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 BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because the issues raised involve substantial issues of first impression in Iowa and substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(d), and 6.1101(2)(f).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellants Auto-Owners Mutual Insurance Company (Auto-Owners) appeals the trial judge's entry of a $450,000 Judgment in favor of Plaintiff-Appellee Metropolitan Property and Casualty Insurance Company d/b/a Metlife Auto & Home and Economy Premier Assurance Company (Metropolitan). (App. pp.282-308). The dispute arises out of the applicability of Metropolitan and Auto-Owners' insurance policies to the injuries suffered by the injured party. (App. pp.10-14).

Course of Proceeding and Disposition Below: On June 13, 2014, Metropolitan filed an Original Notice and Petition against Auto-Owners seeking subrogation for payments Metropolitan paid in a settlement to an injured party. (App. pp.10-14). On June 23, 2014, Auto-Owners filed its Answer denying Metropolitan's Petition and asserting its First Affirmative Defense stating that there was no coverage for the incident in question

because the Auto-Owners' policy only provided coverage "with respect to the conduct of a business." (App. pp.15-18).

On April 2, 2015, Auto-Owners filed an Application for Leave to Amend Answer and its First Amendment to Answer. (App. pp.19-22). The Application was granted on July 2, 2015. (App. pp.137-140). Auto-Owners First Amendment to Answer was docketed on July 6, 2015. (App. pp.141-142).

Auto-Owners First Amendment to Answer asserted its Second, Third, Fourth, and Fifth Affirmative Defenses. (App. pp.141-142). The Second Affirmative Defense provided that Metropolitan's claims for contribution, subrogation, or indemnity was barred because such claims are only available when the insurance policies in question insure the same entities, the same risks, the same interests, and the identical properties. (App. p.141). The Third Affirmative Defense alleged that Metropolitan's claims for contribution, subrogation, or indemnity was barred due to lack of privity between the parties. (App. p.141). The Fourth Affirmative Defense alleged that Metropolitan's claims for contribution or subrogation must be apportioned and reduced by the fault of Metropolitan's insureds, that Nicklaus Lala's fault and resultant liability was entirely and exclusively covered by the policies issued by the Metropolitan, that Metropolitan had no

right to contribution, subrogation, or indemnity related to the fault and resultant damages which are assessed to Nicklaus Lala, and that Nicklaus Lala's fault was the proximate sole cause of the incident in question and Metropolitan was not entitled to contribution or subrogation. (App. p.141). The Fifth Affirmative Defense alleged that Metropolitan's policies were primarily, if not entirely, the primary policies covering the incident in question because the incident in question was primarily, if not entirely, related to personal activities as opposed to business activities and Metropolitan was not entitled to contribution, subrogation or indemnity against Auto-Owners. (App. p.141).

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). On June 10, 2015, Auto-Owners filed two Motions for Partial Summary Judgment. (App. pp.26-27; App. pp.28-29). Auto-Owners' First Motion for Partial Summary Judgment sought a ruling that Metropolitan not be entitled to make a contribution claim against Auto-Owners. (App. pp.26-27). Auto-Owners' Second Motion for Partial Summary Judgment sought a ruling that comparative fault applied to Metropolitan's subrogation claim. (App. pp.28-29).

On June 15, 2015, Auto-Owners filed its second Application for Leave to Amend Answer and its Second Amendment to Answer which asserted its Sixth and Seventh Affirmative Defenses (App. pp.30-35). The Application was granted on August 4, 2015. (App. pp.143-146). The Sixth Affirmative Defense stated that Metropolitan had failed to assert its subrogation claim against the real parties in interest. (App. p.32). The Seventh Affirmative Defense alleged that Metropolitan could not assert any rights and duties of Auto-Owners insureds because the insureds did not obtain Auto-Owners' written consent. (App. p.32).

On June 22, 2015, Metropolitan filed a Motion for Leave to File Amended and Substituted Petition seeking to add a new Defendant, Parker House Properties, L.L.C. (hereinafter referred to as "Parker House"). (App. pp.36-37). On June 22, 2015, Metropolitan also filed a Motion for Summary Judgment alleging there was coverage under the Auto-Owners policy for the incident in question. (App. pp.38-39).

On July 17, 2015, the Honorable Jeanie Vaudt held a hearing on the pending Motions. (App. p.143). On August 4, 2015, the Honorable Judge Vaudt entered an Order denying Auto-Owners' and Metropolitan's Motions for Summary Judgment and Partial Summary Judgment. (App. pp.143-146).

In the same Order, the Court granted Metropolitan's Motion for Leave to File Amended and Substituted Petition. (App. p.144).

On August 6, 2015, Metropolitan filed its Amended and Substituted Petition at Law realleging its original claims against Auto-Owners and alleging claims of indemnity and contribution against Parker House. (App. pp.147-154). On September 1, 2015, Auto-Owners filed its Answer to Metropolitan's Amended and Substituted Petition at Law, including and Eighth Affirmative Defense alleging that Metropolitan's claims were barred pursuant to Chapter 516 because there was no pending judgment against Auto-Owners' insureds. (App. pp.155-160). On September 15, 2015, Parker House filed its Answer to Metropolitan's Amended and Substituted Petition. (App. pp.177-179).

On September 3, 2015, Auto-Owners filed its Application for Interlocutory Appeal, which sought an appeal of the August 4, 2015 Order. (App. pp.161-176). On September 30, 2015, the Honorable Justice Daryl L. Hecht entered an Order denying Auto-Owners' Application for Interlocutory Appeal. (App. pp.180-182).

On December 11, 2015, Parker House filed a Motion to Amend Answer and asserted affirmative defenses, including that Metropolitan was not the proper party to pursue contribution and indemnity under the

circumstances of the case, that Metropolitan's claim for contribution was barred because of the absence of common liability to the claimants, that Metropolitan's claim for indemnity was barred because of the fault of Metropolitan's insureds, and that Metropolitan's claims were barred because Metropolitan's insureds were the alter egos of Parker House and could not recover contribution or indemnity against themselves (App. pp.183-186). The Court granted Parker House's Motion to Amend Answer on December 23, 2015. (App. pp.187-188).

On November 23, 2016, Parker House filed a Motion for Summary Judgment on Metropolitan's claims for indemnity and contribution. (App. pp.189-190). On November 30, 2016, Auto-Owners filed renewals of its prior Motion for Summary Judgment and Motions for Partial Summary Judgment. (App. pp.191-208; App. pp.209-222; App. pp.223-234). On January 11, 2017, the Honorable Jeffrey D. Farrell held a hearing on the pending Motions for Summary Judgment and Partial Summary Judgment. (App. pp.252).

On January 16, 2017, Auto-Owners filed an Application for Leave to Amend Answer to Metropolitan's Amended and Substituted Petition at Law and its Amendment to Answer and asserted a Ninth Affirmative Defense. (App. pp.235-239). The Ninth Affirmative Defense asserted that the anti-

subrogation doctrine applied and Metropolitan cannot subrogate against its insureds by pursuing subrogation or contribution against Auto-Owners. (App. p.237). The Application was granted on March 7, 2017. (App. p.265).

On February 17, 2017, Auto-Owners filed an Application for Leave to Amend Answer to Assert Tenth Affirmative Defense to Metropolitan's Amended and Substituted Petition at Law and asserted a Tenth Affirmative Defense. (App. pp.239-242). The Tenth Affirmative Defense asserted that the settlement entered into between Metropolitan and Parker House was contrary to the insurance policies issued to Parker House by Auto-Owners. (App. p.241). The Application was granted on March 7, 2017. (App. p.265).

The Tenth Affirmative Defense was prompted when Parker House agreed to file a $450,000 offer to confess judgment in favor of Metropolitan, assign its rights against Auto-Owners to Metropolitan, and pay $1,000 of the judgment in exchange for Metropolitan agreeing to not execute on the offer to confess judgment. (App. p.239; App. pp.246-249).

On February 21, 2017, Parker House filed its Offer to Confess Judgment in favor of Metropolitan in the amount of $450,000. (App. p.243). On February 24, 2017, Metropolitan filed its Acceptance of Parker House's

Offer to Confess Judgment. (App. pp.244-245). On February 27, 2017, Metropolitan filed a Partial Satisfaction of Judgment acknowledging payment of $1,000. (App. pp.250-251).

On March 7, 2017, the Honorable Jeffrey D. Farrell entered an Order granting Auto-Owners' Second Motion for Partial Summary Judgment finding that comparative fault was to be considered at trial. (App. pp.250-265). The Court denied Auto-Owners' Motion for Summary Judgment and First Motion for Partial Summary Judgment. (App. p.265). The Court also granted a pending Motion to Continue to allow the parties to certify new expert witnesses "only as to the question whether the settlement between [Metropolitan] and Parker House [was] reasonable and prudent." (App. pp.265).

