UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1702

MENARD, INC.,
Plaintiff - Appellee,

vs.

FARM BUREAU PROPERTY & CASUALTY INSURANCE COMPANY,
Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF IOWA

Honorable Helen C. Adams, Chief U.S. Magistrate Judge
Case No. 4:21-cv-404-HCA

BRIEF OF APPELLEE MENARD, INC.

Submitted:
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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

On April 13, 2019, Cynthia Bowen, a Farm Bureau motor vehicle liability policyholder, was injured while at Menard's store. The injury took place while a Menard, Inc. employee was using Ms. Bowen's vehicle by loading lumber into the vehicle.

Menard, Inc. requested defense and indemnity under the Farm Bureau insurance policy. Farm Bureau initially denied Menard, Inc.'s (hereinafter "Menard") request on several bases. The issue for appeal before this Court is whether the policy's "intrafamily immunity" exclusion clause applies.

Menard then filed a declaratory judgment action seeking a judgment on coverage in its favor. Each party filed a Motion for Summary Judgment. The District Court granted Menard's Motion for Summary Judgment and found that the "intrafamily immunity" exclusion did not apply in this case.

Iowa law supports upholding the District Court's ruling and interpretation of the plain language of the Farm Bureau policy. In the alternative, Iowa law states that any ambiguities in the policy must be resolved against Farm Bureau. Iowa Code and public policy support the District Court's ruling, which should be upheld. As an additional alternative, Farm Bureau should be estopped from asserting the "intrafamily immunity" exclusion to deny coverage. Oral argument of fifteen minutes for each side would be appropriate in this case.

CORPORATE DISCLOSURE STATEMENT

As required by 8th Cir. R. 26.1A, Appellee in this case provides the following information to the court:

(a) The following are the names of all associations, firms, partnerships, corporations, and other artificial entities that either are related to the Appellee as a parent, subsidiary, or otherwise, or have a direct or indirect pecuniary interest in the Appellee's outcome in the case:

Menard, Inc., which is a privately owned company.

(b) With respect to each entity named in response to (a), the following describes its connection to or interest in the litigation, or both:

Menard, Inc. is the named Appellee in the above captioned cause of action.

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Most Apposite Cases:

Am. Family Mut. Ins. Co. v. Corrigan, 697 N.W. 2d 108 (Iowa 2005)

Boelman v. Grinnell Mut. Reinsurance Co., 826 N.W.2d 494 (Iowa 2013)

Postell v. Am. Family Mut. Ins. Co., 823 N.W.2d 35, 46 (Iowa 2012)

II. In the Alternative, The Iowa Motor Vehicle Financial Responsibility Act and Public Policy Require that the Court Find That the Intrafamily Immunity Exclusion Does Not Apply to Menard.

Most Apposite Law:

Iowa Code § 321A.21

Iowa Code § 321.1(24B)(a)

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Most Apposite Cases:

City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052 (8th Cir. 1979)

Hully v. Aluminum Co. of Am., 143 F. Supp. 508, 513 (S.D. Iowa 1956)

Woodroffe v. Woodroffe, 864 N.W.2d 553 (Iowa Ct. App. 2015)

STATEMENT OF THE CASE

I. Factual Background

In April 2019, Cynthia Bowen was a guest at one of Menard, Inc.'s ("Menard") stores in West Burlington, Iowa. (App. 181-82, R. Doc. 25-2, ¶¶ 6-10) She was injured when a Menard employee assisted her with loading 2 x 10 green treated boards into her vehicle ("occurrence"). (App. 181-82, R. Doc. 25-2, ¶¶ 6-10) The boards were kept on the second level of a platform. (App. 437, R. Doc. 39-1, ¶ 20) The Menard employee offered to go up and pick out boards for Ms. Bowen. (App. 437, R. Doc. 39-1, Response to ¶ 23) The Menard employee inspected the boards, selected two, and loaded them into Ms. Bowen's vehicle. (App. 442, R. Doc. 39-2, ¶¶ 20-23) Ms. Bowen's vehicle was, at all relevant times, insured by Farm Bureau Property & Casualty Insurance Company ("Farm Bureau"). (App. 180, R. Doc. 25-2, ¶ 1) On February 16, 2021, Ms. Bowen filed suit against Menard for the injuries and damages she suffered that day. (App. 5-10, R. Doc 1-1, pp 1-6) Menard then sought defense and indemnity from Farm Bureau for that suit, pursuant to the terms of the Farm Bureau policy. (App. 310-11, R. Doc. 25-4, pp 124-25) Farm Bureau denied Menard's tender for defense and indemnification, stating that the Menard employee could not be considered to be an insured as he was not using the vehicle at the time of the incident. (App. 312-17, R. Doc. 25-4, pp 126-31) Menard sought reconsideration of the denial. (App. 318-19,

R. Doc. 24-4, pp 132-33) Farm Bureau again denied the tender for defense and indemnification, giving no further explanation and citing no further policy provisions. (App. 328, R. Doc. 25-4, p 142)

II. Procedural Background

On December 28, 2021, Menard filed a declaratory judgment action against Farm Bureau in the United States District Court for the Southern District of Iowa in the Central Division. (App. 1-4, R. Doc. 1, pp 1-4) Farm Bureau filed its Answer on January 13, 2022. (App. 134-39, R. Doc. 6, pp 1-6) This Answer contained an additional basis for denial of coverage to Menard, the Intrafamily Immunity exclusion contained in the Farm Bureau policy. (App. 138, R. Doc. 6, p 5, ¶¶ 1-3) Menard filed a Motion for Summary Judgment on May 19, 2022. (App. 158-59, R. Doc. 25, p 1-2) Farm Bureau filed a Motion to Amend Answer in order to add an additional affirmative defense, the Handling of Property exclusion contained in the Farm Bureau policy. (App. 372-75, R. Doc. 30, p 2, ¶ 6) The Court granted Farm Bureau's Motion to Amend their Answer. (App. 444-49, R. Doc. 47, pp 1-6) Farm Bureau additionally filed a Resistance to Menard's Motion for Summary Judgment as well as a Cross Motion for Summary Judgment. (App. 376, 343, R. Doc. 31, 29)

The District Court issued an Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment. (App. 444-

61, R. Doc. 47) Menard does not agree with Farm Bureau's characterization of the District Court's ruling in the Appellant's Procedural History.

