IN THE IOWA SUPREME COURT

NO. 18-0129

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY d/b/a METLIFE AUTO & HOME and ECONOMY PREMIER ASSURANCE COMPANY

Plaintiffs-Appellees,

vs.

AUTO-OWNERS MUTUAL INSURANCE COMPANY

Defendant-Appellant.

APPEAL FROM THE
IOWA DISTRICT COURT IN AND FOR POLK COUNTY
HONORABLE JEANIE K. VAUDT, JUDGE
HONORABLE JEFFREY D. FARRELL, JUDGE

DEFENDANT-APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

I. AUTO-OWNERS' REQUEST THAT THIS COURT REVIEW THE DISTRICT COURT'S ORDER DENYING AUTO-OWNERS' MAY 20, 2015 MOTION FOR SUMMARY JUDGMENT IS APPROPRIATE

Argument

On May 20, 2015, Auto-Owners filed a Motion for Summary Judgment arguing that because the incident in question did not relate to the business conduct of Auto-Owners' insured there was no coverage under Auto-Owners' policy. (App. pp.23-25). The question raised in Auto-Owners' Motion was one of law. (App. pp.23-25). The Motion asked to district court to determine there was no coverage under the Auto-Owners' policies because the tragic death of Hunter True did not relate in any way to the business conduct by or on behalf of Parker House. (App. pp.23-25).

Metropolitan claims the denial of a motion for summary judgment is no longer appealable once the matter proceeds to a trial on the merits. (Metropolitan's Proof Brief, p. 22). Metropolitan's application of this position is too broad. To the extent that this rule exists, it only applies in circumstances where the district court finds a genuine issue of material fact exists and the case proceeds to final trial. Estes v. Progressive Classic Ins. Co., No. 09-1673m 809 N.W.2d 111, at *2-3 (Iowa Ct.App. 2012) (citing Klooster v. N. Iowa State Bank, 404 N.W.2d 564, 567 (Iowa 1987)). There

were no disputed facts relative to Auto-Owners May 20, 2015 Motion for Summary Judgment. (App. pp.23-25). Auto-Owners should be entitled to an appeal on the merits of the district court's decision based upon the record before the district court as it stood at that time.

Even if the district court found a genuine issue of material fact existed on this issue, Auto-Owners proposes the Court adopt a new standard allowing for appeal of a denial of a motion for summary judgment. The purpose of an appeal is to correct errors committed at the district court level which have an adverse effect on the outcome of a case. A standard allowing aggrieved parties whose summary judgment motions have been denied furthers that purpose. For example, the Wisconsin Rules of Appellate procedure provide for such an appeal:

> (4) Matters reviewable. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

Wis. Stat. Ann. § 809.10(4) (2017).

Even absent a broad standard, a standard should be adopted to allow parties similarly situated as Auto-Owners to appeal the denial of a motion for summary judgment. Not only did Auto-Owners file its motion for summary judgment, but Metropolitan did not seek any additional time for

additional facts to be developed. Then, after the district court denied Auto-Owners motion for summary judgment, Auto-Owners filed an application for interlocutory appeal. (App. pp.143-146; App. pp.161-176). This Court denied the application for interlocutory appeal. (App. pp.180-182). This left Auto-Owners no opportunity to appeal the district court's order denying their summary judgment based upon the facts of the case as they stood at the time of Auto-Owners' motion.

Adopting a new standard limited to parties similarly situated as Auto-Owners is appropriate. The new standard allowing the appeal of a denial of a motion for summary judgment could be limited to parties that were denied summary judgment at the district court level and were subsequently denied on their application for interlocutory appeal on that issue.

Auto-Owners should be entitled to appeal the merits of the district court's decision on Auto-Owners' May 20, 2015 motion for summary judgment based upon the record before the district court as it stood at that time. While Auto-Owners believes this appeal is appropriate under current Iowa law, Auto-Owners would alternatively propose this Court adopt a new standard allowing for appeal of a denial of a motion for summary judgment to parties similarly situated as Auto-Owners.

II. THE AUTO-OWNERS POLICY LANGUAGE IS CLEAR, UNAMBIGUOUS, AND DOES NOT COVER PERSONAL ACTIVITY AND PARKER HOUSE DID NOT HAVE COVERAGE BECAUSE THE INCIDENT WAS PERSONAL, NOT COMMERCIAL IN NATURE.

