iowa 1981)

Iowa Fuels & Minerals, Inc. v. Iowa State Board of Regents, 471 N.W.2d 859, 863 (Iowa 1991)

McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W.2d 117, 119 (Iowa 1984)

National Sur. Corp. v. Westlake Inv., LLC, 880 N.W.2d 724, 734 (Iowa 2016)

Ottumwa Hous. Auth. v. State Farm Fire & Cas. Co., 495 N.W.2d 723, 726 (Iowa 1993)

Iowa Statutes:
Section 85.20 of the Code of Iowa

ARGUMENT – STATEMENT OF LAW

I.

Plaintiff T.H.E. incorrectly asserts Section II of the CGL Policy does not define covered risks. It does, however, as even a cursory reading makes clear. The trial court improperly followed T.H.E.'s lead.

In its brief Plaintiff T.H.E. contends that "although Section II defines 'insured,' it does *not* define the risks that are covered." (Plaintiff T.H.E.'s Brief at p. 21; hereafter "Brief, p. 21").

That is a false premise as the language of Section II (and the Multi-Plex Liability Endorsement as later explained) make obvious.

Section II first details who is an insured under the CGL Policy (i.e., employees such as Defendant Glen); next explains they are covered "only for acts within the scope of their employment . . . or while performing duties related to the conduct of [Adventure Lands] business" (i.e., risks covered); and then limits that risk coverage by excluding the following as covered events:

- (1) "Bodily Injury" or "personal and advertising injury": . . .
- (2) "Property Damage" to property: . . . (Appendix Volume II, page 0340; hereafter "App. Vol. II, p. 0340").

A few of the risk exceptions noted in Section II include certain types of bodily injury risks, personal and advertising injury risks, various property damage risks, newly acquired organization risks; risks associated with conduct of any current or past entity now shown as a Named Insured in the Declarations; and relational risks associated with bodily injury (later removed as a risk exception). (App. Vol. II, p. 0340).

Any objective reading of the CGL Section II language makes it obvious there is insurance coverage policy ambiguity created by comparing the risks covered as outlined in Section I and those defined in Section II of the CGL Contract.

Section II acknowledges and accepts coverage responsibility for employees' described acts on a much broader and more generalized scale than Section I, subject to the risk exceptions noted in Section II, none of which apply to bar Defendant Boohers' claims as alleged in this case.

When the rules of contract construction and interpretation are applied to the ambiguous policy language, as detailed in Defendant Boohers' opening Brief, it makes obvious this is no case for pretrial dismissal against Plaintiff T.H.E. as occurred below.

The trial court improperly relied exclusively on Section I of the policy in concluding:

"In the Section I insuring clause of the CGL Policy, THEIC agrees that it 'will pay those sums that the insured becomes legally obligated to pay as *damages because of "bodily injury". . . to which this insurance applies.* (CGL Policy at p. 1, §I, ¶ 1(a)) (emphasis added). The Boohers argue that the insuring clause should be read to mean 'damages. . . to which this insurance applies.' The Boohers indicate that because there is no exclusion for relational or consequential damages, the 'insurance applies' to the Boohers' claims." (App. Vol. II, p. 0996).

That conclusion completely misses the point raised by Defendant Booher below. No argument was made that Section I should be rewritten or somehow interpreted and/or construed as the trial court suggests. Rather, Defendant Booher urged the trial court to compare the contract language in Section I with that found in Section II. In so doing the ambiguous nature of the risks covered would have been self-evident. Unfortunately, the trial court for reasons unknown refused to engage in that analysis.

In so improperly limiting its review the trial court committed reversible error.

II.

The Plaintiff T.H.E. wrongfully claims the language of "expected or intended bodily injury or property" exclusionary language of Section I of the CGL Policy bars reliance on the risk coverage acceptance by the carrier in Section II. The trial court wrongfully adopted that same approach in releasing the carrier from responsibility below.

T.H.E. suggests that "bodily injury"' as used in its CGL Policy does not cover lost consortium claims as alleged in the underlying action. Those damages are covered, however, as the Multi-Plex Liability Endorsement confirms when it expanded the definition of "bodily injury" and provided the following additional coverage:

Employee v. Employee Bodily Injury Liability – Additional Coverage

Section II – Who Is An Insured, 2. a., item (1) is modified to eliminate "Bodily Injury." (App. Vol. I, p. 0703).