A Non-Jury Trial was scheduled for September 25-27, 2017. (App. pp.267-271). On September 18, 2017, Auto-Owners filed Motions in Limine to exclude the testimony of Craig F. Stanovich and Marsha Ternus. (App. pp.274-277; App. pp.278-281). Auto-Owners alleged Mr. Stanovich's testimony should have been excluded because interpretation of insurance policies is an issue for the Court. (App. pp.274-276). Auto-Owners alleged Ms. Ternus' testimony should have been excluded because she failed to

offer a factual opinion as to the reasonableness or prudence of the settlement between Metropolitan and Parker House. (App. pp.278-280).

A Non-Jury Trial was held on September 25-26, 2017. (App. p.282). On November 20, 2017, the Honorable Judge Jeffrey D. Farrell entered judgment against Auto-Owners and in favor of Metropolitan in the amount of $450,000. (App. pp.282-308).

The Court found that Parker House was an insured under the Auto-Owners' policies because of its ownership of the farm for investment purposes was a business purpose. (App. pp.291-295). The Court also found that Nicklaus Lala and Samuel Lala were covered under the Auto-Owners' policies as either employees or volunteer workers when they were putting guns away at and locking the house in question. (App. pp.292-293). The Court further found that Nicklaus Lala was an agent of Parker House when he was securing the property and locking it. (App. pp.292-293). Additionally, the Court found that Parker House was liable under a premises liability theory. (App. pp.295-297).

The Court then found that the settlement between Metropolitan and Parker House was reasonable and prudent and that Metropolitan was entitled to contribution from Auto-Owners. (App. pp.297-302). Lastly, the Court denied Auto-Owners' ten Affirmative Defenses. (App. pp.305-306).

On December 14, 2017, Auto-Owners filed a Motion to Amend or Enlarge the November 20, 2017 Ruling requesting the Court grant Auto-Owners credit for the $1,000 Metropolitan had already received through its settlement with Parker House and enter specific written rulings on Auto-Owners' Motions in Limine regarding the testimony of Mr. Stanovich and Ms. Ternus. (App. pp.309-312). On December 30, 2017, the Court entered an Order denying Auto-Owners Motion to Amend or Enlarge. (App. pp.313-314).

On January 19, 2018, Auto-Owners timely filed its Notice of Appeal. (App. pp.315-317).

STATEMENT OF THE FACTS

Parker House, its commercial property, and its commercial policy

Jay and Lorrie Lala, (hereinafter "Mr. Lala" and "Mrs. Lala") organized Parker House as a for-profit business in 1997 with the purpose to engage in any lawful business or businesses and to engage in all other activities necessary, customary, convenient or incident thereto. (App. pp.840, 843-844, 861). Parker House purchased from Auto-Owners a business policy known as a Tailored Protection policy, which included a Commercial General Liability Coverage form. (App. pp.523-524). Effective September 30, 2006, the Tailored Protection Policy was endorsed

to add a location which was classified as vacant land comprised of 116.78 acres of vacant farmland near Nora Springs, Iowa. (App. p.878). Consistent with Auto-Owners' underwriting procedures, the total acreage was rounded up to 117 acres and the endorsement was effective as of May 1, 2006. (App. p.878).

Parker House, its personal property, and its personal policy

Parker House later purchased property located at 1545 Foothill Ave., Nora Springs, Iowa (hereinafter referred to as the "1545 Foothill Property") in November 2008, which included 2.82 acres of land and a house. (App. p.337; *Transcript v. I p.20, Lines 1-24*). Parker House never notified Auto-Owners of the purchase of the additional land, which was not vacant, but included a house/dwelling. (App. p.825-833).

After acquiring the 1545 Foothill Property, the Lalas obtained *personal* liability insurance coverage for the property through Metropolitan. (App. pp.891,894). The Metropolitan policy was a personal homeowner's insurance policy, which included, among other things, coverage for legal liability protection, motor vehicle liability protection, and other personal protections. (App. pp.885-954). The policy applied to the Lalas' primary home, the Lalas' personal vehicles, and the 1545 Foothill Property. (App. pp.887-902). The Lalas' used the house at the 1545 Foothill Property as a

place for personal guests to stay, for use by hunting parties, and for other personal uses. (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*). The house was fully furnished with residential furnishing as opposed to business furnishings. (App. p.340; *Transcript v. I p.25, Lines 2-17*). It is undisputed that the house was not used for Parker House's business purposes. (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*).

The accident on the personal property involving personal activity

On April 22, 2012, the Lalas' son Nicklaus, his friend Hunter True, and another friend went to the 1545 Foothill Property to ride dirt bikes and all-terrain and utility-terrain vehicles. (App. p.725, Lines 7-19). As they were getting ready to leave the property, Nicklaus Lala and Mr. True entered the house at the 1545 Foothill Property to lock up. (App. p.725, Lines 7-19).

A rifle was resting on Nicklaus Lala's bed, where it had been left by Nicklaus, or his younger brother Sam, during an earlier visit. (App. p.721, Lines 16-21). The rifle was located at the 1545 Foothill Property for the personal pursuits of hunting and target shooting and was not used for the protection of any property owned by Parker House or for any other business use. (App. p.721, Lines 12-15). Nicklaus Lala picked up the rifle to look at

it when a round discharged, killing Mr. True. (App. p.726, Lines 1-7). Mr. Lala was at the 1545 Foothill Property mowing the grass and doing some yard work and left approximately 15 minutes before the incident. (App. p.355; *Transcript v. I p.40, Lines 1-12*).

The rifle that accidentally discharged (hereinafter referred to as "the rifle") was purchased by Mr. Lala when he was 10 years old. (App. p.350; Transcript v. I p.35, Lines 21-23). The rifle was used only for recreational purposes including hunting and target shooting. (App. p.368; *Transcript v. I p.68, Lines 18-21*). The ammunition purchased for the rifle was used for recreational or personal purposes. (App. p.368; *Transcript v. I p.68, Lines 18-21*). The rifle was not purchased from funds of Parker House. (App. p.350; *Transcript v. I p.35, Lines 21-23*). The rifle was not used for protecting the house or the property of Parker House. (App. pp.368-369; *Transcript v. I p.68, Line 18-p.69, Line 7*). The rifle was at the 1545 Foothill Property for target practice. (App. p.368; *Transcript v. I p.68, Lines 18-21*).

Nicklaus Lala had attended a hunter safety class when he was approximately 12 years old, where he was provided instructional materials and instruction on how to properly store firearms. (App. p.715, Line 1-p.716, Line 6). As part of the hunter safety class, Nicklaus Lala was

instructed on how to inspect a firearm to determine if it was loaded. (App. p.716, Lines 7-17). As a result of instructions from his father and the hunter safety class, Nicklaus Lala knew a firearm should be inspected to see if it was loaded before using it for any purpose. (App. p.716, Lines 7-17). Nicklaus Lala was instructed by his father to treat every gun as if it was loaded and to always keep a gun un-cocked when it is stored. (App. p.716, Line 22-p.717, Line 10). Nicklaus Lala knew it was not a good storage practice to leave a rifle laying on a bed and that a gun should not be pointed at another human being. (App. p.721, Lines 14-20; App. p.727, Lines 14-17). Nicklaus Lala did not need his father on the day in question to instruct him to check and see if the rifle was loaded before he picked it up, as he already knew that that would be a proper and safe procedure to follow. (App. p.733, Line 25-p.734, Line 7).

The Auto-Owners' Commercial Policy

At the time of the April 22, 2012 incident, Parker House was insured by Auto-Owners through a Commercial General Liability policy with policy number 044607-39075482-11. (App. p.787). As explained in the Argument below, the Auto-Owners Commercial General Policy applied only to Parker House's business conduct. (App. pp.803-805).

In addition, due to the lack of notification by Parker House regarding the property transactions, on the date of the April 22, 2012 incident, the only real property insured per location 002 of Auto-Owners policy No. 044607 was the remaining 70.05 acres of vacant farmland purchased by Parker House on April 27, 2006. (App. p.878).

Metropolitan's personal policy

At the time of Hunter True's death, Metropolitan had in force a PAK II insurance policy naming as insureds Jay Lala or Lorrie Lala, the parents of Nicklaus Lala. (App. p.885). This policy included coverage for legal liability protection (resulting from an occurrence in which there is actual accidental property damage, personal injury or death), motor vehicle liability protection, uninsured or underinsured motorist protection, homeowners' liability protection, incidental business liability protection, boater's liability protection, medical expense protection and other personal protections. (App. pp.885-954). Nicklaus Lala, along with his brother Samuel Lala, as members of Mr. and Mrs. Lala's family, would have been covered under the homeowners' liability protection of this policy. (App. p.911).

