IN THE SUPREME COURT OF IOWA

NO. 18-0129

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

Plaintiffs-Appellees,

v.

AUTO-OWNERS MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HONORABLE JEANIE K. VAUDT
HONORABLE JEFFREY D. FARRELL

APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Michael S. Jones
PATTERSON LAW FIRM, L.L.P.
505 5th Avenue, Suite 729
Des Moines, IA 50309
Phone: 515-283-2147
FAX: 515-283-1002
E-mail: mjones@pattersonfirm.com

ATTORNEYS FOR PLAINTIFFS/ APPELLEES.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT PROPERLY DENIED AUTO-OWNERS' MAY 20, 2015 SUMMARY JUDGMENT MOTION AS GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER AUTO-OWNERS PROVIDED COVERAGE FOR THE POTENTIAL LIABILITY OF PARKER HOUSE PROPERTIES.

AUTHORITIES

Kiesau v. Bantz, 686 N.W.2d 164 (Iowa 2004).

Lindsay v. Cottingham & Butler Ins. Servs., Inc., 763 N.W.2d 568 Iowa 2009).

Linn v. Montgomery, 903 N.W.2d 337 (Iowa 2017).

II. THE AUTO-OWNERS POLICY PROVIDES COVERAGE TO PARKER HOUSE FOR ITS LIABILITY ARISING FROM THE LOADED RIFLE WHICH DISCHARGED AND KILLED HUNTER TRUE WHILE HUNTER WAS ON PROPERTY OWNED BY PARKER HOUSE.

AUTHORITIES

Amish Connection, Inc. v. State Farm Fire & Cas. Co., 861 N.W.2d 231 (Iowa 2015).

Brown v. MR Group, LLC, 693 N.W.2d 138 (Wis. App. 2005).

Chrysler Fin. Co. v. Bergstrom, 703 N.W.2d 415 (Iowa 2005).

Farm Bureau Gen. Ins. v. Estate of Stormzand, 2016 WL 1688883 (Mich. Ct. App. 2016).

Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783 (Iowa 1988).

Irons v. Coal, 734 A.2d 1052 (Conn. 1998).

Jupin v. Kask, 849 N.E.2d 829 (Mass. 2006).

Michigan Millers Mut. Ins. Co. v. Asoyia, Inc., 793 F.3d 872 (8th Cir. 2015).

My Phuong Tran v. Huy The Dao, 2016 WL 4245376 (La. Ct. App. 2006).

Nationwide Ins. Co. of America v. Calabrese, 2015 WL 1293064 (S.D. Fla. 2015).

Schmidt v. Fortis Ins. Co., 349 F.Supp.2d 1171 (N.D. Iowa 2005).

Sebastiano v. Bishop, 1997 WL 587138 (Ohio Ct. App. 1997).

Simonsen v. Lumber Co. Brew Pub & Eatery, LLC, 2013 WL 500395 (Wis. App. 2013).

State Auto Prop. & Cas. Ins. Co. v. Furniture Deals, LLC, 2013 WL 12143975 (W.D. Mo. 2013).

Talen v. Employers Mut. Cas. Co., 703 N.W.2d 395 (Iowa 2005).

Transcontinental Ins. Co. v. Edwards, 1996 WL 814532 (W.D. Ark. 1996).

Travelers Indem. Co. v. Nix, 644 F.2d 1130 (5th Cir. 1981).

Iowa Code § 515.105.

Iowa Code § 702.7.

III. WELL ESTABLISHED IOWA LAW SUPPORTS THE RULING WHEREBY AUTO-OWNERS MUST REIMBURSE $450,000 OF THE $900,000 PAID BY METROPOLITAN TO SETTLE THE HUNTER TRUE ESTATE CLAIMS, INCLUDING THE CLAIM AGAINST PARKER HOUSE.

AUTHORITIES

Aid Ins. Co. v. United Fire & Cas. Co., 445 N.W.2d 767 (Iowa 1989).

Bishop of Charleston v. Century Indem. Co., 225 F.Supp.3d 554 (D. S.C. 2016).

Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004).

Duffy v. Harden, 179 N.W.2d 496 (Iowa 1970).

Foster v. Costco Wholesale Corp., 291 P.3d 150 (Nev. 2012).

Hanson v. Town & Country Shopping Ctr., Inc., 144 N.W.2d 870 (Iowa 1966).