The Court's Order on Summary Judgment began with a review of the undisputed facts. (App. 450, R. Doc. 47, p 7) The Court found that the Menard employee "offered to get the boards from the upper level for Ms. Bowen. Ms. Bowen agreed to let [the employee] retrieve the boards but told him to select only straight and unwarped boards." (Order Granting Summary Judgment, App. 450, R. Doc. 47, p 7) As the Menard employee lowered the first board towards Ms. Bowen, it suddenly slipped out of his hands and struck Ms. Bowen. (Order Granting Summary Judgment, App. 450, R. Doc. 47, p 7) The Menard employee then selected and lowered the remaining board and loaded them into Ms. Bowen's vehicle. (Order Granting Summary Judgment, App. 450, R. Doc. 47, p 7).

The Court then reviewed the relevant provisions from the Farm Bureau policy as well as the history of the pre-suit requests for tender of defense and immunity. (Order Granting Summary Judgment, App. 451-52, R. Doc. 47, pp 8-9) The Court discussed the relevant legal standard for granting summary judgment. (Order Granting Summary Judgment, App. 452-53, R. Doc. 47, pp 9-10) The Court then noted that there were two main issues: "(1) Is Menards an insured covered by the Policy?; and (2) If so, does an exclusion apply?" (Order Granting Summary Judgment, App. 453, R. Doc. 47, p 10) The Court gave the proper standard for

interpretation and construction of insurance policies. (Order Granting Summary Judgment, App. 453-54, R. Doc. 47, pp 10-11)

The Court then summarized each parties' arguments and performed a detailed coverage analysis, beginning with first determining that there was coverage for Menard as a permissive user of Ms. Bowen's vehicle because loading the vehicle was using the vehicle under Iowa law. (Order Granting Summary Judgment, App. 454-58, R. Doc. 47, pp 11-15) The Court then turned to the exclusions at issue to determine if either of them acted to deny coverage to Menard. (Order Granting Summary Judgment, App. 458, R. Doc. 47, p 15) The Court found that the Handling of Property exclusion did not apply in this case as Ms. Bowen had accepted the boards before they were moved into her vehicle. (Order Granting Summary Judgment, App. 459, R. Doc. 47, p 16) The Court then turned to the Intrafamily Immunity exclusion. (Order Granting Summary Judgment, App. 460, R. Doc. 47, p 17) The Court found that "the plain meaning of 'intrafamily' is inside of the family" as part of its ruling on this exclusion, but the Court did not find that the wording of the heading was the sole reason that it granted summary judgment in favor of Menard on this issue. (Order Granting Summary Judgment, App. 461, R. Doc. 47, p 18) The Court summarized arguments for both sides, reviewed the plain language of the insurance contract, found no ambiguity, and indicated that it found Menard's argument more

persuasive. (Order Granting Summary Judgment, App. 461, R. Doc. 47, p 18) The underlying litigation was then resolved with a confidential settlement in which Farm Bureau refused to participate. The District Court's ruling on this matter should be upheld and the Intrafamily Immunity exclusion does not bar coverage to Menard under the Farm Bureau policy in this case.

III. Ruling for Review

On appeal, Menard asks that the Court uphold the District Court's March 20, 2023 Order Granting Summary Judgment. Menard contends that the District Court's interpretation and construction of the plain meaning of the Intrafamily Immunity exclusion is consistent with Iowa law. If there is an ambiguity in the insurance policy, it must be interpreted in favor of Menard. In the alternative, Menard requests that the Court affirm the District Court's ruling on the basis that it required by Iowa Statute and public policy. In an additional alternative, if the Intrafamily Immunity exclusion is applicable, which was not discussed by the District Court, Menard requests that the Court find that Farm Bureau is estopped from asserting this exclusion.

SUMMARY OF THE ARGUMENT

Menard argues first that the District Court's holding that Menard was an insured under the Farm Bureau policy and that the "intrafamily immunity" exclusion did not apply to Menard under the plain terms of the policy was correct and should be upheld. Menard argues that, in the alternative, there is an ambiguity in the Farm Bureau policy due to the severability clause. An insurance policy is a contract of adhesion. Any ambiguity in the policy must be interpreted in favor of providing coverage and not restricting coverage. Therefore, the District Court's holding that the "intrafamily immunity" exclusion does not apply to Menard should be upheld.

Menard argues second that the Iowa Motor Vehicle Financial Responsibility Act as applied to the Farm Bureau policy and the cases cited by Farm Bureau require the extension of coverage to Menard.

Menard argues finally that if the "intrafamily immunity" exclusion is upheld, Farm Bureau should be estopped from asserting the exclusion due to either estoppel by acquiescence or equitable estoppel. The District Court did not reach these arguments as it found that the "intrafamily immunity" exclusion did not apply to Menard.

STANDARD OF REVIEW

Appellee does not dispute the Standard of Review provided by the Appellee for all issues.

PLAINTIFF-APPELLEE'S ARGUMENT

I. The District Court Correctly Interpreted the Intrafamily Immunity Exclusion in Holding That It Did Not Bar Coverage.

Appellant Farm Bureau Property & Casualty Insurance Company is requesting this Court to upend Iowa insurance law and expand the Intrafamily Immunity exclusion to apply to non-family members of the named insured. Farm Bureau has abandoned the majority of arguments it made before the District Court for exclusion of coverage and proceeded solely on the intrafamily immunity provision contained in the insurance policy at issue to support its appeal of Chief Magistrate Helen C. Adams's Order Granting Summary Judgment in favor of Menard, Inc. "The plain meaning of 'intrafamily' is inside of the family. [The Menard employee] is not related to [the Farm Bureau policyholder] and is therefore outside of the family. The Intrafamily Immunity exclusion does not apply." (App. 461)

"Construction of an insurance policy--the process of determining its legal effect--is a question of law for the court. Interpretation--the process of determining the meaning of words used--is also a question of law for the court unless it depends on extrinsic evidence or a choice among reasonable inferences to be drawn." *Allied Mut. Ins. Co. v. Costello*, 557 N.W.2d 284, 286 (Iowa 1996). The words of an insurance policy are given their plain meaning unless they are defined. *See Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 536 (Iowa 2002).

As the District Court noted, the terms of the insurance policy at issue are plain. (Order Granting Summary Judgment, p 18; App. 461) However, in the alternative, even if there is ambiguity in the terms of the insurance contract, there is clear, repeated Iowa Supreme Court precedent which states: "[d]ue to the adhesive nature of insurance contracts, ambiguous policy provisions are interpreted in the light most favorable to the insured." *Am. Family Mut. Ins. Co. v. Corrigan*, 697 N.W. 2d 108, 111 (Iowa 2005) (*citing Cairns v. Grinnell Mut. Reinsurance Co.,* 398 N.W.2d 821, 824 (Iowa 1987)); *see also West Bend Mut. Ins. Co. v. Iron Works, Inc.,* 503 N.W.2d 596, 598 (Iowa 1993). "An insurance policy is not ambiguous, however, just because the parties disagree as to the meaning of its terms." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 502 (2013). If the policy is clear, "the court will not 'write a new contract'" for the parties. *Id.* (*citing Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 682 (Iowa 2008)).