Argument

The liability of an insurer is governed by the policy language. Grams v. IMT Ins. Co., No. 13-0434, 2014 WL 467895, at *2 (Iowa Ct.App. February 5, 2014). Here, the Auto-Owners' business insurance policies only provided coverage when harm attributed to Parker House arose out of Parker House's business conduct. (App. pp.803-805). Because none of the events responsible for the tragic death of Hunter True arose out of Parker House's business conduct, the plain language of the Auto-Owners' policies establishes that there is no coverage.

Metropolitan is critical of the cases cited by Auto-Owners because the cases are not factually identical to the present case. (Metropolitan Proof Brief, p. 31). The present case was a tragedy and thankfully, voluminous case law with the same fact pattern does not exist. The numerous cases cited by Auto-Owners are still instructive in this case.[1] What is clear from all of those cases is that the conduct leading to the alleged injury must have a

[1] The cases cited by Auto-Owners and criticized by Metropolitan are: Sebastiano v. Bishop, No. OT-97-003, 1997 WL 587138 (Ohio Ottawa App. Sept. 19, 1997); Simonsen v. Lumber Company Brew Pub & Eatery, LLC.,

relationship to the business. In other words, for a business policy to provide coverage, there must be business conduct that brings about the coverage. There simply is no such link in this case.

Metropolitan ignores the personal nature of all of the events that led to this tragic incident. Everything for which Metropolitan faults Parker House was created by the personal actions of a member of the Lala family. On the day of the incident in question, the only reason Nicklaus Lala, Hunter True, and Haylee Hennagir were at the 1545 Foothill Property was for personal, recreational purposes. (App. p.725, Lines 7-19). The gun was only there because of personal reasons. (App. p.368; *Transcript v. I p.68, Lines 18-21*). The gun was only loaded because of personal reasons. (App. p.722, Lines 9-15). All of the events leading up to the tragic incident were set in motion by the personal actions of members of the Lala family. Metropolitan wants to

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No. 2012AP594, 2013 WL 500395 (Wis Ct.App. Feb. 12, 2013); Talen v. Employers Mut. Cas.Co., 703 N.W.2d 395 (Iowa 2005); State Auto Property & Casualty v. Furniture Deals, LLC, No. 11–1206–CV–W–SOW, 2013 WL 12143975 (W.D.Mo. July 23, 2013); My Phoung Tran v. Huy The Dao, No. 2015 CA 1941, 2016 WL 4245376 (La.App. 1 Cir. Aug. 10, 2016); Transcontinental Insurance Co. v. Edwards, No. 96–5099, 1996 WL 814532 (W.D.Ark. Dec. 23, 1996); Travelers Indemnity Co. v. Nix, 644 F.2d 1130 (5th Cir. 1981); Nationwide Insurance Company v. Calabrese, No. 13–CIV–81145, 2015 WL 1293064 (S.D. Florida March 23, 2015); Farm Bureau General Insurance v. Estate of Stormzand, No. 325326, 2016 WL 1688883 (Ct.App.Mich. April 26, 2016).

make it the responsibility for Parker House, as a business, to undo all of the potential harms of the personal actions of the Lala family. Metropolitan further wants Auto-Owners to pay for the personal actions of the Lala family when no such coverage would ever be provided in an insurance policy providing business coverage.

The "cardinal principle guiding our interpretation [of insurance policies] is that the intent of the parties at the time the policy was sold controls." National Surety Corporation v. Westlake Investments, LLC, 880 N.W.2d 724, 733 (Iowa 2016). Parker House only purchased the Auto-Owners policy for business coverage. Parker House was formed in order to engage in any lawful business or businesses and to own and operate commercial real estate in Mason City, Cerro Gordo County, Iowa. (App. pp.843-844). Because the Lalas wanted coverage for personal matters, they purchased the personal policy through Metropolitan. Both the policy language and the factual evidence show it was the parties' intent to only cover Parker House's business conduct.

III. THE DISTRICT COURT ERRED IN FINDING POTENTIAL EXPOSURE OF PARKER HOUSE UNDER AN AGENCY THEORY OR PREMISES LIABLITY THEORY AND DETERMINING THE SETTLEMENT BETWEEN PARKER HOUSE AND METROPOLITAN WAS REASONABLE AND PRUDENT

Argument

To be bound by the settlement between Parker House and Metropolitan, Iowa law requires there to be coverage for Parker House under the Auto-Owners' policies and that the settlement was reasonable and prudent.