With "bodily injury" removed as an exclusion to employee coverage in Section II by the subject policy endorsement, that policy modification underscores T.H.E.'s responsibility to defend and indemnify employee Glenn's actions which caused injury and harm to decedent Stephen Booher's family.

T.H.E. goes on to argue that what took place at the Raging River Ride was not an "occurrence" under the Section V policy definitions. (App., Vol. II, p. 0345). The problem with that position, as adopted unfortunately by the below court, is that it requires a jury, as fact finder, to determine whether the event and the resulting harm were both "expected or intended from the standpoint of the insured", not the court as T.H.E. encouraged below. (Iowa R. App. P. 6.904(3)(j)); *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 734 (Iowa 2016) (Jury instruction provided guidance in application of the terms "action" and "occurrence" and furthermore detailed how such action should be determined from the viewpoint of the insured and whether if it was intended or should reasonably have been expected.)) (Id.).

T.H.E. argues the same point, inaccurately, on this appeal: "Thus if Glen expected both the event and the resulting injury to Stephen, then coverage would not extend to any injury he caused." (Brief, p. 15).

Is Defendant Glen's expectation a law determination for the trial judge? No. It is a fact issue for the jury to decide. (Iowa R. App. P. 6.904(3)(j); *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 734 (Iowa 2016)).

In so invading the province of the jury the trial court acted in error.

T.H.E. further misrepresents Defendant Boohers' position in reciting: "The Boohers do not allege in the Underlying Action that Stephen was injured by an unintended event." (Brief, p. 15).

The carrier goes on to contend in its appellate brief: "Thus Glen expected both the exposure to danger, which he observed, and the injury, which he allegedly observed Stephen was in the process of suffering." (Brief, p. 16).

First, Defendant Booher set out fifteen (15) allegations supporting Glen's claimed cumulative grossly negligent conduct toward the decedent Steve Booher. Some occurring prior to the ride start and some after:

Ride Pre-start Failures:

- Failed to check ride visually;
- Failed to watch ride as it started;
- Failed to be on guard;
- Failed to know his role and properly handling ride failure incidents;
- Failed to determine if load assistants were standing on a boat;
- Did not first get a thumbs-up signal from Steve and Reed; and,
- Failed to follow ride instructions prominently displayed on ride control board.

Ride Post-Start:

- Failure to stop the ride once Glen became aware of the incident involving Steve and Reed, the loading assistants, which had knocked them both off their feet;
- He left the operator's station within clear visual range of the ride's loading assistants, without shutting down the ride;
- He failed to engage the oversized, red "E – Stop Aux. knob located immediately in front of him after he was aware both loading assistants were down, and the ride was still running;

- He failed to key the ride to the "off" position after becoming aware that the loading assistants had been jolted off their feet due to premature start of the ride, allowing the ride to continue operating;
- From his operator's platform above and in proximity to the ride and the loading assistants, he could easily observe that Steve had been knocked down onto the moving ride belts and was being pulled by continuous belt action into the confluence of the ride boat and the abutting Raging River concrete sidewall, yet failed to stop the ride and instead left his station;
- Defendant Glen only returned to his operator's station and stopped the ride after several ride patrons waiting to board, repeatedly yelled at him to "stop the ride;"
- Glen admitted that he caused the assistants to topple on to the exposed ride conveyor belt; and,
- Glen failed to consider Steve's injury, once he was knocked down onto the ride conveyor belt, as serious, and treat it accordingly. (App. Vol. I, pps. 0385-86).

The detailed and extensive pre-and post-start claimed grossly negligent actions of Glen do not allege that he "expected both the event and the resulting injury to Stephen" resulting in a condition whereby "coverage would not extend to any injury he caused," as Plaintiff T.H.E. argues. (Brief, p. 15).

Nor is it appropriate for the trial judge to decide those issues as a matter of law, wrongfully removing them from purview of the jury as fact-finders. (Iowa R. App. P. 6.904(3)(j); *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 734 (Iowa 2016).

The trial court improperly invaded the jury's province, which wrongful invasion T.H.E. supports in its Brief, in concluding: "The facts alleged in the Underlying Action do not create possible liability covered by THEIC." (Brief, p. 14).

The fact determinations made by the court below are highly improper in a pretrial order where the jury is yet to be sworn.

What constitutes Defendant Glen's "expected or intended injury" to decedent Steve Booher, is a jury determination, not that of a trial judge.

That error warrants a reversal of the court's ruling below.

III.

The trial court erred in concluding that the Defendant Booher's claims for injury and damage can only arise from and through Steve Booher's bodily injury. In so doing, the court wrongfully adopted T.H.E.'s position on that issue.