In the present case, there is no need for the court to draft a new policy of insurance for the parties. The guiding polestar for interpreting insurance contracts is that ambiguities are strictly construed in favor of the insured and against the insurer. *Allied Mut. Ins. Co.,* 557 N.W.2d at 286. A cardinal rule is that insurance contracts are construed to provide coverage. *Id.* Because the insurer drafts the contract, it has a duty to define any limitations or exclusionary clauses in clear and

explicit terms. *West Bend Mut. Ins. Co.,* 503 N.W. 2d at 598. The burden of establishing an exclusion rests upon the insurer. *Id.*

A. The District Court's Interpretation That There is No Ambiguity in the Policy and the Intrafamily Immunity Exclusion Does Not Apply is Correct and Reasonable.

For the purpose of this appeal, Farm Bureau concedes that the employee of Menard, Inc. who was loading the lumber into Ms. Bowen's car is an unnamed insured, although they took the opposite position in the District Court. (Appellant's Appeal Brief p 18-19; App. 348-49) Interpretation and construction of the insurance contract provisions require a coverage analysis for the employee of Menard, Inc. under these circumstances. It should be noted that insurance policy coverage for Menard, Inc. (hereinafter "Menard") is provided through coverage for their employee.

1. Farm Bureau Insurance Policy Language

The Farm Bureau policy notes that it is organized "into sections for each type of insurance you chose, and each section is divided into coverage modules." (App. 16) The policy begins with a General Section which is appliable to the entire insurance policy. (App. 16-25) The General Section continues with definitions which are also common to the entire policy. (App. 16-17) "Insured" is defined as:

> **"Insured"** can mean different "persons" or organizations, depending on the type of coverage. For that reason, "insured" is defined separately in each section of the policy.

(App. 16) (Emphasis added.)

The General Section also contains a section headed "Severability" which reads:

> **Severability**
> This insurance applies separately to each "insured" against whom a claim or "suit" is brought, but having more than one "insured" does not increase the limits shown in the Declarations."

(App. 23) (Emphasis in original.) The policy continues into a "Vehicle Section" which contains additional definitions and from there into a "Vehicle Liability Module," which contains the relevant policy coverage provisions. (App. 26-34) Three policy provisions are pertinent for this portion of the policy analysis. First, bodily injury liability coverage is defined in the Vehicle Liability Module as:

> **Bodily Injury Coverage and Property Damage Liability Coverage**
> We cover "damages" that result from "bodily injury" or "property damages" "caused by" an "occurrence" to which these coverages apply involving the ownership, operation, use, loading, unloading, or negligent entrustment of "your personal vehicle".

(App. 30) (Emphasis in original.)

Second, an insured is defined in the Vehicle Liability Module as:

> **Who Is An Insured**
>
> . . .
>
> 1. You;
> 2. Any "household member";
> 3. Any other "person" while using "your personal vehicle" . . . if its use is within the scope of your consent; **or**

4. Any other "person" or organization liable for the use of such a vehicle by one of the above "insureds"

(App. 30) (Emphasis original and emphasis added.)

Third, the "Intrafamily Immunity" exclusion provision which limits bodily injury coverage in the Vehicle Liability Module states as follows:

> **Additional Exclusions**
> Under this Vehicle Liability Module, the Exclusions in the General Section apply and are expanded as follows;
> . . .
> **Intrafamily Immunity**
> There is no coverage for any "bodily injury" to any "insured" or any member of an "insured's" family residing in the "insured's" household.
> (App. 33) (Emphasis in original.)

2. A Coverage Analysis Using the Plain Meaning of the Terms of the Farm Bureau Policy Is in Favor of Providing Coverage for Menard

Under the first policy provision, coverage for "bodily injury" is based on an "occurrence". Here, the "bodily injury" is the injury sustained by Ms. Bowen. The "occurrence" is the loading of the vehicle. Farm Bureau has conceded its argument regarding when the loading of the vehicle began and does not dispute that the vehicle was in the process of being loaded for the purposes of this appeal. We turn next to the category of "Who is an insured."

The Menard employee is an insured by virtue of category number three: use of the vehicle with consent. Use of the word "or" in the "who is covered" provision implies that only one category of persons may be the insured at any one time for

the purposes of any one covered occurrence. The use of the word or when defining the term insured in the policy is significant. As Farm Bureau noted in its Combined Brief in Resistance to Motion for Summary Judgment and Support of Cross-Motion for Summary Judgment, Iowa Courts have generally held the word "or" may express a disjunctive meaning.[1] As the Iowa Supreme Court noted when determining the meaning of the words in another insurance contract, "an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Amish Connection, Co. v. State Farm Fire & Cas. Co*, 861 N.W.2d 230, 237 (Iowa 2015) (*quoting Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991)).

"Or" is properly interpreted in the disjunctive sense in this matter to mean that, for any given "occurrence", only one person within the enumerated one through four categories can qualify as the "insured." In other words construction of the two provisions together, as well as the contract as a whole, results in the Menard employee being considered as the insured for purposes of the occurrence, in this case, loading the vehicle.

[1] Farm Bureau cited to *Lahn v. Inc. Town of Primghar*, noting that for the purposes of statutory construction, Iowa Courts may apply a conjunctive meaning to the word "or," interpreting it to mean "and," in order to "prevent an absurd or unreasonable result." 281 N.W. 214, 216 (Iowa 1938).

Accordingly, when the Intrafamily Immunity exclusion references "the insured" and the insured's family, "the insured" is the Menard employee. Thus, when applied to the occurrence at issue here the Intrafamily Immunity exclusion provides that "there is no coverage for any 'bodily injury' to [the Menard employee] or any member of [the Menard employee's] family residing in the [Menard employee's] household." Menard, however, seeks indemnification for bodily injury sustained by Ms. Bowen and its costs of defending the suit, not an injury to the Menard employee or the Menard employee's family member residing in the same household. As such, the proper application of the policy provisions obligates Farm Bureau to indemnify Menard, through its employee, for damages sustained by Ms. Bowen and its costs of defending the suit.

The District Court performed a similar coverage analysis in its Order Granting Summary Judgment in favor of Menard. The Court found that the Menard employee was an insured to be afforded coverage under the Farm Bureau policy and "Menards is covered by the Policy." (App. 458) The Court then considered the applicability of the exclusion at issue. (App. 460) The Court noted that the "plain meaning of the insurance contract generally prevails." (App. 458) Finding no ambiguity in the plain meaning of the insurance policy or the exclusion, the Court held that the exclusion did not apply. (App. 461)

This result is required by the established principles of insurance contract interpretation and construction. Where the insurance policy is not ambiguous, there is no need to look beyond the plain meaning of the insurance contract. The District Court has made the proper determination, and that decision should be upheld.