The Metropolitan settlement

In January 2014, a settlement involving the accidental shooting death of Hunter True was entered into whereby Metropolitan paid $900,000 to

Michael Carpenter and Hillary Carpenter, the parents of Hunter True, in exchange for a release of all claims and potential claims against Jay Lala, Lorrie Lala, Nicklaus Lala, Parker House, Metropolitan, and Auto-Owners. (App. pp.955-965).

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE GRANTED AUTO-OWNERS' MAY 20, 2015 SUMMARY JUDGMENT MOTION BECAUSE THE INCIDENT DID NOT ARISE OUT OF PARKER HOUSE'S BUSINESS CONDUCT.

Preservation of Error

Auto-Owners preserved error on this issue as the district court issued an Order denying its May 20, 2015 Motion for Summary Judgment. (App. p.143-146).

Standard of Review

This Court reviews a District Court's ruling on Summary Judgment for errors at law. Miller v. Speirs, 810 N.W.2d 870, 870 (Iowa 2011); Iowa R. App. P. 6.907.

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.

On May 20, 2015, Auto-Owners filed a Motion for Summary Judgment arguing that there was no coverage under Auto-Owners' policies because the incident did not arise out of Parker House's business conduct. (App. pp.23-25). On August 4, 2015, the Honorable Jeanie Vaudt entered an Order on Pending Motions denying Auto-Owners' Motion for Summary Judgment. (App. pp.143-146). Judge Vaudt erred because there were no disputed material facts that would have supported any allegation that the incident in question arose out of Parker House's business conduct.

A. The Auto-Owners policy language is clear, unambiguous, and does not cover personal activity.

Auto-Owners' CGL Policy only provided coverage for harm arising out of an incident related to Parker House's business conduct. (App. pp.803-805). Auto-Owners CGL Policy definition of who is an insured includes the following provision:

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:
   ***
   c. A limited liability company, you are an insured. *Your members are also insureds, but only with respect to the conduct of your business.* Your managers are insureds, but only with respect to their duties as managers.
   ***
2. Each of the following is also an insured:

   a. Your "employees", other than either your "executive officers" (if you are an organization other than a

> partnership, joint venture or limited liability company) or your *managers* (if you are a limited liability company), *but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business*, or your "volunteer workers" only while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for "bodily injury", "personal injury" or "advertising injury":
>
> (1) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
>
> (2) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1) above;
>
> (3) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1) or (2) above; or
>
> (4) Arising out of his or her providing or failing to provide professional health care services.
>
> ***

(App. pp.803-805 (emphasis added)).

Under the plain language of Auto-Owners' CGL policy, Mr. and Mrs. Lala, as members of Parker House, are only covered with respect to the conduct of the business of Parker House. (App. pp.803-805). As managers,

they are only covered with respect to their duties as managers. (App. pp.803-805). Therefore, Mr. and Mrs. Lala are not entitled to coverage either as members or managers of Parker House unless the accidental shooting of Hunter True related to Parker House's business conduct or their duties as managers.

These facts are analogous to the facts in Sebastiano v. Bishop, No. OT-97-003, 1997 WL 587138 (Ohio Ottawa App. Sept. 19, 1997). In Sebastiano, the court held that a comprehensive general liability policy did not provide coverage when a construction owner's son removed a pistol that the owner used for target shooting from the owner's truck and accidently discharged the gun killing the son's friend. Id., at *1. The insured was one of two owners of a construction company. Id. The insured kept a pistol in his company truck for target shooting. Id. Without the insured's knowledge, the insured's son removed the gun from the truck. Id. The next morning while "messing around" with the pistol with his friend, the gun discharged, killing the friend. Id. The comprehensive general liability insurer sought summary judgment denying coverage for the conduct, as it only provided coverage to the insured with respect to the conduct of his business. Id. The court agreed that the coverage did not apply:

> [The business owner] was an "insured" only if his possession/transportation of the gun was related in some

> manner to the business of the [construction company]. It is undisputed that [the owner] began storing the pistol in the pickup a few months prior to the accident and only used the pistol for purely personal reasons, that is, target practice. *Appellants offered no evidence from which the trial court or this court could even infer that the possession/storage of the .22 caliber pistol in the pickup truck had any relationship to the partnership business.*

Id., at *4 (emphasis added).

When there is no legitimate business conduct related to a potential insured's activities, there is no insurance coverage under insurance policies issued to a business that only insure conduct related to the business. In Simonsen v. Lumber Company Brew Pub & Eatery, LLC., No. 2012AP594, 2013 WL 500395 (Wis Ct.App. Feb. 12, 2013), the court held that the conduct of a bar employee was not "business conduct" at the time he injured another employee of the bar. There, a male bartender remained in his employer's bar after his shift had ended and consumed alcohol with some of the other bar patrons. Id., at *1. The female bartender that had replaced him as bartender placed his keys behind the bar due to a concern that he should not drive due to his alcohol consumption. Id. When the male bartender got up to leave, he went behind the bar to retrieve his keys. Id. During a struggle over the keys between the two, the female bartender was injured. Id. She sued and the bar's insurer denied coverage on the basis that the male bartender was not acting in his capacity as a member of the LLC at the time

the injury occurred. Id. The insurance policy provided coverage for the male bartender "only if he was an insured under the policy." Id., at *2. The policy stated: "If you are designated in the Declarations as . . . [a] limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business." Id., at *3. The Court held that the male bartender was *not* an insured under the policy:

> Generally, when considering whether a person's liability arises with respect to the conduct of a business, we must determine whether the person's conduct was "either personal or business." In doing so, we must consider whether the activity was performed for the purpose of the business.
>
> [The female bartender] argues [the male bartender] was acting with respect to the business when attempting to obtain his keys because (1) he was located behind the bar, where mere patrons are customarily prohibited, and (2) he did not allow bartenders to lock up and did not feel comfortable leaving the business keys with an employee.
>
> We easily reject [the female bartender's] arguments. First, while the location of [the male bartender's] conduct may be *relevant* to determining the nature of his conduct, the location does not ipso facto *establish* the nature of his conduct. Even assuming [the male bartender's] presence behind the bar was permitted, [the female bartender] fails to construct a bridge to span the inferential gap between [the male bartender's] location and his conduct. We will reject arguments that are inadequately developed.
>
> Second, we conclude [the male bartender] was not acting with respect to the conduct of the business simply because his key ring contained the business keys. . . . Thus, we hold that, as a matter of law, [the male bartender's] alcohol-fueled struggle

> for his keys was not an activity undertaken with respect to the conduct of the *business*.

Id., at *3 (internal citations omitted) (second *italics* added). See also Nova Casualty Co. v. Anderson, No. 804CV2085T27TGW, 2005 WL 3336496 (M.D. Fla. Dec. 5, 2005) (defining the phrase "conduct of the business" to require "a focus on the purported insured's activity in determin[ing] whether the conduct of the business owner was business or personal" and holding that a business owner's after hour purchase and consumption of alcohol with an employee was unrelated to the business and not "business conduct").

Here, there is no connection between the rifle and the shooting of Hunter True with Parker House's business activities. This is not a case where the insureds took action to satisfy their "own business objectives" or acted, even in part, for "business reasons." Talen v. Employers Mut. Cas. Co., 703 N.W.2d 395, 411 (Iowa 2005). Further, there is no evidence that the accidental shooting involved any duties of Mr. and Mrs. Lala as Parker House managers. The shooting did not occur "by virtue" of their role as managers or in "furtherance of the business or interests" of Parker House. State Auto Property & Casualty v. Furniture Deals, LLC, No. 11-1206-CV-W-SOW, 2013 WL 12143975, at *5 (W.D.Mo. July 23, 2013). It was also not "employment-rooted" or "reasonably incidental to the performance" of Mr. and Mrs. Lala's duties as managers of Parker House, which was set up

to develop property. My Phoung Tran v. Huy The Dao, No. 2015-CA-1941, 2016 WL 4245376, at *3 (La.App. 1 Cir. Aug. 10, 2016). Paraphrasing what the Iowa Supreme Court stated in Talen, this is "not an instance in which the personal nature of the services performed overshadowed a business purpose; there simply [is] no business purpose in the [] activities in [this] case." Talen, 703 N.W.2d at 412. Therefore, neither Mr. Lala nor Ms. Lala were entitled to coverage based upon their positions within Parker House.