Haskenoff v. Homeland Energy Solutions, 897 N.W.2d 553 (Iowa 2017).

Illinois Nat'l Ins. Co. v. Farm Bureau Mut. Ins. Co., 578 N.W.2d 670 (Iowa 1998).

Iowa Mut. Ins. Co. v. McCarthy, 572 N.W.2d 537 (Iowa 1997).

John Deere Ins. Co. v. DeSmet Ins. Co., 650 N.W.2d 601 (Iowa 2002).

Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637 (Iowa 2000).

Koenig v. Koenig, 766 N.W.2d 635 (Iowa 2009).

Ludman v. Davenport Assumption High Sch., 895 N.W.2d 902 (Iowa 2017).

Napier v. Patterson, 198 Iowa 257, 196 N.W. 73 (Iowa 1923).

Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995).

Shelton v. Kentucky Easter Seals Soc'y, Inc., 413 S.W.3d 901 (Ky. 2013).

Soults Farms, Inc. v. Schafer, 797 N.W.2d 96 (Iowa 2011).

State Ex. Rel. Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001).

Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009).

Union Ins. Co. v. Iowa Hardware Mut. Ins. Co., 175 N.W.2d 413 (Iowa 1970).

United States v. Brown, 415 F.3d 1257 (11th Cir. 2005).

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009).

Wilson v. Farm Bureau Mut. Ins. Co., 770 N.W.2d 324 (Iowa 2009).

Iowa R. App. P. 6.907.

Iowa Code § 668.5.

Restatement (Second) of Agency § 229(1).

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51, at 242 (Am. Law Inst. 2012).

Restatement (Third) of Torts § 51.

Iowa Uniform Civil Jury Instruction 900.5.

Black's Law Dictionary 1219 (8th Ed. 2004).

IV. PARKER HOUSE DID NOT BREACH THE COOPERATION CLAUSE OF THE AUTO-OWNERS POLICY WHEN, IN FEBRUARY OF 2017, PARKER HOUSE ASSIGNED ITS RIGHTS AGAINST AUTO-OWNERS TO METROPOLITAN AS PART OF A LEGALLY ENFORCEABLE CONSENT JUDGMENT.

AUTHORITIES

Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231 (Iowa 2001).

Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524 (Iowa 1995).

Iowa R. App. P. 6.907.

ROUTING STATEMENT

This case may be transferred to the Iowa Court of Appeals as it involves the interpretation and application of existing Iowa law. Iowa R. App. P. 6.1101(3)(1).

STATEMENT OF THE CASE

On April 22, 2012, Hunter True was accidentally shot and killed on property owned by Parker House Properties, L.L.C. Hunter was 17 years old. The potential claims of the estate of Hunter True and his parents were settled for $900,000. The released parties included Parker House Properties, L.L.C. which later confessed judgment in favor of Metropolitan Property & Casualty Insurance in the amount of $450,000 and assigned its rights in an insurance policy issued by Auto-Owners Mutual Insurance Company. Following a trial to the court, judgment was entered in favor of Metropolitan and against Auto-Owners in the amount of $450,000 plus court costs. Auto-Owners is appealing the judgment.

STATEMENT OF THE FACTS

(a) The fatal shooting.

Jay and Lorrie Lala have been married twenty-seven years and reside at 221 Red Fox Court in Mason City, Iowa. *(App. 327) Tr. p. 10, lines 15-22.* They have two children, Nick born September 20, 1994 and Sam born

January 24, 1998. *(App. 328) Tr. p. 11, lines 8-19.* The home at 221 Red Fox Court is titled individually to Jay and Lorrie. *(App. 328) Tr. p. 11, line 20 through p. 12, line 1.*

Jay and Lorrie Lala also own Parker House Properties, L.L.C. *(App. 329) Tr. p. 12, lines 2-6.* They each own 50% of the company. *(App. 329) Tr. p. 12, lines 6-7.* The company started to operate in the 1990's. *(App. 329) Tr. p. 12, lines 14-16.* Parker House Properties, L.L.C. owns various properties. *(App. 329) Tr. p. 12, line 17 through p. 13, line 20.*