3. Under Iowa Law, it is Proper to Consider the Heading of a Provision When Interpretating a Contract.

The District Court, in its ruling, stated that "the plain meaning of 'intrafamily' is inside of the family. [The Menard Employee] is not related to Ms. Bowen and is therefore outside of the family. The exclusion does not apply." (Order Granting Summary Judgment, App. 461, R. Doc. 47, p 18) Farm Bureau asserted in its brief that the District Court's analysis relied solely on the title of the intrafamily exclusion and not on the plain terms of the exclusion. (Appellant's Appeal Brief p 25) Contrary to this assertion, it is proper to consider a contract's heading when determining the meaning of the provision under the heading. This concept is consistent with, and perhaps embedded in, the well-known viewpoint that all language in a contract has a purpose.

The Iowa Supreme Court, in *Colwell*, noted that "[w]e attempt to interpret every word and every provision of a contract to give it effect, if possible." *See Colwell v. MCNA Ins. Co.*, 960 N.W.2d 675, 679 (Iowa 2021) (*citing Fed. Land Bank of Omaha v. Bollin*, 408 N.W.2d 56, 60 (Iowa 1987) (en banc)). The Court in *Colwell* upheld the converse of the situation here: namely that when the parties

have expressly agreed in writing within the terms of a contract that the contract's headings will not be used in interpretation that such language was allowable.[2] *Id.* *See also Lincoln Grain Inc. v. Aetna Casualty & Surety Co.,* 756 F.2d 75, 77-78 (8th Cir. 1985) (Appeal from a Nebraska District Court holding it was correct for the District Court to use a heading to identify and resolve an ambiguity in the contract at issue). There is no analogous provision in the insurance policy at issue which states that headings should not be used to explain and interpret the wording found in the insurance contract.[3]

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[2] "Article XI, section 4 states that section headings 'are inserted merely for the purpose of convenience and do not, expressly or by implication, limit, define, or extend the specific terms of the section so designated.' We hold the parties to their own contract and won't employ headings as interpretive material where the parties expressly agreed they couldn't be used for that purpose." *Colwell*, 960 N.W.2d at 679.

[3] *See also Georgia- Pacific v. Officemax, Inc.,* a case from the Northern District of California where heading on a complex contract involving liability for contaminated land between buyer or seller was used to assist contract interpretation. 2013 U.S. Dist. LEXIS 133657, *29 (N.D. Cal., Sept. 18, 2013). A point of disagreement between the parties was the import to place on headings in a contract. *Id.* The District Court explained the significance of captions in a contract as, while not controlling, a "useful guide" for interpretation. *Id.* at 31 (*citing People v. Garfield,* 40 Cal. 3d 192, 199-200, 707 P.2d 258 (1985)). Further, the contract should "'be read and construed as a whole, and, more particularly, that the caption of the [contract] is to be read and construed with the language of the [contract] itself.'" *Id.* at 30. (*citing Coit v. Jefferson Standard Life Inc. Co.,* 168 P.2d 163,168 (Cal. 1946)). Analogizing contract interpretation to statutory interpretation, the Court held that "chapter and section headings"…"may properly be considered in determining intent, and are entitled to considerable weight." *Id.* ("Those principles apply here and show that the assumptions of liability in section 4 only apply to the terms of the trust.") (*citing Am. Fed'n of Teachers, Local No.*

As the contract drafter, Farm Bureau, inserted the heading for a reason. Surely there was an intent with its inclusion, and it is not superfluous. A contract is interpreted so that no term is rendered superfluous. *Id. at* 678-79; *see also Estate of Pearson v. Interstate Power & Light Co.,* 700 N.W.2d 333, 343 (Iowa 2005). Why was the heading "Intrafamily Immunity" chosen to precede the exclusion language if it was not intended to assist and guide the insured and the Court which must interpret and construct the insurance policy? If the heading does not accurately describe the exclusion and was not intended to be relied on by the insured and the Court, why include the heading language in the policy contract? The insurance policy is a contract of adhesion. The insurer, Farm Bureau, is the more sophisticated party and there was no negotiation regarding policy terms. If the heading "Intrafamily Immunity" did not accurately state what the exclusion described, to avoid possible confusion, Farm Bureau, could have simply used "Exclusion" as a heading. The use of a heading does have implications for the understanding of the corresponding provision, in this case, a significant exclusion.

B. <u>In the Alternative, the Insurance Policy Language Is Ambiguous and Must Be Interpreted to Provide Coverage for Menard.</u>

In the present case, if the insurance policy is considered to be ambiguous, it is because Menard interprets that there can be only one insured evaluated at a time

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1050 v. Bd. of Educ., 107 Cal. App. 3df 829, 836, 166 Cal. Rptr. 89 (Ct. App. 1980)).

for the purposes of the intrafamily exclusion clause. Farm Bureau argues that all insureds are considered at all times for the purposes of the intrafamily exclusion clause. Further, Farm Bureau argues that both Ms. Bowen and Menard are simultaneously insureds for the purposes of this appeal.

The Iowa Supreme Court stated that "under an objective test, a policy is ambiguous if the language is susceptible to two *reasonable* interpretations." *Boelman,* 826 N.W.2d at 501. (emphasis in original). The court considers the insurance policy contract as a whole and does not read any clause in isolation. *See id.* at 501-2.

If the policy at issue is found to be ambiguous as written, the ambiguity may be easily resolved with the assistance of existing Iowa law. In evaluating whether persons can be considered "the insured" or "any insured" under the definition of the Farm Bureau policy and further, whether the intrafamily exclusion is limited to excluding only family members, the insurance policy provisions must be both construed and interpreted together to resolve the ambiguity. *See Boelman* 826 N.W.2d at 502. Any ambiguous provisions in insurance policies are interpreted in favor of the insured. *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 536 (Iowa 2022); *see also Nat'l Union Fire Ins. v. Terra Industries.,* 346 N.W.2d 1160, 1164 (8th Cir. 2003). Further, an interpretation favoring coverage is the rule. *Allied Mut. Ins. Co. v. Costello*, 557 N.W.2d 284, 286 (Iowa 1996); *see also*

Boelman, 826 N.W.2d at 502. Because the insurance contract is a contract of adhesion, the insurer bears the burden of establishing the applicability of an exclusion. *West Bend Mut. Ins. Co.,* 503 N.W. 2d at 598. "In addition, 'exclusions will be strictly construed against the insurer.'" *Am. Family Mut. Ins. Co. v. Corrigan,* 697 N.W.2d 108, 115-117 (Iowa 2005).