B. Parker House similarly did not have coverage under the Auto-Owners' policy because the incident was personal, not commercial in nature.

Parker House also lacked coverage under the Auto-Owners CGL policy for the shooting of Mr. True. Parker House was not entitled to coverage because the Auto-Owners policy, by its name, was only intended to cover commercial matters, not personal ones. The accidental shooting did not involve Parker House's business.

The Iowa Supreme Court has held that 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). To determine the parties' intent, the court looks to the language of the policy unless the

meaning of that language is ambiguous. Nationwide Agri-Business Ins. Co. v. Goodwin, 782 N.W.2d 465, 470 (Iowa 2010). "[W]ords in an insurance policy are to be applied to subjects that seem most properly related by context and applicability." Talen, 703 N.W.2d at 407.

Here, all of the facts indicate the policy was purchased to cover Parker House's business activities. The coverage provisions for the limited liability company in Auto-Owners' policy provide the context wherein there is only coverage for business conduct. A limited liability company is set up to engage in business conduct, not personal or non-business matters. No qualifying language is needed to provide an express limitation on a limited liability company. *It can only engage in business because it is a business.* However, individual members and managers are capable of engaging in personal conduct while working for the company, which makes it necessary to include an express limitation on their coverage to conduct of the business and duties as managers.

In the construction of insurance policies, the cardinal principle is that the intent of the parties must control; and except in cases of ambiguity, this is determined by what the policy itself says. Goodwin, 782 N.W.2d at 470. Here, the policy language is restricted to business conduct by its plain meaning. Parker House only purchased the 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. p.804). If Parker House's members wanted coverage for personal matters taking place on personal property, it could have purchased a personal policy (which is precisely what they did with Metropolitan). Both the policy language and the factual evidence show it was the parties' intent to only cover Parker House's business conduct.

The next question is whether the accidental shooting of Hunter True related in any way to Parker House's business. It does not. Parker House was set up to own and operate commercial real estate. (App. p.804). The use of firearms does not in any way relate to the business activities of the entity, nor would the accidental shooting of Mr. True. Therefore, there was no business conduct. This was entirely a personal matter.

While Parker House may have owned the property in question, the property served no business purpose. The Lala's used the house as a location for guests to stay, hunting parties to stay, and for other personal uses. (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*). Its purpose was for personal activities unrelated to any business operations of Parker House. (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*). The house was never rented or leased, and no one was ever charged to stay at the house or to use it. (App. p.369; *Transcript v. I p.69, Lines 16-20*). The house was used by the Lala's as a second home or secondary residence. (App. p.368; *Transcript v. I p.68, Lines 4-13*). The house was fully furnished with residential furnishings as opposed to business furnishings. (App. p.340; *Transcript v. I p.25, Lines 2-17*). The Lala's purchased a personal homeowner's insurance policy for the house through Metropolitan Property and Casualty Insurance Company. (App. p.885).

The rifle in question also had no relationship to the business conduct of Parker House. The rifle was purchased by Jay Lala when he was 10 years old, 25 years before Parker House was organized. (App. p.350; *Transcript v. I p.35, Lines 21-23*). The rifle was used only for recreation purposes, including hunting and target shooting. (App. p.368; *Transcript v. I p.68, Lines 18-21*). The rifle was at the 1545 Foothill Property for target practice. (App. p.368; *Transcript v. I p.68, Lines 18-21*). The ammunition purchased for the rifle was used for recreational or personal purposes. (App. p.368; *Transcript v. I p.68, Lines 18-21*). The rifle was not used for protecting the house or the property of Parker House. (App. pp.368-369; *Transcript v. I p.68, Line 18-p.69, Line 7*).

The use of the 1545 Foothill Property generally, and specifically on the day in question, and the presence of the .22 caliber rifle at the property, had no relationship to Parker House's business conduct. (App. p.725, Lines 6-19). As the court held in Sebastiano, absent a relationship to Parker House's business conduct, the Auto-Owners' policies in question do not provide coverage.

The fact that Parker House owned the property is not enough to establish coverage under the policy. To read the Auto-Owners policies that broadly would provide coverage for anything that could take place on the property, an unreasonable interpretation. While it is true that policy exclusions are strictly construed against the insurer, that does not mean courts should interpret insurance policies so broadly that the interpretation becomes absurd and contrary to the intent of the policy.

In Transcontinental Insurance Co. v. Edwards, No. 96–5099, 1996 WL 814532 (W.D.Ark. Dec. 23, 1996), the court held that an insured's assaulting and kidnaping conduct did not fall within the conduct of the insured's business. In Edwards, an insured assaulted and kidnaped his attorney based upon suspicion that the attorney was having an affair with his wife and providing her narcotics. Id., at *2. The insured owned and operated warehouses. Id. The insured and the attorney had just completed a

meeting on the warehouse premises prior to the kidnaping. Id. The warehouses were insured under a commercial general liability policy extending coverage to the insured "only with respect to the conduct of the business." Id., at *5. The insurer sought summary judgment requesting that the conduct be found to be excluded under the policy. Id. The insurance contract did not define the term business nor the phrase "conduct of business." Id. The court interpreted the "ordinary sense" of the words and excluded the conduct from coverage. Id. The court stated, "insurance coverage should not be extended to cover a risk for which a premium has not been collected," and that "[w]hile the lack of a definition causes this court to interpret the phrase in the broadest sense possible under reasonable construction, it simply cannot reasonably construe the phrase to include [the insured's] conduct." Id. at *6.

In support of its holding, the Court cited Travelers Indemnity Co. v. Nix, 644 F.2d 1130, 1132 (5th Cir. 1981) (similar policy excluded coverage when service station operator shot customer who had intervened between station operator and son) which stated:

> It is quite apparent to us that the parties in contracting for this insurance policy did not contemplate anything other than what the policy plainly intends: coverage for liability arising out of the conduct of the business, or incidental to the business. The coverage which [the customer] seeks to impress upon [the insured] and [the insurance company] does not fall within the

> plain terms of the policy. The policy does not provide coverage for personal liability arising from personal matters and cannot be extended to provide coverage for such liability.

Edwards, 1996 WL 814532, at *6. In further support of its ruling, the Court also stated:

> Also, no one could expect [the insurance company] should have been able to foresee [the insured's] bizarre, to say the least, conduct. In order to impose liability under a comprehensive commercial general liability insurance policy, the insurer must have been able to reasonably foresee the liability producing conduct would emanate from the insured's conduct. No one could have foreseen [the insured's conduct] at the time these policies were entered.

Id. Lastly, the Court supported its ruling by stating that the insured's actions were not sufficiently tied to his role with his business to warrant coverage, finding it was personal rather than business conduct. Id., at *7.

In Nationwide Insurance Company v. Calabrese, No. 13–CIV–81145, 2015 WL 1293064 (S.D. Florida March 23, 2015), an insurer issued a CGL policy which named as insureds Calabrese, Florida Caterers, and Calabrese Investments, LLC. Id., at *2. In the section of the policy entitled "Who is an insured" the policy stated:

> "if you are designated . . . as a limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers."

Id. The business of the named insured was catering. Id. Calabrese Investments, LLC owned the commercial building which housed the catering business. Id. Adjacent to the commercial building was a residential building owned by a different LLC operated by Calabrese and his brother. Id., at *3. Calabrese used the residential building to store supplies for the catering business. Id. Calabrese hired an individual to move some of the catering business supplies to a different room in the house and also discussed with the individual repairing the roof on the residential property. Id., at *4. After moving the items, the individual ascended the roof of the house to fix the hole and leak. Id. The roof gave way during the repair and the individual was injured. Id. The court found the central issue here was whether the work the individual performed was done with respect to the conduct of a business within the terms of the policy. Id., at *5. The court stated that courts in and outside Florida have found the phrase "with respect to the conduct of a business" facially unambiguous. Id. The Court went on to state that, "[h]owever, the phrase "conduct of business" requires a focus on the purported insured's activity in determining whether the conduct of the business owner was business or personal." Id. In finding that the individuals work was not related to the catering business, and therefore excluded from coverage under the applicable policy, the court stated:

> [T]he court must whether [the individual's] activity was performed with respect to storage of catering business property at the Residential Property, or with respect to the separate business of renovating, in order to sell or rent the residential property. Put another way, the Court must decide whether [the individual's] activity had a sufficient nexus to the conduct of the catering business. The facts clearly show that it did not.

Id. at *5. The evidence showed Florida Caterers did use the residential property for purposes related to the catering business. Id. It was also clear the individual did do work for the catering business, which may have been done with respect to the conduct of the catering business. Id. However, the repair work performed on the property was not related to the catering business. Id. Therefore, regardless of whether or not Calabrese instructed the individual to ascend the roof and fix the leak, that activity could not have served the catering business and there was no obligation to indemnity under the policy. Id., at *6.