A. The settlement between Parker House and Metropolitan was not reasonable and prudent because Parker House did not have exposure under an agency theory.

Nicklaus Lala was not acting as an agent of Parker House at the time of the incident in question. As a result, there was no exposure to Parker House under the agency theory and any alleged liability under such a theory fails.

Metropolitan asserts that Nicklaus Lala was acting as an agent of Parker House when he was locking up the house and putting the gun away. (Metropolitan's Proof Brief, p.36). However, noticeably absent from the entirety of Nicklaus Lala's deposition testimony is any mention of Parker House. (App. pp.707-759). He also does not make any mention of Jay Lala

telling him to lock up the house before Jay Lala left. (App. p.725, Lines 7-19).

"Agency . . . results from (1) manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to the former's control and, (2) consent by the latter to so act." Three Minnows, L.L.C. v. Cream, L.L.C., No. 12-0591, 2013 WL 1453246 at *4 (Iowa Ct.App. 2013) (quoting Pillsbury Co. v. Ward, 250 N.W.2d 38 (Iowa 1977)). A principal and agent must mutually manifest assent to the agency relationship before agency is created. Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 100 (Iowa 2011).

There is no evidence to establish that Nicklaus Lala assented to be an agent for Parker House. Nicklaus Lala was not acting as an agent of Parker House having been instructed by a principal of Parker House to lock up the property and secure the guns. Nicklaus Lala was a son who was following his father's instructions, if any, that were given to him. If Nicklaus Lala did not lock up the property or secure the guns, he would not have been fired by a principal of Parker House, he would have been grounded by his dad.

Nicklaus Lala was not on the property on the day in question for the purposes of Parker House. (App. p.725, Lines 7-19). His purpose was purely personal and recreational. (App. p.725, Lines 7-19). While the

locking up of the house may benefit Parker House, merely conferring a benefit on another does not make the person conferring the benefit an agent of the other. Some type of consent to an agency relationship must exist. Soults, 797 N.W.2d at 100.

Additionally, the facts do not support any statements that Nicklaus Lala was securing the gun in question when it discharged. When asked during his deposition why he was picking up the gun, Nicklaus Lala stated, "No reason. Just picking up a gun." (App. p.727, Lines 5-6). A few lines later, he was again asked what the purpose of picking up the gun and swinging it was, to which he replied,

> "Just holding a gun. There was a gun on the bed, I picked it up, I was gonna look at it. I didn't have time to do what I was gonna do with it 'cause it went off, but I mean it's like going to Cabelas and you look at guns. You have to pick one up."

(App. p.727, Line 19-p.728, Line 3). Questioning of Nicklaus Lala continued regarding what he was going to do with the gun and in his later responses he states that he did not recall why he was going to look at the gun, that he did not remember what he was going to do with it, and confirmed that he did not have any particular thing in mind as to what he was going to do with the gun. (App. p.728, Lines 4-18). This testimony is far from the statements of Metropolitan and its experts that Nicklaus Lala

picked up the gun with the intention of putting it in a gun case. (App. p.696).

There was no exposure to Parker House under the agency theory. Because of the lack of any agency relationship, there is no basis for using an alleged agency relationship to support a position that Parker House's settlement was reasonable and prudent.

B. The settlement between Parker House and Metropolitan was not reasonable and prudent because Parker House did not have exposure, or only minimal exposure, under a premises liability theory.

Even as the landowner of where the incident took place, Parker House did not have exposure, or only minimal exposure, under a premises liability theory as it relates to the injuries suffered by Hunter True.

It is undisputed that Parker House was the owner of the property in question. (App. p.331; *Transcript v. I p.14, Lines 19-25*). It is also undisputed that it was the Lala family that utilized the property in question for their personal use. (App. pp.340-342; *Transcript v. I p.25, Line 2-p.27, Line 25* and App. pp.368-369; *Transcript v. I p.68, Line 4-p.69, Line 7*). Metropolitan asserts that Parker House had exposure under a premises liability theory under Section 51 of the Restatement (Third) of Torts. (Metropolitan's Proof Brief, p.37). Metropolitan's focus on Section 51 is misplaced.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51, at 242 (Am. Law Inst. 2012) formulates a landpossesor's duty as follows:

> Subject to section 52, a land possessor owes a duty of reasonable care to entrance on the land with regard to:
>
> (a) conduct by the land possessor that creates risks to entrants on the land;
>
> (b) artificial conditions on the land that pose risks to entrants on the land;
>
> (c) natural conditions on the land that pose risks to entrants on the land; and
>
> (d) other risks to entrants on the land when any of the affirmative duties provided in Chapter 7 is applicable.