One of the locations owned by Parker House Properties is in Floyd County. *(App. 332) Tr. p. 15, lines 1-3.* The Floyd County property is located about 13 miles from the Lala home in Mason City. *(App. 332) Tr. p. 15, lines 4-6.* The Floyd County property address is 1545 Foothill Avenue. *(App. 333) Tr. p. 16, line 23 through p. 17, line 5.* The property is also described in the Floyd County Assessor's office records as Section 14, Township 96, Range 18. *(App. 456) Exhibit 6.* Jay Lala refers to the location as "the farm." *(App. 334) Tr. p. 17, lines 10-18.*

There is a dwelling at the Floyd County location. *(App. 334) Tr. p. 17, line 20 through p. 18, line 4; see also, (App. 456) Exhibit 6.* The dwelling sits on a 2.82 acre parcel. *(App. 334) Tr. p. 17, lines 20-23; see also, (App. 456) Exhibit 6.* The parcel was purchased by Parker House on

November 14, 2008. *(App. 337) Tr. p. 20, lines 1-8; see also, (App. 457) Exhibit 6.* No one lives in the dwelling on a regular basis. *(App. 337-38) Tr. p. 20, line 25 through p. 21, line 1.* But the dwelling is furnished, including appliances, beds, couches, a television, and dining table. *(App. 340) Tr. p. 25, lines 2-6.* Jay, Lorrie, and Nick have keys to the dwelling. *(App. 346) Tr. p. 31, lines 8-16.* When not in use, the dwelling is locked. *(App. 348) Tr. p. 33, lines 4-7.* The dwelling is locked for safety and security. *(App. 348) Tr. p. 33, lines 8-12.* Whenever someone leaves the property, it is expected they will turn off the television, clean up, and secure the guns. *(App. 349-350) Tr. p. 34, line 8 through p. 35, line 4.*

Hunter True was a friend of Nick Lala. *(App. 350) Tr. p. 37, lines 6-19.* Hunter was invited to the farm on April 22, 2012. *(App. 353) Tr. p. 38, lines 2-4.* Jay was also at the farm that day while Nick and Hunter were there. *(App. 353) Tr. p. 38, lines 2-10.* Jay went in the dwelling that day. *(App. 354) Tr. p. 39, lines 1-2.* Hunter was allowed to go inside the dwelling to use the restroom, watch TV, or fix a snack. *(App. 354) Tr. p. 39, lines 18-17.* Jay left the farm on April 22, 2012 about 15 minutes before learning that Hunter had been accidently shot. *(App. 354-55) Tr. p. 39, line 22 through p. 40, line 12.* The shooting occurred around dinner time. *(App. 355) Tr. p. 40, lines 15-16.* Before he left the farm on April 22nd, Jay told Nick to "lock

up." *(App. 355-56) Tr. p. 40, line 21 through p. 41, line 11.* Jay instructed Nick to lock up as Jay was heading home to make dinner. *(App. 357) Tr. p. 42, lines 3-9.*

Hunter was shot by an Ithaca rifle which had been laying on a bed in the dwelling. *(App. 359) Tr. p. 44, lines 8-15.* Prior to April 22nd, the rifle was last used in January or February when Jay and the rest of the Lala family were at the farm. *(App. 359) Tr. p. 44, lines 16-22.* When the gun was left on the bed in January or February, Jay Lala probably locked up the house. *Tr. p. 52, lines 13-18.*

As the boys were locking up on April 22nd, they passed the bedroom where the rifles were at. *(App. 363) Tr. p. 48, line 24 through p. 49, line 7.* Jay would expect that if Nick saw the gun while he was locking up the house Nick would secure it. *(App. 364) Tr. p. 49, lines 12-19.* Hunter initially survived the shooting but later died at the hospital in Mason City. He was 17 years old. *See, (App. 455) Exhibit 5; see also (App. 148) Amended and Substituted Petition at para.6 and (App. 155) Auto-Owners' Answer Admitting para.6.*

Ammunition for the rifle was kept at the farmhouse. *(App. 365) Tr. p. 50, lines 8-22.* The ammunition was stored in the garage. *(App. 366) Tr. p. 51, lines 4-12.*