In Travelers Indemnity Co. v. Nix, 644 F.2d 1130 (5th Cir. 1981), the Fifth Circuit Court of Appeals held that a liability insurer's policy excluded coverage when a service station operator shot a customer who had intervened between the station operator and his son. In Nix, a service station owner and his son were involved in an altercation at the service station. Id., at 1131. The son's friend intervened in the altercation by asking the service station owner to quit beating the son. Id. An argument then occurred

between the son's friend and the station owner. Id. The station owner reached under the store counter and retrieved a gun. Id. The station owner shot at the son's friend, with one bullet striking the son's friend in the leg. Id. The shooting occurred on the premises of the service station. Id. The son's friend sued. Id. The service station's insurer filed a declaratory judgment action to determine their responsibilities under the business liability policy. Id., at 1130. The insurance policy in question named "Harold Nix Gulf Station, Harold Nix, d/b/a," as the insured. Id. The Court concluded that "[t]here is no question but that the shooting incident arose out of a purely personal transaction and had nothing to do with the operation of the station or grocery or any business connected therewith." Id., at 1131. In discussing the intent of the policy, the Court stated:

> [t]he parties are presumed to have in contemplation the nature and character of the business, and to have foreseen the usual course and manner of conducting it. Thus, in construing a policy of insurance so as to arrive at the true intention of the parties, the ordinary legal and literal meaning of the words must be given effect where it is possible to do so without destroying the substantial purpose and effect of the contract.

Id. at 1132; citing Liverpool & London & Globe Ins. Co. v. Georgia Auto & Supply Co., 115 S.E. 138 (Ga.App. 1922). "The policy does not provide coverage for personal liability arising from personal matters and cannot be extended to provide coverage for such liability." Nix, 644 F.2d at 1132.

In sum, Parker House was limited to coverage with respect to the conduct of its business. As shown, there was absolutely no business connection with the accidental shooting of Hunter True. As also demonstrated, the accidental shooting had no relation to the conduct of the business of Mr. and Mrs. Lala as members or their duties as managers. Auto-Owners owed no coverage and Metropolitan was not entitled to subrogation or contribution.

II. THE DISTRICT COURT ERRED IN FINDING THAT AUTO-OWNERS' COMMERCIAL POLICY COVERED THIS PERSONAL INCIDENT

Preservation of Error

This issue was preserved as it was fully litigated in the trial in the District Court and the Court issued a ruling finding coverage.

Standard of Review

When reviewing the judgment of a district court in a nonjury law case, our review is for correction of errors at law. Bus. Consulting Servs., Inc. v. Wicks, 703 N.W.2d 427, 429 (Iowa 2005); Iowa R. App. P. 6.907.

Argument

The District Court also improperly determined there was coverage. The majority of the case law and factual statements that support the District Court's error on this issue were cited and discussed in the previous section.

However, some additional authority and factual reference may provide further clarity of the District Court's error.

Under the Auto-Owners' policies, Auto-Owners was only obligated to defend and indemnify Parker House, Jay Lala, and Lorrie Lala, if the incident in question was conduct related to an insured under the policies with respect to business conduct. (App. pp.803-805). It would be impossible for a business (in this case Parker House), as a legally created, yet non-physically existing entity, to engage in conduct that is not business related. Because a non-physically existing entity cannot commit an act, any act in furtherance of the business must be completed by an individual on behalf of the business. The incident in question did not arise out of an individual carrying out the business conduct of Parker House. This was "not an instance in which the personal nature of the services performed overshadowed a business purpose; there simply [was] no business purpose in the [] activities in [this] case." Talen, 703 N.W.2d at 412. There is "no evidence from which the trial court or this court could even infer that the possession/storage of the [firearm] in the [property] had any relationship to the [] business." Sebastiano, 1997 WL 587138 at *4.

In its ruling, the District Court properly states that it was Parker House that was holding the 1545 Foothill Property for investment purposes.

(App. p.294). The Court also properly states that it was the Lala family that used the land *for recreation*, including shooting guns. (App. p.294, (emphasis added)). These contrasting statements illustrate the reason why the Auto-Owners' policies do not provide coverage.

Illustrating the significance of the business purpose versus personal purpose distinction is Farm Bureau General Insurance v. Estate of Stormzand, No. 325326, 2016 WL 1688883 (Ct.App.Mich. April 26, 2016). Stormzand was the sole proprietor of Stormzand Asphalt Maintenance (SAM) and had a business insurance policy with Farm Bureau. Id. The insured on the policy was Stormzand Andrew D d/b/a Stormzand Asphalt Maintenance. Id. The policy provided that if you are designated in the Declarations as an individual, the person so designated [is an insured] but only with respect to the conduct of a business of which he/she is a sole proprietor. Id. The key phrase to the appeal, said the court, is "but only with respect to the conduct of a business of which he/she is a sole proprietor." Id. Mr. Stormzand owned an offroad vehicle called a "Rhino," which he used for both business and personal uses. Id. Stormzand's son had attended a recreational event and borrowed the Rhino. Id. While using the Rhino, the son was involved in an accident and a passenger was severely injured. Id. The court looked at the terms of the Farm Bureau policy to determine

whether Stormzand's conduct in lending the Rhino was insured business conduct. Id. Under the plain terms of the policy, Stormzand was insured only with respect to the conduct of a business of which he was a sole proprietor. Id., at *2. The policy does not define "conduct" or "conduct of a business." The court looked at some dictionary definitions of conduct and found that conduct means "behavior by action, deeds, the act, manner or process of carrying on." Id. The word "of" can be used as a function word to indicate the cause, motive, or reason. Id. Thus, to fall under the policy, Stormzand's decision must have been an action, deed, or act "the cause, motive, or reason" of which was the business of SAM. Id.

The trial court found that Stormzand's action to allow his son to use the Rhino was of a singularly personal concern and not related to the business. Id. The court of appeals found the district court did not clearly err. Id. Stormzand allowed his son to use the Rhino because he believed the Rhino was safer than his son's other off-road vehicles. Id. There is nothing on the record to support that Stormzand lent the Rhino to his son for anything other than personal purposes. Id. The son was not an employee of SAM, nor was the Rhino painted with any SAM advertisements. Id. Moreover, there is nothing on the record to suggest that Stormzand considered SAM or any related business interests in deciding to loan the

Rhino. Id. Instead, the record supports that Stormzand's only purpose was a personal interest in his son's safety. Id. Furthermore, while Stormzand was the sole proprietor for his business, this fact does not mean that every decision he made was for the purpose of the business. Id. Because the trial court did not clearly err when it found that Stormzand's act of loaning the Rhino was not the "conduct of a business," Farm Bureau has no duty to indemnify Stormzand's estate for any liability. Id., at *3.

Here, it was the Lala family that used the land for recreation, including shooting guns, not Parker House. (App. p.294). It was not Mr. or Mrs. Lala as members or managers of Parker House that used the land for recreation. It was not Nicklaus Lala, Sam Lala, or Hunter True that used the land for any purpose related to Parker House. It was the Lala family that used the land for recreation. (App. p.294).

The decision to allow this land to be used for recreation was made by Jay and Lorrie Lala for singularly personal concerns and not related to Parker House. There is no evidence that "the cause, motive, or reason" in using the land for recreation was for the business of Parker House. Any alleged failure by Jay Lala, Lorrie Lala, Nicklaus Lala, or Sam Lala, as those failures relate to the rifle in question, all arose out of their personal concerns and their personal recreational use of the 1545 Foothill Property.

The District Court was right when it found that it was the Lala family that used the land for recreation, including shooting guns. The problem is that the District Court did not apply the plain policy language to that finding. Had it done so, the District Court would have concluded that there was no personal coverage as a matter of law.

III. THE DISTRICT COURT ERRED AGAIN IN FINDING THAT METROPOLITAN WAS ENTITLED TO CONTRIBUTION OR INDEMNITY FROM AUTO-OWNERS WHERE THE TWO COMPANIES INSURED DIFFERENT PARTIES AND DIFFERENT RISKS

Preservation of Error

This issue was preserved as it was fully litigated in the trial in the District Court and the Court issued a ruling finding that Metropolitan was entitled to contribution or indemnity.

Standard of Review

When reviewing the judgment of a district court in a nonjury law case, our review is for correction of errors at law. Wicks, 703 N.W.2d at 429; Iowa R. App. P. 6.907.

Argument

The District Court found that Metropolitan was entitled to contribution from Auto-Owners. (App. pp.297-302). That finding was in error.