1. *The Severability Clause in the Farm Bureau Policy Renders the Intrafamily Exclusion Ambiguous and the Exclusion Should Be Interpreted in Favor of Providing Coverage for Menard.*

The severability clause of the Farm Bureau policy is important when interpreting the meaning of the intrafamily exclusion provision in the Vehicle Liability Module. The clause states as follows: "This insurance applies separately to each 'insured' against whom a claim or 'suit' is brought, but having more than one 'insured' does not increase the limits shown in the Declarations." (App. 23) The plain language of the policy indicates that the insurance policy applies separately to each insured. (App. 23) This language means an individual and separate coverage analysis is necessary for both the Menard employee using the vehicle with permission and for Farm Bureau policyholder Ms. Bowen. As noted above, the Menard employee is an insured pursuant to the Vehicle Liability Module category three, as a permissive user, and Ms. Bowen is an insured pursuant to the Vehicle Liability Module category one, as the policyholder. (*See* App. 30)

The Iowa Supreme Court first had the opportunity to interpret the applicability of a severability clause in *Zenti v. Home Ins. Co.,* 262 N.W.2d 588 (Iowa 1978). In that case, the Court was asked to determine whether an insurance company was obligated to defend two executive officers of a corporation from a suit filed against them for negligent supervision when the insurance company had already paid worker's compensation benefits due to the incident which was the basis of the suit. *Id.* at 588-89. The severability clause at issue stated "[t]he insurance afforded under Coverages E and F applies separately to each Insured against whom claim is made or suit is brought but the inclusion herein of more than one Insured shall not operate to increase the limits of this Company's liability." *Id.* at 589. The Court found that the clause was not applicable to the exclusion and that the insurer owed a defense to the executive officers. *Id.* at 592. The severability clause at issue in *Zenti* is substantially similar to the clause in the Farm Bureau policy at issue in this matter. *Id.* The Farm Bureau severability clause at issue states "[t]his insurance applies separately to each 'insured' against whom a claim or 'suit' is brought…" (App. 23) The severability clauses are similar in that they both state that the insurance applies separately to each insured. Generally, severability clauses are used to expand coverage, not to contract coverage. *See Postell v. Am. Family Mut. Ins. Co.,* 823 N.W.2d 35, 46 (Iowa 2012).

The Iowa Supreme Court has more fully explained its reasoning in applying a severability clause in *Corrigan*. *See Corrigan*, 697 N.W.2d at 115-17. The issue before the Court in *Corrigan* was whether a homeowner's policy would provide coverage for insureds sued individually when the basis for the suit was the intentional acts of one insured, framed as negligence tort. *Id.* at 110-11. The relevant exclusion in the insurance policy stated "[w]e will not cover bodily injury or property damages arising out of … violation of any criminal law for which **any** insured is convicted." *Id.* at 112. (Emphasis added.) The Court noted that "[t]o interpret the policy in this manner would require this court to conclude the term 'the insured' means the same as 'any insured,' a conclusion we have rejected in the past." *Id.* at 116. (*citing Vance v. Pekin Ins. Co.*, 457 N.W.2d 589, 593 (Iowa 1990)). The severability clause provides important context for the interpretation of the individual insured as opposed to any insured covered by the policy. In the present case, Farm Bureau argues that each insured should be considered for all coverage at all times. However, the severability clause indicates that that interpretation is not correct. The insurer must be specific with each exclusion if it applies to all insureds at all times or only to the particular insured who is being considered for coverage at the time of the coverage analysis.

The Iowa Court of Appeals further interpreted severability clauses in the context of an innocent coinsured in an unreported decision. *See Am. Family Mut.*

Ins. Co. v. Eastman, 2005 Iowa App. LEXIS 343 *(Iowa Ct. App. April 28, 2005) (subsequently reported as a table decision at *Am. Family Mut. Ins. Co. v. Eastman*, 698 N.W.2d 337, (Iowa Ct. App., 2005)) "[w]e believe the effect of a general severability clause on a specific policy exclusion designed to eliminate coverage for injuries caused by 'any' insured is a question of first impression in Iowa." *Id.* at 11 (*citing Michael Carbone v. General Accident Ins. Co.*, 937 F.Supp.413, 416-24 (U.S. E.D. Penn. 1996) (for a history of severability clauses and their general applicability to insurance policies). "We join the vast majority of jurisdictions holding a standard severability clause protects coverage for an innocent co-insured only where the specific exclusion limits its application to the conduct of 'the insured.'" *Id.* at 13. The Court notes there is an important distinction between "the insured" and "any insured" in an exclusion when viewed through the light of the severability clause. The Court in *Eastman* clarifies how insurance companies can use the severability clause in conjunction with the language of their exclusion clauses to specify to whom the clause applies. In the present case, the language "the insured" and "any insured" creates an ambiguity in the exclusion which must be interpreted in favor of Menard, who Farm Bureau has already acknowledged as an insured.

More recently, in *Postell*, the Iowa Supreme Court further addressed and explained the issue of the severability clause on a homeowner's policy in the

context of damage to an innocent coinsured. *See Postell,* 823 N.W.2d at 37. This decision is applicable to the instant case because the Court clarifies which analogous insurance policy provisions are considered ambiguous. David and Michelle Postell owned a home, insured by American Family, which was deliberately and intentionally burned by David Postell, who later died from injuries sustained in the fire. *Id.* at 38. American Family denied coverage due to an intentional act exclusion prohibiting coverage due to loss or damage committed "by or at the direction of any insured," although coinsured Michelle Postell had no role in the fire. *Id.* at 39. The Court considered the effect of a severability clause in this matter. *Id.* at 46. The severability clause at issue statues "[e]ach person described above is a separate insured under this policy." *Id.* The Court notes that severability clauses generally extend coverage. *See id.* "[W]e found such clauses serve as a conduit by which the insurance company can communicate that, under the policy, the term insured does not always mean 'any' insured person, but sometimes, only 'the' insured claiming coverage." *Id.* "Thus, the severability clause serves to reinforce the language differentiating between joint obligations ("any" or "an" insured) and separate obligations ("the" insured)." *Id.* In the *Postell* case, it was clear that there was a duty of "any insured" to avoid intentional acts which would bring about a loss or damage to the property covered by the insurance policy.