John Moran is an insurance agent at First Insurance Agency in Mason City, Iowa where he has worked for 27 years. *(App. 371) Tr. p. 87, lines 7-19.* Mr. Moran is licensed under Iowa law as an insurance agent. *(App. 371) Tr. p. 87, lines 20-22.* Mr. Moran is the president of First Insurance Agency. *(App. 373) Tr. p. 89, line 24 through p. 90, line 3.* First Insurance Agency is an agent for Auto-Owners Mutual Insurance Company pursuant to a written contract and First Insurance receives commission from Auto-Owners for the policies it places with Auto-Owners. *(App. 374-75) Tr. p. 90, line 13 through p. 91, line 9.* Whatever commission First Insurance Agency is owed for the coverage of Parker House Properties, L.L.C. written through Auto-Owners comes as part of the agency's statement from Auto-Owners. *(App. 376) Tr. p. 92, lines 16-20.* First Insurance has been an agent of Auto-Owners for 60 years. *(App. 378) Tr. p. 94, lines 3-5.* The agency frequently issues commercial general liability policies like the Auto-Owners policy issued to Parker House Properties, L.L.C. *(App. 379) Tr. p. 95, lines 5-14.* First Insurance Agency added coverage to the Parker House policy with Auto-Owners for the Location 2 described as Section 14, Township 96N, Range 18. *(App. 380) Tr. p. 96, lines 17-21.* Within a few days of when Parker House purchased the 2.82 acre parcel in November of 2008, John Moran visited the location, which is the location where the shooting that

involved Hunter True took place. *(App. 381) Tr. p. 97, line 24 through p. 99, line 12.* After the shooting of April 22, 2012, Parker House notified the insurance agency. *(App. 387) Tr. p. 103, lines 5-14.* The accidental shooting that occurred on April 22, 2012 that involved Hunter True is the kind of tragic event that the policies written through First Insurance Agency are intended to provide coverage for. *(App. 386) Tr. p. 102, lines 17-23.* John Moran told Jay Lala that he had coverage under both the Metropolitan policy and the Auto-Owners policy, in other words there was double coverage. *(App. 388) Tr. p. 104, lines 1-9.* Parker House was never an insured under the Metropolitan policy. *(App. 399) (App. 389) Tr. p. 115, lines 4-24.* The intent of the Auto-Owners policy is to provide liability protection for Parker House. *(App. 399) Tr. p. 115, line 18 through p. 116, line 3.*

Nick Lala's testimony was submitted at trial through a deposition. *See, (App. 707-751) Plaintiffs' Exhibit 31*. The Ithaca .22 rifle was last used in January or February. *(App. 721) Exhibit 31 p. 15, lines 21-25*. On the day of the accident, Nick was locking up and Nick noticed the gun was on the bed and when Nick picked it up the gun went off. *(App. 725-26) Exhibit 31 p. 19, line 20 through p. 20, line 7*. Nick did not intend to point the gun at Hunter. *(App. 726) Exhibit 31, p. 21, lines 10-13*. Nick's dad was at the

farm before the shooting took place. *(App. 746) Exhibit 31, p. 40, lines 18-20*. Nick was surprised that the Ithaca was loaded at the time he picked it up. *(App. 747) Exhibit 31, p. 41, lines 21-25*. Nick was not expecting it to be loaded and cocked when he picked it up. *(App. 748) Exhibit 31, p. 42, lines 7-12*. Prior to April 22, 2012, the last time Nick had seen the Ithaca rifle was in January or February of 2012. *(App. 749) Exhibit 31, p. 43, lines 16-23*. It is Nick's understanding that the loaded and cocked Ithaca rifle was laying on the bed for at least two months prior to the accidental shooting. *(App. 749) Exhibit 31, p. 43, line 24 through p. 44, line 3*.

(b) Auto-Owners policy.

The Auto-Owners policy names Parker House Properties, L.L.C. as a named insured. *(App. 787) See, Defendant's Exhibit A.* The Auto-Owners policy has a $1,000,000 each occurrence limit. *(App. 787) Id.* Location 2 on the policy is described as Section 14, Township 96N, Range 18. *Tr. p. 56, lines 6-10, see also, (App. 788) Exhibit A.* The Floyd County property is insured as part of the Auto-Owners policy. *Tr. p. 56, lines 14-21; see also, (App. 788) Exhibit A.* The description S14, T96N, R18 in Nora Springs describes the property Parker House owns in Floyd County. *Tr. p. 85, lines 10-19.* The address 1545 Foothill Avenue encompasses all of the parcels of land that Parker House has in Floyd County. *Tr. p. 85, lines 20-24.* All of

the parcels of land owned by Parker House Properties in Floyd County were insured as part of the Auto-Owners policy. *Tr. p. 56, lines 14-21.*

The Insuring Agreement of the Auto-Owners policy reads, in part, that:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

(App. 793) Exhibit A, Form 55300 at p. 1.