Under Iowa law, subrogation in the insurance context "permits an insurer who has paid a loss to an insured to become 'subrogated in a corresponding amount to the insured's right of action against any other person responsible for the loss." Wilson v. Farm Bureau Mutual Insurance Company, 770 N.W.2d 324, 328 (Iowa 2009). Even when the insurance contract does not explicitly provide for subrogation rights, the insurer's "right to subrogation attaches by operation of law upon payment of the loss based on principles of equity." Id. Based on this language, subrogation in Iowa contemplates shifting the entire amount of the loss from the insurance company who paid it onto the person actually "responsible for the loss." Id.

In the case of Metropolitan, it did not contend that Auto-Owners was responsible for the entire amount of the settlement Metropolitan paid. Since Metropolitan's claim was only for part of the settlement amount, Metropolitan was really seeking contribution from Auto-Owners. An insurance company's right of contribution depends upon whether the insurance policies insure the same individuals and the same risks. In this case, the insureds were not identical and different risks were covered. Metropolitan had no right of contribution.

As a general matter, both the Iowa Code and Iowa case law have recognized that there must be identity of interests before a right of

contribution exists. In the Iowa Code, section 668.5(1) (2017) of the comparative fault act states that a right of contribution exists between "two or more persons who are liable upon the same indivisible claim for the same injury, death or harm." As this language indicates, before contribution can be obtained pursuant to the comparative fault act, the claim and harm must be identical.

Iowa courts have also held that there must be an identity of interest for contribution to be recovered. In American Trust & Savings Bank v. U.S. Fidelity, 439 N.W.2d 188, 189 (Iowa 1989), the court found that the "right to equitable contribution exists between two or more persons who are liable on the same indivisible claim." Common liability "must be established as a condition of contribution." Id. In Hills Bank & Trust Company v. Converse, 772 N.W.2d 764, 773 (Iowa 2009), the court found the right to contribution can "only occur between persons who are both liable on the same indivisible claim." The common liability element is a "condition to an allowance of contribution." Id. Finally, in State ex. rel. Palmer v. Unisys Corporation, 637 N.W.2d 142, 153 (Iowa 2001) the court found that the common liability rule for contribution exists because "the principles of equity on which the right of contribution rests are applicable only when the

situation of the parties are equal." On the other hand, equality among parties whose "situations are not equal is not equitable." Id.

In the insurance context, in St. Paul Insurance Companies v. Horace Mann, 231 N.W.2d 619, 621 (Iowa 1975), the Iowa Supreme Court found that St. Paul insured the school district as well as Mr. Arbore. Horace Mann insured only the teacher. Id. Both policies insured against liability for, among other things, bodily injury. Id. Without more, it is evident both would be liable in a suit against the teacher, or in other words, if one insurer paid the full amount of the claim it could sue the other insurer for contribution. Id. Generally, where there is so called double or concurrent insurance, with two or more policies providing the same or duplicating coverage, the right to contribution has been held to exist between such insurers. Id. But there must be an identity between the policies as to parties, and the insurable interest and risks. Id. And, as stated in Appleman, Insurance Law and Practice, contribution is a "principle sanctioned in equity, and arises between co-insurer's only, permitting one who has paid the whole loss to obtain reimbursement from other insurers who are also liable therefore." Id., at 621-622 (citing Republic Ins. Co. v. United States Fire Ins., Co., 444 P.2d 868, 870 (Colo. 1968)). As this language indicates, the Iowa Supreme Court expressed the view that in contribution claims

between insurers, there must be identity between the parties and the insurable interest and risks.

Courts in other jurisdictions have more recently addressed the rule that the right of contribution between insurance companies depends on the policies insuring the same parties and the same risks. In State Farm v. Zurich Insurance Co., 111 F.3d 42, 43 (6th Cir. 1997), State Farm and Monroe Guaranty sought to recover a portion of a payment made in settlement of a personal injury claim. Evans/Griffin Incorporated had leased commercial office space in a building owned by Clifton Oxford Investment company. Id. Evans/Griffin had liability insurance from State Farm and Monroe Guaranty, but did not designate Clifton Oxford as a named or additional insured. Id. In July 1990, a child was injured while in an elevator in a common area of the building owned by Clifton Oxford. Id. When a lawsuit was filed on behalf of the child against Clifton Oxford to recover for personal injuries, Clifton Oxford filed a third-party complaint against Evans/Griffin seeking indemnification under the terms of the lease. Id. This third-party complaint was dismissed after State Farm, Monroe, and Evans/Griffin entered into an agreement with Clifton Oxford wherein State Farm and Monroe agreed to jointly defend and indemnify Clifton Oxford as if it were a named insured. Id. After assuming Clifton Oxford's defense,

State Farm and Monroe settled the personal injury claim for over $300,000. Id., at 44. Thereafter, State Farm and Monroe instituted this action against Zurich, which insured Clifton Oxford, to recover all or a portion of the settlement payment. Id.

The court found that it is well established that "contribution among insurance companies is available where 'all insurers are equally liable for the discharge of a common obligation.'" Id. Such double coverage, however, only exists where "both policies were on the same property, on the same interest in the property, against the same risks, and payable to the same parties. Id. The court cited Reliance Insurance Co. v. Liberty Mutual Fire Ins. Co., 13 F.3d 982 (6th Cir. 1994), where two insurance policies insure the same property but different insureds, there is no right of contribution. Id., at 45. The court then looked at the facts in Reliance and found that because each policy there "covered a different insured and neither named the other as an additional insured under their respective policies, contribution was not a proper remedy." Id.

The court in Zurich thus found it had to first determine whether the three policies at issue covered a common insured, Clifton Oxford. The district court held and Zurich contended that Clifton Oxford was not an insured under either the State Farm or Monroe insurance policy despite the

agreement entered into between State Farm, Monroe, and Clifton Oxford. The court found it need not decide whether the agreement was sufficient to make Clifton Oxford an insured retroactively under the policies because the "policies insured different interests." The State Farm and Monroe policies, in addition to covering Clifton Oxford's liability, also insured Evans/Griffin's liability to Clifton Oxford under the indemnity clause. While Clifton Oxford gave up that right in exchange for the agreement of State Farm and Monroe to treat him as an insured, the policies nevertheless covered that additional obligation and an additional insured, Evans/Griffin, who was liable in that obligation. Thus, the Zurich policy did not have the same insureds or cover the same interests.

Here Auto-Owners and Metropolitan's policies covered different insureds and different interests. Auto-Owners provides business coverage to Parker House. (App. p.787). Auto-Owners also provides coverage to Jay Lala and Lorrie Lala as members with respect to the conduct of the business and as managers with respect to their duties as managers. (App. pp.803-805). Metropolitan, on the other hand, provides a broad range of personal liability protections to Mr. and Mrs. Lala as individuals, along with their sons Nicklaus Lala and Samuel Lala. (App. pp.885-954). Since the

Metropolitan policy covers different insureds and different interests, there is no right to contribution.

In Continental Casualty Company v. Signal Insurance Company, 580 P.2d 372, 373 (Ariz. Ct.App. 1978), two liability insurance carriers sought to recover contribution from a third liability insurance carrier on the ground that they all insured the same risk. Id. The underlying facts involved a carnival ride accident and the ensuing wrongful death and personal injuries lawsuit. Id. The carnival had been conducted pursuant to a contract between the Coliseum Board and the Midway. Id. Midway agreed to carry liability insurance in amounts not less than $2,000,000 for each person, $5,000,00 for each accident, with each policy to include the Coliseum Board and the State of Arizona as additional named insureds. Id. A certificate of insurance was issued and filed with the Coliseum Board showing coverage with Continental Casualty for one of Midway's joint venture owners. Id. A similar certificate was filed showing coverage for another related party with National Indemnity company. Id.

The court found the controlling principle in cases involving contribution among insurance carriers can be stated as follows: In order for there to be contribution among insurers, the interest, as well as the risk and the subject matter, must be identical. Id., at 374. The court concluded that

each of the policies involved in this case was to insure a separate risk. Id. Hilligoss' policy with Continental was to insure Hilligoss' contribution to the joint venture, and Davis' policies with National and Signal were to insure Davis' contribution. Id. The court went on to examine the facts and ultimately found that because the risks insured by the policies of the appellees are not identical to those on the appellant's policy, contribution, as a matter of law, will not be granted. Id., at 376. The interests, risks, and subject matters must be identical before contribution will be granted. Id. The court found equitable principles, upon which the doctrine of contribution is founded . . . are not offended by this result. Id. The appellees received a premium to cover the operation of Davis' Scrambler; appellant did not. Id. Appellees intended to cover this particular loss, if it occurred; appellant had no such intent. Id. There is nothing inequitable, said the court, about denying contribution in this case. Id.