However, in the present case, the matter may not be as clear. The Intrafamily Immunity exclusion in the Farm Bureau policy at issue in this case uses both the terms "any insured" and "the insured." (App. 33) "There is no coverage for any 'bodily injury' to any 'insured' or any member of an 'insured's' family residing in the 'insured's' home." *Id.* When analyzing the entire policy, including the severability clause which is intended to help make clear the relationship of each insured to the other, there remains some ambiguity. It is not clear if the exclusion is intended to apply to "any insured" or only to "the insured" relevant to the coverage analysis for each individual potential insured. Because there is remaining ambiguity, the intrafamily exclusion should be interpreted in favor of Menard. Farm Bureau has already indicated that it considers Menard to be an insured for the purposes of this appeal and the only remaining issue is whether the intrafamily exclusion applies. If the exclusion is ambiguous, it must be interpreted in favor of coverage for the insured, Menard. This means the intrafamily exclusion does not apply to exclude insurance policy coverage in this case and the District Court's ruling must be upheld.

II. The Iowa Motor Vehicle Financial Responsibility Act and Public Policy Require that the Court Find That the Intrafamily Immunity Exclusion Does Not Apply to Menard.

Although the District Court held that the Intrafamily Immunity exclusion did not violate public policy, it did express concern that adopting Farm Bureau's

position would "significantly undermine" coverage "required by Iowa law". (App. 461, fn. 8) The District Court is referring to the Iowa Motor Vehicle Financial Responsibility Act: Iowa Code Chapter 321A. (Order Granting Motion for Summary Judgment, App. 460, R. Dec. 47, p 17) Further, the District Court noted that Intrafamily Immunity exclusions are enforceable in the State of Iowa. (Order Granting Motion for Summary Judgment, App. 461, R. Dec. 47, p 18) (Citations omitted.) Farm Bureau argues on appeal that Iowa case law enforcing other Intrafamily Immunity exclusions is dispositive. It is Menard's position that those cases are distinguishable under the facts of this case, or in the alternative, are no longer valid based on Iowa Code Chapters 321 and 321A.

A. Denying Coverage is in Direct Contravention of Iowa Statute.

When a statute requires an insurance policy to provide specific coverage, and that specific coverage is not provided directly by the wording of the policy, the coverage is incorporated into the policy by operation of law. *See Lee v. Grinnell Mut. Reinsurance Co.,* 646 N.W.2d 403, 409 (Iowa 2002) (*citing Tri-State Ins. Co. v. De Gooyer*, 379 N.W.2d 16, 17 (Iowa 1985)). "Consequently, when a policy provision conflicts with a statutory requirement, the policy provision is ineffective and the statute controls." *Id.* (*citing Matthess v. State Farm Mut. Auto Ins. Co.*, 548 N.W.2d 562, 564 (Iowa 1996)). Policy provisions that are contrary to statute

are ineffective and the statute controls. *See Hinners v. Pekin Ins. Co.,* 431 N.W.2d 345, 346 (Iowa 1988).

Iowa Code § 321A.21 was enacted in 1947 and first included in the Iowa Code in 1950. The relevant subsection provides that an insurance policy:

> [s]hall insure the person named in the policy and any other person, as insured, using the motor vehicles with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the motor vehicles…

Iowa Code § 321A.21(2)(b) (2022). Iowa Code Chapter 321A originally concerned drivers who, because of past driving problems, such as conviction of operating while intoxicated, are required to provide proof of financial responsibility. *See Universal Underwriters Ins. Co. v. American Family Ins. Group*, 587 N.W.2d 224, 226 (Iowa 1998). However, in 1997, Iowa Code Chapter 321 was amended to provide for mandatory financial liability coverage, effective January 1, 1998 and retroactively applied to July 1, 1997. *See Lee*, 646 N.W.2d at 408. One such amendment is Iowa Code § 321.20B(1)(a) which provides, in relevant part, as follows:

> [n]otwithstanding chapter 321A, which requires certain persons to maintain proof of financial responsibility, a person shall not drive a motor vehicle on the highways of this state unless financial liability coverage, as defined in section 321.1, subsection 24B, is in effect for the motor vehicle and unless the driver has in the motor vehicle the proof of financial liability coverage card issued for the motor vehicle…

Pursuant to Iowa Code § 321.1(24B)(a) the mandated insurance coverage to comply with the required financial liability coverage is as follows:

> [a]n owner's policy of liability insurance which is issued by an insurance carrier authorized to do business in Iowa to or for the benefit of the person named in the policy as insured, and insuring the person named as insured and **any person using an insured motor vehicle with the express or implied permission of the named insured against loss from liability** imposed by law for damages arising out of the ownership, maintenance, or use of an insured motor vehicle… (Emphasis added.)

Farm Bureau's interpretation of the Intrafamily Immunity exclusion is in contravention of Iowa Code §§ 321.1(24B)(a) and § 321.20(B)(1)(a). These code sections require that the Farm Bureau policy provide coverage against loss from liability for damages for the Menard employee as a person using Ms. Bowen's motor vehicle with permission. The statutory requirements are superimposed upon, or read into, the insurance policy. *See Lee*, 646 N.W.2d at 409. Thus, the intrafamily immunity clause application as urged by Farm Bureau is invalid, and coverage must be provided to the Menard employee for the damage sustained by Ms. Bowen.

B. <u>The Cases Validating Family Exclusions are Distinguishable from this Case or Cannot be followed in Light of Iowa Code Chapter 321 Financial Coverage Provisions</u>.

Farm Bureau cites several cases in support of its proposition that Iowa courts have always allowed diminutions of the requirements of insurance carriers to provide coverage required by law. However, their cases may be distinguished

when considered in light of the coverage requirements provided by Iowa Code Chapter 321.

It should further be noted that the liability coverage required by Iowa Code Chapter 321 is different from the uninsured/underinsured motorist coverage required by Iowa Code Chapter 516A. Uninsured and uninsured motorist coverage must be offered with every liability policy, but the prospective insured may decline it with a signature. *See* Iowa Code § 516A.1(1-2). Further, the Iowa Legislature has made it clear that this coverage may be limited with specific statutory language: "[s]uch forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits." Iowa Code § 516A.2(1)(a). There are no such limitations allowed by statute to the liability provisions of Iowa Code Chapter 321. The court must carefully consider any limitations to the statutory terms of liability coverage in order to comply with the legislature's intent and public policy.

1. Walker v. American Family Mutual Insurance Company Can Be Distinguished From the Present Case By Subsequent Legislative Requirements.

Farm Bureau cited a 1983 Iowa Supreme Court case in support of its position with similar facts to the matter at bar. *See Walker v. American Family Mut. Ins. Co.,* 340 N.W.2d 599, 600 (Iowa 1983). In Walker, policyholder Jordan Moorman was a passenger in his vehicle driven with permission by James Walker.

Id. There was an accident and Moorman was killed. *Id.* American Family refused to pay any settlement or judgment for the wrongful death claim of Moorman, relying on the following exclusion in the policy issued to Moorman: "This policy does not apply…[u]nder liability coverage, (c) [t]o bodily injury to…(2) the insured or any member of the family of the insured residing in the same household as the insured." *Id.* (Emphasis omitted.)