The definition of insureds is described as follows:

> **SECTION II – WHO IS AN INSURED**
>
> 1. If you are designated in the Declarations as:
>
> a. An individual, you and your spouse are insureds but only with respect to the conduct of a business of which you are the sole owner.
>
> b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
>
> 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 your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

Exhibit A, Form 55300 at pp. 11-12.

In addition to the named insured, the Auto-Owners policy also provides coverage for employees according to the following policy language:

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 conduct of your business.

(App. 803) Exhibit A, Form 55300 at p. 12.

Brenda Carr is the underwriting manager for Auto-Owners. *Tr. p. 117, lines 6-12.* Carr has been employed by Auto-Owners for 16 years. *Tr. p. 117, lines 22-25.* First Insurance Agency in Mason City is the agent for the policy issued to Parker House. *Tr. p. 121, line 22 through p. 122, line 4.* Exhibit 15 is Auto-Owners' commercial underwriting pages that relate to a dwellings classification code. *(App. 401-02) Tr. p. 126, line 19 through p. 127, line 1.* The classification codes are based on one, two, or three family dwellings. *(App. 402) Tr. p. 127, lines 2-5.* The classification codes include dwelling or apartments owned by corporations and similar insureds who allow employees or others to occupy the dwelling with or without leasing or renting. *(App. 402-03) Tr. p. 127, line 20 through p. 128, line 8.* The Auto-Owners' classification code on the commercial general liability policy for a dwelling is intended to be used when there is no business operated from the location. *(App. 403) Tr. p. 128, lines 16-21.* If Auto-Owners had rated the Floyd County location for a dwelling rather than vacant land, the annual premium would have been $82.59. *(App. 409) Tr. p. 134, lines 3-10.* Auto-Owners' annual premium for that location when rated for vacant land is more than if rated as a dwelling. *(App. 412) Tr. p. 137, lines 10-18.* The premises liability exposure covered by the Auto-Owners policy includes anything that could happen at that premises for which the

insured would be found legally liable. *(App. 414) Tr. p. 139, lines 13-21.* Auto-Owners charged $125 for the annual premium for Location 2, even though it knew there was no active business at that location. *(App. 414) Tr. p. 139, line 22 through p. 140, line 2.* The cheapest way for Auto-Owners to have written coverage for Location 2 in Floyd County for the four contiguous parcels in Floyd County would have been to rate it as a dwelling for an annual premium of $82.59 as part of the package policy, Exhibit A. *(App. 415) Tr. p. 140, lines 12-24.*

Kevin Downey is employed by Auto-Owners as the branch claim manager in Cedar Rapids. *(App. 417) Tr. p. 158, lines 18-23.* The commercial general liability policy is a common insurance form that Downey works with every day. *(App. 418) Tr. p. 159, lines 13-23.* Auto-Owners received a report of the April 22, 2012 shooting within a few days after it occurred. *(App. 418-19) Tr. p. 159, line 24 through p. 160, line 2.* The Auto-Owners claim file included the document marked as Exhibit 7, which Auto-Owners received on May 1, 2012. *(App. 419-420) Tr. p. 160, line 18 through p. 161, line 2.* So within a few days after the shooting, Auto-Owners was aware of the dwelling on the property. *(App. 420-21) Tr. p. 161, line 25 through p. 162, line 4.* By the time Auto-Owners issued reservation of rights letters dated August 13, 2012 and November 4, 2013,

Auto-Owners knew that there was a dwelling at the location where the accident took place. *(App. 423) Tr. p. 164, lines 7-12; see also, (App. 464 and 467) Exhibits 8 and 9.* At the time that Auto-Owners prepared the reservation of rights letters, it knew that Parker House purchased, in 2008, the dwelling where the shooting took place. *(App. 425) Tr. p. 166, lines 15-18.* Auto-Owners never claimed that Parker House committed a material misrepresentation in regards to the coverage provided by Auto-Owners. *(App. 427) Tr. p. 168, lines 1-4.* Auto-Owners agrees that the shooting incident was a bodily injury. *(App. 430) Tr. p. 171, lines 9-13.* Auto-Owners agrees that the shooting incident is an occurrence as that word is defined by the policy. *(App. 430) Tr. p. 171, line 14 through p. 172, line 12.* Auto-Owners agrees that the Floyd County property was within the policy's coverage territory. *(App. 431) Tr. p. 172, lines 14-21.* When a policy has multiple insureds, Auto-Owners must evaluate coverage from the standpoint of each insured. *(App. 432) Tr. p. 173, lines 5-23.*