In the case of Auto-Owners and Metropolitan, Auto-Owners' policies provide commercial general liability coverage and umbrella coverage to the business Parker House. (App. p.787). These policies also provide coverage to Jay Lala and Lorrie Lala but only with respect to the conduct of the business and with respect to their duties as managers. (App. pp.803-805). Auto-Owners policies in no way cover Nicklaus Lala or Samuel Lala.

In contrast, Metropolitan's PAK II insurance policy only covers personal risks. (App. pp.885-954). The Metropolitan policy provides coverage to Mr. and Mrs. Lala as individuals for legal liability, motor vehicle liability, uninsured or underinsured motorist protection, homeowners liability protection, and other personal protections. (App. pp.885-954). Metropolitan's policy also provides coverage to Nicklaus Lala and Samuel Lala, as members of their family, under the homeowners' liability protection. (App. p.911).

The policies at issue insure different parties. And the "interests, risks, and subject matters" are not identical. As a result, there is no right to contribution. That result makes sense. Mr. and Mrs. Lala paid premiums to Metropolitan to cover personal related matters such as the accidental shooting death of Hunter True and Metropolitan agreed to provide such coverage. No such premiums were paid to Auto-Owners and Auto-Owners never agreed to provide such coverage. Metropolitan had no right of contribution against Auto-Owners.

IV. THE DISTRICT COURT ERRED IN BINDING AUTO-OWNERS TO THE SETTLEMENT AGREEMENT, WHICH WAS ENTERED INTO IN VIOLATION OF AUTO-OWNERS' COOPERATION CLAUSE.

Preservation of Error

This issue was preserved as it was fully litigated in the trial in the District Court and the Court issued a ruling finding the settlement enforceable.

Standard of Review

When reviewing the judgment of a district court in a nonjury law case, our review is for correction of errors at law. Wicks, 703 N.W.2d at 429; Iowa R. App. P. 6.907.

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. Auto-Owners' policies did not cover the accident and Auto-Owners had no duty to agree to the settlement.

In Auto-Owners' CGL policy, several provisions required Parker House to obtain Auto-Owners consent to settlement. The first of these sections is as follows:

SECTION IV-COMMERCIAL GENERAL LIABILITY CONDITIONS

*****

2. Duties in the Event of Occurrence, Offense, Claim or Suit

***

c. You and any other involved insured must:

***

(1) Immediately send us copies of any correspondence, demands, notices, summonses, or papers in connection with any claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of any claim or defense of any "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

(App. p.806).

The Common Policy Conditions of Auto-Owners' CGL policy contains the following provision on cooperation:

F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties, but only with respect to that property.

(App. p.791).

The Special Conditions section of Auto-Owners CGL Policy contains the following language:

ASSIGNMENT. No interest in this policy may be assigned without our written consent. But if you are an individual named insured and die, we will cover:

(a) your legal representative, but only within the scope of his duties as such; and

(b) anyone having proper temporary custody of your insured property, but only:

1. with respect to that property; and
2. until your representative is appointed.

(App. p.549).

Auto-Owners' Commercial Umbrella Policy also contains a section entitled Conditions which contains the following two provisions:

This policy is subject to the following conditions:

***

B. Assignment

No interest in this policy may be assigned without **our** written consent. But if **you** should die within the policy term, the policy will cover:

1. **Your** legal representative, as the Named **Insured**, but only with respect to his or her duties as such; and

2. Any person or organization having proper temporary custody of **your** property, as **insured**, but only until **your** legal representative has been appointed.

***

F. Legal Action Against Us

We may not be sued unless:

1. There is full compliance with all the terms of this policy; and

2. Until the obligation of an **insured** to pay is finally determined either by:

   a. Judgment against the **insured** after actual trial; or

   b. By written agreement of the **insured**, the claimant and **us.**

No one shall have any right to make **us** a party to a **suit** to determine the liability of an **insured**.

(App. pp.494-495)

In this case, Parker House settled with Metropolitan without Auto-Owners consent in violation of the above policy provisions. Therefore, the

issue is whether Auto-Owners was entitled to rely on the cooperation clauses in denying coverage under Iowa law.

In Kelly v. Iowa Mutual Insurance Company, 620 N.W.2d 637, 640 (Iowa 2000), McCarthy had settled a wrongful death claim concerning Kelly and the estate agreed to seek the remaining $500,000 from Iowa Mutual who insured McCarthy. Iowa Mutual later alleged that McCarthy's settlement of the wrongful death case over Iowa Mutual's objection constituted a breach of policy conditions and resulted in a forfeiture of coverage. Id. The estate did not argue that McCarthy complied with the policy conditions, but it "does assert that various actions of Iowa Mutual released McCarthy from his obligations under the policy." Id., at 641. Specifically, the estate complained of Iowa Mutual's defense of McCarthy under a reservation of rights, its commencement of a declaratory judgment action to litigate coverage, and Iowa Mutual's refusal to approve the settlement between McCarthy and the estate. Id.

The court found that once a party to a contract breaches the agreement, the other party is no longer obligated to continue performing his or her own contractual obligations. Id. The court then cited Red Giant Oil Co., v. Lawlor, 528 N.W.2d 524 (Iowa 1995), which held that where an insurance company refuses to defend the insured against a claim covered by

the policy, the insured is free to settle with the injured party by stipulating to the entry of a judgment that is collectible only from the insurer. Id. The court in Red Giant found the "insurer's unjustified refusal to defend relieves the insured from his or her contract obligations not to settle and the insured is at liberty to make a reasonable settlement or compromise without losing his or her right to recover on the policy." Id. Unlike the insurer in Red Giant, Iowa Mutual did not breach its duty to provide a defense. Id., at 642. Therefore, the court had to look at the other circumstances revealed by the record to determine whether there potentially was a breach of the insurance contract by Iowa Mutual. Id. The estate contended that Iowa Mutual breached the contract in three ways: (1) by defending McCarthy under a reservation of rights; (2) by commencing a declaratory judgment action; and (3) by refusing to consent to the proposed settlement. Id. The court addressed each contention separately. Id.

The estate appeared to argue that Iowa Mutual's defense of McCarthy pursuant to a reservation of rights violated the contract. Id. The court found that an insurer "does not breach the policy simply because the defense it provides is under a reservation of rights." Given this language, Parker House was not excused from complying with the cooperation clauses in its

policy simply because Auto-Owners chose to defend the claims against it under a reservation of rights.[1]

The court then looked at the issue of Iowa Mutual's refusal to consent to the proposed settlement. The court noted that when an insurer defends an insured, it has control over the defense and over settlement. Id. The court had recognized that in this situation a covenant of good faith and fair dealing is implied. Id. This covenant includes a duty to settle cases without litigation in appropriate cases. Id. The court looked at prior cases on this issue and found that we have "not had an occasion to consider the insurer's duty to settle under circumstances such as those before us, where the insurer has reserved its right to deny coverage for any judgment entered against the insured. Id., at 644.

The court found that insurance company cannot use its erroneous belief that is has no coverage to justify a refusal to settle. Id. At the point in time that the insurer is faced with a "fair and reasonable settlement" demand that a "reasonable and prudent insurer would pay," the insurer must either abandon its coverage defense and pay the demand or lose its right to control

[1] The second claim in Kelly involves a declaratory judgment action and is not applicable to this case.

the conditions of settlement." Id. If the insurer prefers to debate coverage and accordingly refuses to pay the settlement demand, the insured is free to either pay the settlement demand or stipulate to the entry of judgment in the amount of the demand. Id., at 645. The insurer, if found to have coverage, will be liable for the insured's settlement if the settlement is found to be fair and reasonable." Id. The court held that when an "insurer provides a defense under a reservation of rights and rejects a fair and reasonable settlement demand that a reasonable and prudent insurer would pay, the insured is free to consummate the settlement on terms that protect the insured from any personal exposure." Id.

The court in Kelly further stated that the burden of proof as to whether a settlement is fair and reasonable is on the party seeking to enforce it. Id. The court found that in "cases such as the one before us, where a third party seeks to establish coverage, the burden shifts to the insurer to introduce evidence of noncompliance. Id., at 641. If it is established that the insured has not substantially complied with the policy conditions, the party claiming coverage bears the burden to prove that the performance was excused or waived or that the failure to comply was not prejudicial to the insurer. Id. Under this language, Auto-Owners has established that Parker House did not substantially comply with the policy provisions. Therefore, Metropolitan,

who claims there is coverage for the incident, has the burden to prove that the performance was excused, which in this case would be establishing that the settlement was fair and reasonable. Id.