The Court held that the exclusion was valid because it did not violate then existing Iowa Code chapter 321A. *Id.* at 601. At the time, Iowa had no mandatory insurance requirement. *Id.* The Court performed an analysis based on public policy. *Id.* at 600-3. "Whenever a court considers invalidating a contract on public policy grounds, it must also weigh in the balance the parties' freedom to contract." *Id.* at 601. The Court found that the legislature had not given the Court leave to "substitute a compulsory insurance law for a financial responsibility law." *Id.* at 602. The Court further found that "[o]ur legislature has expressed … an intent to allow motorists considerable freedom to decide what automobile liability coverage, if any, they wish to procure." *Id.*

Since the Court decided *Walker*, the legislature has spoken on the question of mandatory insurance coverage. That requirement has been changed by Iowa Code §§ 321.1(24B)(a) and 321.20B(1)(a) and the opposite is now true: there are mandatory automobile insurance laws. The court has further interpreted insurance

exclusion provisions. *Walker* no longer supports Farm Bureau's position and can be distinguished from the present case.[4] At this time, the Iowa legislature has indicated an intent that all users of a vehicle be provided with insurance coverage by the passage of Iowa's omnibus insurance coverage statute.

2. Jones v. State Farm Decides the Question of Whether a Parent's Loss of Consortium Claim is Derived From a Child's Bodily Injury Claim or is a Separate Injury; Not Whether the Intrafamily Immunity Exclusion Violates Public Policy.

The first case Farm Bureau considers is *Jones v. State Farm Mut. Auto Ins. Co.,* 760 N.W.2d 186, 189 (Iowa 2008). The *Jones* case involves two State Farm liability policies with two State Farm uninsured and underinsured motorist endorsements. *Id.* at 187. Divorced parents of a minor child each had their own separate State Farm insurance policies which provided both liability and uninsured or underinsured motorist coverage. *Id.* The minor child Skye Jones lived with her mother, Shawna Jones. *Id.* The minor child Skye Jones was seriously injured in an accident due to the negligence of her mother, who was killed in the same accident. *Id.* at 187. Skye's father, Clinton Jones, wished to recover for his own loss of consortium claim, as well as for Skye's injuries and damages which were not covered by her mother's policy. *Id.* There was no dispute that Skye Jones was not

[4] *Walker* can be further distinguished from the present case in that the exclusionary clause uses only "the insured" and not "any insured." *Walker,* 340 N.W.2d at 600. There is no discussion of a severability clause in *Walker*, but the language of the exclusion which is provided is less ambiguous than the intrafamily exclusion in the present case.

covered by her mother, Shawna Jones's State Farm liability policy, presumably due to the intrafamily exclusion. *Id.* at 187. "As a result, by operation of Iowa law, Shawna became an 'uninsured motorist' and the uninsured motorist (UM) coverage of Shawna's policy was available for Skye's claims." *Id.*

The question put to the court in Jones was whether a father's loss of consortium claim is derived from a child's bodily injury claim, such that it is barred by the intrafamily exclusion. *See id.* at 188. There was no dispute that Clinton Jones was not insured on Shawna Jones's State Farm liability policy. *Id.* at 189. The question was: if the daughter, Skye Jones, is considered to be an insured under the mother Shawna Jones's State Farm liability policy, is the father's loss of consortium claim barred by the intrafamily exclusion as derivative of the minor child's bodily injury claim? *Id.* The court answered "no." *Id.* A father's loss of consortium claim was not considered to be derivative of a child's bodily injury claim and it was considered a separate injury.

A further question before the court was: if Shawna Jones's liability policy was insufficient to compensate Clinton Jones for his loss of consortium claim, could he bring an underinsured motorist action against State Farm pursuant to his own policy? *Id.* at 189. The answer was "yes." *Id.* at 190. The court in *Jones* cited Iowa Code § 516A.1 for the latter proposition, noting that "the statute requires only that there be bodily injury to a person which results in damage to the insured." *Id.*

In fact, *Jones* supports the argument advanced by Menard that policy provisions contrary to statute are ineffective. *Id.* at 190.

3. Rickerd v. Iowa Mutual Insurance Company Can Be Distinguished Because the Parties Were Family Members as Contemplated By the Intrafamily Immunity Exclusion.

Rickerd involved a two-car accident where a husband (Orville) was liable for the death of his wife (Roxine) and the injury of a third party. 2003 Iowa App. LEXIS 416*, *2 (May 14, 2003) (table decision reported at 666 N.W.2d 621 (Iowa Ct. App. 2003)). Iowa Mutual Insurance Company declined to pay the estate of Roxine the value of the liability coverage on the policy, citing the "family member exclusion" of the policy's liability coverage. *Id.* at *2. Instead, they noted that Orville became an uninsured driver by operation of the exclusion and offered that coverage. *Id.* at *3. The Iowa Court of Appeals upheld the family member exclusion. *Id.* at *5. The policy language is not contained within the decision.

Rickerd can be distinguished from the current matter because the claimant on the policy was a family member of the named insured. In the present case, a similar situation would occur if the Menard employee's spouse who resided with the employee was assisting with loading the lumber and was injured due to the employee's negligence, then made a claim for liability coverage under the Farm Bureau policy. However, these are not the factual circumstances of this case. Menard is not asserting that family members of an insured cannot be subject to

exclusion under the policy. Menard is arguing that the Menard employee is the insured and that Ms. Bowen is not his family member, so the Intrafamily Immunity exclusion does not apply to bar coverage.[5]

III. If the Intrafamily Immunity Exclusion Does Apply, Farm Bureau is Estopped from Asserting the Intrafamily Immunity Exclusion.