As to the definition on page 11 of the policy defining who is an insured, Kevin Downey of Auto-Owners agrees that section c of the definition applies to Parker House Properties, L.L.C. *(App. 434) Tr. p. 175, lines 22-25.* Subpart a of the who is an insured definition deals with sole proprietors and subpart b deals with partnerships. *(App. 435) Tr. p. 176,*

lines 3-9. The Auto-Owners exclusions are listed on pages 2 through 7. *(App. 794-99) Defendant's Exhibit A.* Auto-Owners does not rely on the exclusions in the policy to deny coverage for the loss arising from the April 22, 2012 incident. *(App. 436) Tr. p. 177, lines 4-9.* There is not any language in the Auto-Owners policy that says coverage is limited by the classification that is used for rating the policy. *(App. 439-440) Tr. p. 180, line 24 through p. 181, line 6.* If the Auto-Owners liability coverage for Parker House restricts coverage to the location shown in the declarations page, Auto-Owners would have identified that language, but did not. *Tr. p. 178, line 22 through p. 180, line 17; see also, (App. 787 and 862) Exhibits A and U*.

Craig Stanovich has extensive experience in the insurance industry since 1978. *(App. 763-66) Exhibit 33, p. 4, line 22 through p. 7, line 10; see also Plaintiffs' Exhibit 17*. Stanovich has authored articles and taught classes regarding commercial general liability coverage. *(App. 766) Exhibit 33, p. 7, line 25 through p. 9, line 8*. The Auto-Owners policy utilizes an Insurance Services Office (ISO) standard coverage form. *(App. 760-69) Exhibit 33, p. 9, line 18 through p. 10, line 18*. There is no provision of the policy which would exclude coverage for Parker House for the incident of April 22, 2012. *(App. 773) Exhibit 33, lines 11-15*. If fault is assessed to

Parker House for the April 22, 2012 incident occurring inside the dwelling, there is nothing in the policy that would exclude coverage for Parker House. *(App. 774) Exhibit 33, p. 15, lines 4-10*. A classification limitation endorsement is available for an insurer to limit coverage to the description found in the policy classification codes. *(App. 775-76) Exhibit 33, p. 16, line 22 through p. 17, line 6*. Auto-Owners did not use a classification limitation endorsement on the policy issued to Parker House. *(App. 777) Exhibit 33, p. 18, lines 1-6.*

(c) Settling the claims.

Economy Premier Assurance Company (hereinafter "Economy") is a subsidiary of Metropolitan. *(App. 147) Amended and Substituted Petition at para. 1 and (App. 155) Auto-Owners' Answer Admitting para. 1.* Economy negotiated a settlement with Hunter True's estate to resolve all potential claims against Parker House and Jay, Lorrie, Nick, and Sam Lala. *Exhibit 11*. The claim was settled prior to litigation being filed. Economy paid $900,000 to settle the case. *Exhibit 11*. There is no dispute that the settlement with the estate was fair and reasonable. *(App. 150) Amended and Substituted Petition at para. 28 and (App. 258) Auto-Owners' Answer Admitting that allegation.* The estate's attorney stated that, had the claim not been settled, he was authorized to file suit against Parker House as one

of the named defendants. *(App. 682-83) Exhibit 14.* At trial, the parties stipulated that the claims of Metropolitan and Economy would be treated as a single claim against Auto-Owners held by Metropolitan. *Stipulation of the Parties filed 9/22/17; see also, (App. 694) Exhibit 19*.