The trial judge noted: "Contrary to some of what THEIC argues in support of its position on this issue, the CGL Policy would recognize some of the Boohers' consequential damage claims, but only if Stephen's bodily injury is covered. (CGL Policy at p. 1, §I ¶ 1(c)). As noted already, the CGL Policy requires the 'bodily injury' to be caused by an 'occurrence,' and it excludes 'bodily injury' that is expected or intended from the standpoint of the insured." (App. Vol. II, p. 0996).

While agreeing that certain of Defendant Booher's damage claims are covered under the CGL Policy, the trial court went on to improperly rely on "bodily injury," "occurrence," and "expected or intended" policy language as allowing the carrier to escape responsibility to defend and indemnify Defendant Glen. That determination is flawed based on the following:

Neither an "occurrence" nor "expected or intended" injury are properly decided by the court pretrial as both require jury determinations, not the court's fact finding. (Iowa R. App. P. 6.904(3)(j); *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 734 (Iowa 2016)).

The court furthermore improperly relied on "bodily injury" as that phrase was used in Section I of the GCL Policy in so concluding. (App. Vol. II, p. 0996). The Section II risk coverage should have been considered by the court in its analysis and in reaching its conclusions. Although "bodily injury" was initially listed as an exclusion in that policy section, it was later removed and coverage expanded as previously explained, by the Multi-Plex Liability Endorsement.

Defendant Booher does not argue that Section I should be read as: "damages. . . to which this insurance applies as the court suggests." (App. Vol. II, p. 0996).

To the contrary what Defendant Booher contended below and reasserts here is that Section II of the CGL Policy needs to be taken into account and should have been in the lower court's analysis.

The trial court simply ignored that matter in its ruling, as though the language allowing generalized coverage, with certain defined risk exclusions in that policy Section II was of no consequence. Despite it being raised by Defendant Booher below that critical issue went unaddressed.

In so doing the trial court erred. For the several reasons previously addressed, the risk-inclusive language of Section II of the policy should have been taken into account with a trial court determination following which

concluded Plaintiff T.H.E. has a duty to both defend Defendant Glen; and indemnify him if Defendant Booher is successful in pursuit of the Underlying Claim.

IV.

When the allegations in the pleadings are compared to the policy language, an issue of potential or possible liability against Defendant Glen is generated under the policy provisions. The trial court committed reversible error in concluding otherwise.

Does potential liability exist as against Defendant Glen in the Underlying Action? Yes.

As explained in the Defendant Boohers' opening brief, and as plead, Glen had knowledge of the ride perils; that injury was a probable result of the ride danger; and there was a conscious failure on his part to avoid the peril.

If those elements alleged in the Petition are proven at trial in the Underlying Action, gross negligence will have been established under Section 85.20 of the Code of Iowa.

The next question is whether Plaintiff T.H.E. would be obligated to pay that judgment under the policy terms. Again, the answer is yes.

As explained earlier Section II of the CGL Policy acknowledges that carrier obligation.

How else can the operative language be read other than to generate that responsibility? It first recites that employees (such as Glen) are covered while operating rides as Glen was doing when Steve was injured. It then goes on to state exceptions to that generalized coverage. Specifically, and critically, the language that carrier drafted states that employees, however, "<u>are not insured for</u>" – and then proceeds to itemize numerous specific risks excluded from T.H.E. Policy coverage.

If Section II was simply to identify who an insured is under the policy, then T.H.E. should have just listed those so covered.

The ambiguity is created when the carrier attempted to define, in Section II, certain employee's acts which are covered and others not. In so drafting that insurance clause it is readily apparent that Section II was expanded into a second policy recitation of coverage.

If it is not so understood what else could its presence in the insurance agreement mean? When a carrier states that employees are covered while at work, but <u>not for</u> certain thereafter described

injuries and damage, how can that be understood by a lay, non-expert individual who reads that clause as other than a coverage explanation?

And later, in the Multi-Plex Endorsement, Section II is modified to drop "bodily injury" providing in the carrier's terms "additional coverage". (Multi-Plex Liability Endorsement).

It can't be read any other way. And that is why the ambiguity exists when comparing Section I to the language of Section II of the CGL Policy.

That is also likely why both the carrier T.H.E. and the trial court completely ducked that issue, choosing to simply ignore it.

Ambiguity exists. ("Policy language is ambiguous when considered in the context of the policy as a whole, it is susceptible to two plausible interpretations." *National Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 734 (Iowa 2016)).