The District Court did not address Menard's waiver or estoppel arguments in its Order Granting Summary Judgment because it found that the "intrafamily immunity" exclusion did not apply. (App. 461, R. Doc. 47, p 18) In the event that the Court on this appeal finds that there is no coverage due to the Intrafamily Exclusion, Farm Bureau is estopped from asserting the exclusion because it was untimely asserted to Menard's prejudice. Menard tendered defense and demanded indemnification on two occasions by letter. (App. 310-11, R. Doc. 25-4, pp 124-25; App. 318-19, R. Doc. 24-5, pp 132-33) On both occasions, Farm Bureau denied the request for tender of defense and demand for indemnification on September 21, 2021, and October 15, 2021. (App. 312-17, R. Doc. 25-4, pp 126-31; App. 328, R. Doc. 25-4, p 142) Neither of Farm Bureau's denial letters asserted the Intrafamily Exclusion. (App. 312-17, R. Doc. 25-4, pp 126-31; App. 328, R. Doc. 25-4, p 142) Farm Bureau neglected to assert the Intrafamily Exclusion until it filed its Answer. (App. 138, R. Doc 6, p 5, ¶¶ 1-3) Farm Bureau waited almost

[5] *Shelter Gen. Ins. Co. v. Lincoln* has a substantially similar fact pattern as *Rickerd* and this analysis applies to that case as well. *See Shelter Gen. Ins. Co.,* 590 N.W.2d 726, 727-28 (Iowa 1999).

five months after its denial of coverage to assert the Intrafamily Exclusion provision as a basis for denial. (App. 138, R. Doc 6, p 5, ¶¶ 1-3)

A. Estoppel by Acquiescence Prevents Farm Bureau From Asserting the Intrafamily Immunity Exclusion

The theory of estoppel by acquiescence is particularly germane given Farm Bureau's conduct. Estoppel by acquiescence occurs when "a person knows or ought to know that he is entitled to enforce his right . . . and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right." *Woodroffe v. Woodroffe*, 864 N.W.2d 553 (Iowa Ct. App. 2015) (quoting *Humboldt Livestock Auction, Inc. v. B&H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (Iowa 1967)). The necessary elements for a claim of estoppel by acquiescence are "(1) a party has full knowledge of his rights and material facts; (2) [that party] remains inactive for a considerable time; and (3) [that party] acts in a manner that leads the other party to believe the act now complained of has been approved." *Ney Leasing Corp. v. Cargill Meat Logistics Sols., Inc.*, No. C09-1051, 2010 U.S. Dist. LEXIS 107107, at *26 (N.D. Iowa Oct. 6, 2010) (citations omitted). The theory of estoppel by acquiescence is differentiated from equitable estoppel in that it does not require a showing of prejudice or justifiable reliance. *Woodroffe*, 864 N.W.2d 553 (citations omitted). Instead, courts generally look at the actions taken by the individual "who holds the right in order to determine whether [such] right has been waived." *Id.* (*quoting Davidson v. Van Lengen*, 266

N.W.2d 436, 439 (Iowa 1978)). Awareness for some time and subsequent failure to object is often sufficient to trigger a finding of estoppel under this theory. *See, e.g.*, *id.*; *In re Thompson Tr.*, 801 N.W.2d 23, 26-27 (Iowa Ct. App. 2011) (notice and subsequent silence sufficient); *Van Lengen*, 266 N.W.2d at 439-40 (crediting a theory of estoppel by acquiescence where the defendant did not attempt to *actively* enforce her rights for several years).

Under the same set of facts, Farm Bureau is also or alternatively, estopped by acquiescence, which does not require proof of prejudice. Farm Bureau's delay in raising the defense led Menards to believe that either the exclusion did not apply or that Farm Bureau intended on waiving it. Because all elements have been established, it is proper to estop Farm Bureau from relying on the Intrafamily Immunity exclusion. Therefore, the holding by the District Court that Menard's employee is covered as an insured under the Farm Bureau policy should be affirmed on this alternate basis.

B. Equitable Estoppel Prevents Farm Bureau from Asserting the Intrafamily Immunity Exclusion.

Equitable estoppel occurs when "(1) an insurer or its agent misrepresents a fact material to the insurance contract; (2) the insured in good faith reasonably relies on such misrepresentation; and (3) the insured would be prejudiced by failure of the insurer to give effect to the misrepresented fact." *Hully v. Aluminum Co. of Am.*, 143 F. Supp. 508, 513 (S.D. Iowa 1956) (citations omitted). Silence or

inaction can establish the misrepresentation. *See, e.g.*, *Alcorn v. Linke*, 257 Iowa 630, 641, 133 N.W.2d 89, 96 (Iowa 1965) ("Estoppel may arise from silence, . . . where there is a duty to speak, and the party on whom the duty rests has an opportunity to speak, and knowing the circumstances, keeps silent.") (citations omitted); *Legacy Bank v. Holmes*, 873 N.W.2d 551 (Iowa Ct. App. 2015) ("The [lower] court also correctly noted an 'estoppel may arise under certain circumstances from silence or inaction.'").

A claim of equitable estoppel is implicated where an insurer delays asserting a defense of noncoverage. This is because an "insurer ha[s] a duty to inform the insured of its position within a reasonable time, and its failure to do so" constitutes a valid basis for it being equitably estopped from later claiming noncoverage. *Pekin Ins. Co. v. Tysa, Inc.*, No. 3:05-cv-00030-JEG, 2006 U.S. Dist. LEXIS 93525, at *33 (S.D. Iowa Dec. 27, 2006) (*citing City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979)). Consequently, when an insured fails to raise defenses, it may be estopped from denying coverage. *Carter Lake*, 604 F.2d at 1059 (citations omitted); *accord Hully*, 143 F. Supp. 508 (crediting a theory of equitable estoppel even where the insurance company did not assume defense of the underlying action).

To establish a claim for equitable estoppel, Menard must show: (1) a misrepresentation: by affirmative action, by silence, or by inaction; and (2)

prejudice to Menard. At the time of its denial of coverage, Farm Bureau had full knowledge of the facts surrounding Bowen's underlying litigation. It had, therefore, a duty to inform Menard of all the reasons for its denial of coverage. Farm Bureau has knowledge of its own policies, including their exclusions and when they apply; yet Farm Bureau failed to assert the Intrafamily Immunity exclusion. (App. 312-17, R. Doc. 25-4, pp 126-31; App. 328, R. Doc. 25-4, p 142) Menard relied on this omission to its prejudice when determining whether to file the declaratory action at issue and when determining which claims to make on summary judgment. In addition, Menard relied on the omission when considering its strategy in relation to the underlying litigation. *See Carter Lake*, 604 F.2d at 1061-62 (basing a finding of prejudice on an untimely reservation of rights which hampered settlement efforts and impacted discovery sought). Because all elements have been established, it is proper to estop Farm Bureau from relying on the Intrafamily Immunity exclusion. The Court must affirm the District Court's holding and confirm that there is coverage for Menard under the Farm Bureau policy.

CONCLUSION

For the foregoing reasons, Menard asks that the Court uphold the decision of the District Court finding that the Intrafamily Immunity exclusion of the Farm

Bureau insurance policy is not applicable to bar coverage for the occurrence in this case.

Respectfully submitted,

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/s/Veronica Kirk

Attorney for Menard, Inc.

Dated June 30, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 30, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the CM/ECF system.

I further certify that on _____, I mailed by First-Class Mail, postage prepaid, ten (10) copies of the foregoing to the Eighth Circuit Clerk of Court and 1 copy thereof to the respective counsel for the Appellant named below:

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