Auto-Owners was aware of the settlement proposal primarily consisting of a $450,000 demand by Metropolitan against Parker House associated with an offer to confess judgment and a covenant not to execute. *(App. 441) Tr. p. 182, lines 4-18.* Auto-Owners refused the settlement proposal because it disputed coverage. *(App. 441) Tr. p. 182, lines 16-25; see also, Stipulation of the Parties filed 9/22/17.*

Ron Pogge is an attorney at the Hopkins & Huebner Law Firm in Des Moines. *(App. 443) Tr. p. 184, lines 10-24.* Mr. Pogge has been licensed to practice law in Iowa since 1976. *(App. 444) Tr. p. 185, lines 5-7.* About half his work involves litigation representing plaintiffs or claimants, although during his career there have been times where the litigation work was 90% of Mr. Pogge's practice. *(App. 444) Tr. p. 185, lines 13-24.* He has reviewed materials regarding the death of Hunter True and is adequately informed regarding the facts of the incident of April 22, 2012. *(App. 448) Tr. p. 189, lines 17-21*. He prepared a report summarizing his opinions. *(App. 448) Tr. p. 189, lines 22-25.* The report is dated July 31, 2017.

(App. 449) Tr. p. 190, lines 1-7. The settlement between Metropolitan and Parker House was clearly reasonable. *(App. 450-51) Tr. p. 191, line 23 through p. 192, line 12.* In Ron Pogge's opinion, if an action by Hunter True's estate had gone to trial, the jury would have assessed a significant portion of fault to Parker House. *Tr. p. 192, lines 13-23.* If Ron Pogge had been an attorney for Parker House and were presented with the $450,000 settlement agreement with Metropolitan, his recommendation would have been to settle the case. *(App. 452) Tr. p. 193, lines 19-25.*

Thomas Duff was the attorney for the Estate of Hunter True and Hunter's parents. *(App. 682-83) Plaintiffs' Exhibit 14*. Prior to filing a lawsuit, a settlement was reached in which the claims of the Estate of Hunter True and his parents were released, concluding with a settlement agreement signed January 7, 2014. *(App. 682) Plaintiffs' Exhibit 14 at p. 1*. Parker House Properties, L.L.C. was listed as a released party. *Id.* If a settlement had not been reached, legal action would have been filed and Parker House would have been named as a defendant. *(App. 683) Exhibit 14 at p. 2*. The settlement was for an amount totaling $900,000. *(App. 671-75) Plaintiffs' Exhibit 11*.

On or about February 24, 2017, Parker House and Metropolitan executed a settlement agreement whereby Parker House confessed judgment

in the amount of $450,000 in favor of Metropolitan. *(App. 690-93) Plaintiffs' Exhibit 18*. The agreement included a covenant not to execute and Parker House assigned all of its rights against Auto-Owners to Metropolitan. *(App. 691) Plaintiffs' Exhibit 18 at p. 2*.

Marsha Ternus was an expert for Metropolitan. The loaded gun was a risk to entrants on the land if handled improperly, and so this risk was within Parker House's duty to exercise reasonable care as the possessor of the premises. *Plaintiffs' Exhibit 20 at p. 3*. In the opinion of Ms. Ternus:

> The loaded gun involved in Hunter's accidental shooting was a dangerous condition, requiring the exercise of reasonable care by Parker House to discover the dangerous condition and to either warn entrants of the danger, i.e., that the gun was loaded, or to take precautions to render the gun less of a danger by unloading it or by more securely storing the gun.

Id. Jay Lala was acting in his capacity as the owner of Parker House when he instructed Nick to lock up or secure the house. *Id. at p. 6*. Nick was acting as an agent of Parker House. *Id.*

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED AUTO-OWNERS' MAY 20, 2015 SUMMARY JUDGMENT MOTION AS GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER AUTO-OWNERS PROVIDED COVERAGE FOR THE POTENTIAL LIABILITY OF PARKER HOUSE PROPERTIES.

A. Preservation of Issues. The issue has not been preserved for appeal. The denial of a motion for summary judgment is no longer appealable once the matter proceeds to a trial on the merits. *Lindsay v. Cottingham & Butler Ins. Servs., Inc.*, 763 N.W.2d 568, 572 (Iowa 2009), *citing, Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). After a trial on the merits, the denial of the motion for summary judgment merges with the trial on the merits. *Id.* Accordingly, the Iowa Supreme Court cannot consider the assignments of error relating to the denial of the motion for summary judgment. *Id.*

B. Standard of Review. Metropolitan agrees that the standard of review of a ruling on a motion for summary judgment is for errors at law.