The Kelly case was cited in Westview v. Iowa Mut. Ins., No. 05-1594, 2006 WL 3802154, *1 (Iowa Ct. App. Dec. 28, 2006). Specifically, the court cited the language stating that at the "point in time that the insurer is faced with a fair and reasonable settlement demand that a reasonable a prudent insurer would pay, the insurer must either abandon its coverage defense and pay the demand or lose its right to control the conditions of settlement." Id., at *3. Westview asserted that it entered into a fair and reasonable settlement with Vander Stouwe and Iowa Mutual, as the insurer, should be liable to pay the amount of the settlement. Id. The court found that whether Iowa Mutual is liable to pay the amount of the settlement hinges upon whether Vander Stouwe had coverage under the insurance policy against Westview's claims. Id. The provision in Kelly, said the court, "only applies if the insurer has an "erroneous belief it has no coverage." Id. If in fact there is no coverage, the insurance company is not liable for a subsequent settlement by the insured. Id. The court agreed with the district court's conclusion that Vander Stouwe was not covered for the claims made by Westview for consequential damages. Id.

As this language indicates, if there is no coverage, the rule in Kelly on settlement does not apply. Id. This is consistent with the Red Giant case as well. Id. While that decision involved wrongful refusal to defend, the court did find that the injured party had the "burden to prove by a preponderance of the evidence that (1) the underlying claim was covered by the policy, and (2) the settlement which resulted in the judgment was reasonable and prudent." Red Giant, at 535.

The same principle applies in all of the above cases: if there is no coverage, there is no breach of the policy by failing to consent to an insured's settlement. Therefore, if Parker House had no coverage, the rule on settlement in the Kelly case would not apply. In this case, Auto-Owners' policy is clear that it applies to business conduct. The shooting death of Hunter True did not involve business conduct. Therefore, Auto-Owners' belief that there was no coverage is not erroneous and there was no duty to settle.

B. The settlement between Parker House and Metropolitan was not reasonable and prudent.

A breach of the cooperation clauses by Parker House cannot be excused if the settlement entered into by Parker House was not reasonable and prudent. The burden was on Metropolitan to prove that the settlement was reasonable and prudent.

Auto-Owners is not liable to pay the settlement on behalf of Parker House because the settlement did not satisfy the standards set forth in Red Giant Oil Company v. Lawlor, 528 N.W. 2d 524 (Iowa 1995).

In Red Giant, the Court considered whether an insured could bind an insurer to a settlement it reached with an injured party. Id. The Court found good reason to bind the insurer, but created a standard to protect insurers from concerns that the insured might collude with an injured party. Id. The Court held that the party who accepts assignment of a claim and sues the insurer must prove that the underlying claim: (1) was covered by the policy and (2) the settlement was "reasonable and prudent." Id., at 535. The Court also held the insurer may plead defenses including fraud and collusion. Id.

Auto-Owners provided the reports and testimony of two attorneys, David Riley and Max Kirk, on this issue. The report from Attorney David Riley opined that Nick Lala was not acting on behalf of Parker House on the day in question. (App. p.871). Mr. Riley further stated in his report that there was no business purpose to be served by his visit that day, and no business purpose of Parker House was being advanced when Nick Lala reached for and picked up the weapon. (App. p.873). In Mr. Riley's opinion, had the case been tried to a jury, the jury would have put 75% to 100% of the fault on Nick Lala, and the remainder of the fault, if any, on Jay Lala

individually. (App. p.873). Mr. Riley states no fault would have been assessed to Parker House. (App. p.873). Given the minimal exposure to Parker House, Mr. Riley's expert opinion was that the settlement of $450,000 was not reasonable by "any stretch of the imagination" and was "totally out of line for the minimal exposure of Parker House." (App. p.873).

Auto-Owners also provided a report from attorney Max Kirk. (App. pp.880-882). In his report, Mr. Kirk found it "difficult to conceive of any realistic scenario in which the fault of Nicklaus Lala would be imputed to Parker House." (App. p.882). For that reason, Mr. Kirk believed it seemed "highly unlikely that any fault would be attributed to Parker House for the accidental shooting, based on the actions of Nicklaus Lala." (App. p.882). In Mr. Kirk's opinion, a reasonable and prudent person in the position of Parker House would not pay anything beyond nominal damages to settle the claims of Metropolitan. (App. p.882).

Metropolitan offered only the testimony of Attorney Ronald Pogge and Attorney Marsha Ternus to establish that the settlement was reasonable and prudent. Their testimony does not adequately refute the testimony of Attorneys Riley and Kirk and failed to establish by a preponderance of the

evidence that the settlement between Parker House and Metropolitan was reasonable and prudent.

Attorney Pogge testified that he believed a jury would have assessed a significant amount of fault to Parker House under a premises liability theory. (App. p.451; *Transcript v. I p.192, Lines 9-23*). He also considered Nicklaus Lala and Jay Lala to be agents of Parker House when making his determination. (App. p.452; *Transcript v. I p.193, Lines 10-14*). The facts of this case do not support either of Attorney Pogge's position.

Also relevant to Metropolitan's failure to prove that the settlement was reasonable and prudent, is the District Court's error in admitting the testimony of Attorney Marsha Ternus. Because Attorney Ternus' testimony and opinion should have been excluded, it should not have been considered in determining whether the settlement between Parker House and Metropolitan was reasonable and prudent. Evidentiary rulings are reviewed for an abuse of discretion. Hopkins v. Dickey, No. 16-1109, 2017 WL 4842620, at *2 (Iowa Ct. App. Oct. 25, 2017).

A party seeking to introduce expert testimony has the burden of demonstrating to the court, as a preliminary question of law, that the expert is qualified and will present reliable opinion testimony. Quad City Bank & Trust v. Jim Kircher & Assoc., P.C., 804 N.W.2d 83, 92 (Iowa 2011).

Evidence is relevant only if it is reliable and helpful to the fact finder. Taft v. Iowa Dist. Court ex rel. Linn County, 828 N.W.2d 309, 319 (Iowa 2013). The test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting expert testimony: (1) court must first determine if the testimony will assist the trier of fact in understanding the evidence or to determine a fact in issue; and (2) determine if the witness is qualified to testify. Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, 685 (Iowa 2010). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. Federal Advisory Committee's Note 2017 Iowa Rules of Court, at 396-97 (Thomson Reuters), citing, 7 Wigmore §1918.

The entire purpose of designating the personal injury attorneys as experts in this matter was so that they could testify as to the reasonableness and prudence of the settlement between Metropolitan and Parker House. (App. p.265). The Court opined that "it is possible that an attorney who is experienced in the settlement of personal injury lawsuits might offer evidence that would be helpful to the court as the trier of fact. (App. p.263). Certainly, there was no need for an expert witness to testimony about the law on whether or not Parker House was or was not liable in this matter.

Such an issue is solely within the purview or the Court sitting as the fact-finder.

Ms. Ternus' testimony should have been excluded because it fails the first prong of the test cited in Ranes: her testimony will not assist the trier of fact in understanding the evidence or to determine a fact in issue. Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, 685 (Iowa 2010).

By her own admission, both in her report and her deposition, Ms. Ternus has no opinion on the reasonableness or prudence of the settlement between Metropolitan and Parker House. (App. pp.695-702). In her report, Ms. Ternus only offers an opinion about whether she believes "a jury would assess liability to Parker House for the death of Hunter True," stating, "[f]or the foregoing reasons, I believe a jury would assess liability to Parker House for the death of Hunter True." (App. p.701).

Additionally, Metropolitan's designation of Ms. Ternus conceded that she would not offer an opinion about the reasonableness or prudence of the settlement and instead will analyze the "legal issues" of Auto-Owners' experts. (App. p.272). Contrast her designation with Metropolitan's designation of R.Ronald Pogge wherein he will "offer opinions regarding Metropolitan's claims against Parker House and opinions regarding the settlement between Metropolitan and Parker House." (App. p.272). There

was nothing in Ms. Ternus' report or testimony based upon her report that could assist the Court. The district court abused its discretion in admitting her testimony.

Given the reports and testimony of Attorneys Riley and Kirk, the settlement entered into by Parker House was not reasonable or prudent. Auto-Owners refusal to consent to the settlement does not excuse Parker House's failure to comply with all of the cooperation clauses. 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.

For all of the 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.

REQUEST FOR ORAL ARGUMENT

Counsel for the Defendant-Appellant Auto-Owners requests to be heard in oral argument.

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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 13,834 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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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 Brief and Request for Oral Argument 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 Brief and Request for Oral Argument was $0.00.

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