(Id.) Metropolitan asserts these duties upon Parker House as the landowner, whereas Section 51 imposes these duties upon the land possessor. There is no doubt that it was the Lala family, personally, that was the land possessor of the property in question. And it is the personal nature of this incident that is the reason Parker House and Auto-Owners, as its insurer, did not have exposure or coverage for the incident.

Restatement (Third) of Torts § 49 defines a land possessor and states:

> Possessor of Land Defined
>
> A possessor of land is

(a) a person who occupies the land and controls it;

(b) a person entitled to immediate occupation and control of the land, if no other person is a possessor of the land under Subsection (a); or

(c) a person who had occupied the land and controlled it, if no other person subsequently became a possessor under Subsection (a) or (b).

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 49 (Am. Law Inst. 2012).

The Lala family furnished the property with residential furnishings. (App. p.340; *Transcript v. I p.25, Lines 2-17*). Jay Lala considered the 1545 Foothill Property to be a second home or secondary residence. (App. p.368; *Transcript v. I p.68, Lines 4-13*). Jay Lala considered the purpose of the 1545 Foothill Property to be for more personal use as opposed to business use. (App. p.368; *Testimony, Transcript v. I p.68, Lines 4-13*).

These statements provide that it was the Lala family, personally, that possessed the land in question. Everything related to the incident in question was purely personal in nature. Any exposure from a premises liability perspective would be born by the Lala's personally and not from Parker House.

Metropolitan also asserts that the loaded gun was a condition on the land under Section 51. (Metropolitan's Proof Brief, p.37). In support of its

position, Metropolitan focuses on Illustrations 2 and 3 of Section 51 that address liability arising from a container of anhydrous ammonia. (Metropolitan's Proof Brief, p.37). The Illustrations, however, do not relate to a person on the property encountering an obvious or known danger, but an unexpected one. The Illustrations describe injuries sustained after the malfunction of a container with an unknown substance, which turns out to be anhydrous ammonia. In those Illustrations, the contents of the container could be innocuous, such as water, or dangerous, such as anhydrous ammonia. This unknown creates the need for a duty to warn. The Illustrations are not analogous to the presence of a gun on land. Immediately known to anyone who would encounter a gun is that a gun can only contain something dangerous. No warning is necessary to inform anyone entering the land that guns can be dangerous.

The settlement entered into by Parker House was not reasonable or prudent. Parker House did not have any exposure under an agency theory. Parker House also did not have any exposure under a premises liability theory. Auto-Owners was not liable to pay the settlement.

CONCLUSION

Auto-Owners' policies only provided coverage to Parker House with respect to the conduct of its business. There was no business connection with the accidental shooting of Hunter True. Accordingly, there was no coverage and Metropolitan was not entitled to subrogation or contribution. Metropolitan is also not entitled to contribution for the separate reason that Auto-Owners and Metropolitan did not insure the same parties and the same risks.

Auto-Owners was also entitled to enforce the cooperation clauses and deny coverage based on Parker House's failure to comply, because Auto-Owners' coverage position was not erroneous and the settlement entered into was not reasonable and prudent. Additionally, there simply was no basis for finding any potential liability under and agency theory or premises liability theory against Parker House.

For all of these reasons, Auto-Owners requests the Court reverse the ruling of the District Court and enter a ruling in favor of Auto-Owners on all issues.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 3,195 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

The 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(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

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CERTIFICATE OF FILING

I, Timothy W. Hamann, hereby certify that I, or a person acting on my direction, did file the attached Defendant-Appellant's Final Reply Brief via the Electronic Document Management System with the Clerk of the Iowa Supreme Court on this 8th day of June, 2018.

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CERTIFICATE OF COST

The undersigned hereby certify that the actual cost of producing the foregoing Appellant's Final Reply Brief was $0.00.

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