"Thus, we determine whether an ambiguity exists not by examining clauses seriatim, but by interpreting the policy in its entirety, including all endorsements, declarations, or riders attached." *Boelman v. Grinnell Mut. Ins. Co.*, 826 N.W.2d 494, 501-02 (Iowa 2013) (emphasis added).

Given the adhesive nature of the lengthy policies involved the insurance provisions at issue should be interpreted in their entirety, construed in a light most favorable to the insured, and against Plaintiff T.H.E. as the drafter of the 366 – page insurance agreement, assuming no superfluous parts. *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 445 (Iowa 1970); *City of Cedar Rapids v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 304 N.W.2d 228, 231 (Iowa 1981); and *Iowa Fuels & Minerals, Inc. v. Iowa State Board of Regents*, 471 N.W.2d 859, 863 (Iowa 1991).

As alleged in the underlying petition Defendant Boohers' claims against Defendant Glen generate an issue of potential or possible liability against the latter under the terms of the policy. *Ottumwa Hous. Auth. v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723, 726 (Iowa 1993). There is no exception for gross negligence coverage provided in Section II of the CGL Policy. It outlines general liability coverage subject only to a few risk exceptions, none of which apply here.

T.H.E. must defend Defendant Glen against that possibility of a potential resulting judgment being entered against him and thereby obligates T.H.E. to potentially indemnify Defendant Glen, as well. *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 119 (Iowa 1984).

Of critical significance to resolution of this case – and clearly establishing in the carrier's own words that Section II is a coverage section of the policy – is the following Multi-Plex Liability Endorsement language in the carrier's chosen words:

> "Coverage provided under the Commercial General Liability Coverage Form CG 00 01, is amended as follows:
>
> . . . **Employee v. Employee Bodily Injury Liability – Additional Coverage**
>
> Section II – Who Is An Insured, 2. a., item (1) is modified to eliminate 'bodily injury.'" (emphasis added) (App. Vol. I, p. 0703).

That rider, in T.H.E.'s own terms, is an admission that Section II of the CGL Policy, while titled "Who Is An Insured" is also properly viewed a coverage provision of the insurance T.H.E. provides employees such as Defendant Glen - the trial court's and the carrier's contentions otherwise notwithstanding.

The trial court's exclusive focus on Section I as being the sole repository of coverage details in this case is, and was, misplaced as the foregoing makes abundantly clear.

T.H.E. admits that Section II of the CGL Policy, in terms it selected and used, is also a coverage policy section.

The lower court failed to acknowledge and address that circumstance and policy admission.

That reversible error should be corrected by this reviewing court.

CONCLUSION

Defendant Boohers renew their conclusion as previously stated in their opening brief.

Plaintiff T.H.E. Insurance Company has admitted Section II of the CGL Policy details insurance coverages, as well as Section I, all as explained. To the extent ambiguity now exists, as a result of the carrier's inconsistent and ambiguous draftsmanship that is the circumstance which requires a determination that T.H.E. is now required to defend and indemnify Defendant Glen under Iowa law, as explained.

The lower court's ruling which granted the insurance carrier's Motion for Summary Judgment should be reversed; and the trial court's denial of Defendant Boohers' Motion for Summary Judgment likewise overturned with directions from this court requiring T.H.E. to both defend and indemnify Defendant Glen, should trial of the Underlying Action result in a judgment against the latter.

RENEWED REQUEST FOR ORAL AGRUMENT

Defendants/Appellants Booher, renew their request to be heard orally on this appeal, all as previously set forth in their opening brief.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Iowa R. App. P. 6.903(l)(g)(1) because this reply brief contains 3,220 words, excluding the parts of the reply brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This reply brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(l)(f) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14.

1/14/19
Date

/s/ Fred L. Dorr
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CERTIFICATE OF SERVICE AND FILING

I, Fred L. Dorr, attorney for the Defendants/Appellants Estate of Stephen Paul Booher; Gladys Booher, Administrator; and, Gladys F. Booher, Individually, hereby certify that on the 14th day of January 2019, I filed the foregoing Defendants'/Appellants' Reply Brief electronically with the Iowa Supreme Court Clerk. A copy was served on the attorneys of record for the Petitioner/Appellee, John L. Lorentzen, Keith Duffy and Thomas C. Goodhue of the law firm Nyemaster Goode, P.C., by operation of the EDMS process as well as by email to each of them. A separate copy was mailed this same date to Defendant Stuart Glen at his address below:

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