C. Discussion. Parker House Properties, L.L.C. (hereinafter "Parker House") owned the location where the fatal accident occurred. Parker House is the named insured on the Auto-Owners policy. The rifle which accidently discharged and killed Hunter True was kept at the location, an acreage outside of Mason City known by the address of 1545 Foothill

Avenue. The loaded rifle had been left on the bed in the house for at least two months before the April 22, 2012 fatal accident.

On the day he was shot and killed, Hunter True was an invitee. Jay Lala, who along with his wife, Lorrie, owned Parker House was at the property that day and left within 15 minutes of the shooting. Hunter True was the friend of Jay's son, Nicklaus Lala. Jay knew that Nicklaus and Hunter were at the property that day. Hunter True was not a trespasser.

As the owner of the property, Parker House owed a duty of care to Hunter True. Genuine issues of material fact existed as to whether Parker House breached its duty by not discovering the loaded rifle in the house.

Parker House is the named insured on the Auto-Owners policy. Parker House has broad coverage under the Auto-Owners policy. Parker House was formed as a limited liability company. The Auto-Owners policy provides that, "If you are designated in the Declarations as a limited liability company, 'you are an insured.'" Based on the unqualified coverage provided to Parker House, it is covered by Auto-Owners for liability arising from the fatal shooting. In order to avoid coverage, Auto-Owners would have to prove that coverage was excluded. Not only does Auto-Owners not prove an exclusion, it doesn't even assert an exclusion. Instead, Auto-Owners ignores the coverage provided to Parker House, and focuses instead

on whether the limited liability company's members or managers are insureds. The location of the accident was not owned by Jay Lala, Lorrie Lala, or Nicklaus Lala. The property was owned by Parker House. Auto-Owners provided the only coverage available to Parker House for its liability arising from the fatal shooting. As the district court ultimately concluded in its ruling of November 20, 2017, the Auto-Owners policy provides coverage to Parker House for the dangerous condition which caused the death of Hunter True.

Summary judgment is proper only when the entire record demonstrates the absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017). The record is reviewed in the light most favorable to the non-moving party. *Id.* Here, Auto-Owners issued a liability policy to Parker House. The shooting of April 22, 2012 occurred on property owned by Parker House. Genuine issues of material fact existed as to whether Parker House was negligent in failing to discover the loaded rifle.

II. THE AUTO-OWNERS POLICY PROVIDES COVERAGE TO PARKER HOUSE FOR ITS LIABILITY ARISING FROM THE LOADED RIFLE WHICH DISCHARGED AND KILLED HUNTER TRUE WHILE HUNTER WAS ON PROPERTY OWNED BY PARKER HOUSE.

A. Preservation of Issues. Metropolitan agrees that this issue has been preserved for appeal.

B. Standard of Review. Metropolitan agrees that the standard of review for the judgment of a district court following a bench trial in a law action is for correction of errors at law. *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 415, 418 (Iowa 2005). The district court's findings of fact have the force of a special verdict and are binding on the appellate court if supported by substantial evidence. *Id.* Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion. *Id.* Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding. *Id.* In determining whether substantial evidence exists, the appellate court views the evidence in the light most favorable to the district court's judgment. *Id.*

C. Discussion. The Auto-Owners policy provides that Parker House Properties, LLC ("Parker House") is an insured. Specifically, the policy reads:

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 your managers.

(App. 803) Exhibit A at p. 11 (italics added). Thus, the policy makes clear that, as respect to a limited liability company, it covers the named insured, its managers (with respect to their management duties) and members (with respect to the conduct of the named insured's business). *Brown v. MR Group, LLC*, 693 N.W.2d 138, 142 (Wis. App. 2005). Applying Iowa rules of policy interpretation, the commercial general liability policy covers the named insured, and in addition to the named insured, also covers members with respect to the business, managers with respect to their managerial duties, and employees for acts within the scope of their employment. *Michigan Millers Mut. Ins. Co. v. Asoyia, Inc.*, 793 F.3d 872, 880 (8th Cir. 2015). Auto-Owners argument ignores the fact that Parker House, as the named insured, is an insured, without qualification. Auto-Owners is attempting to apply the course of business language that qualifies coverage

for managers of the limited liability company and apply it to the limited liability company. The district court correctly concluded that the language of the policy does not support Auto-Owners interpretation. *(App. 291) Findings of Fact, Conclusions of Law, and Judgment Entry of 11/20/17 at p. 10*. "The policy stated that a LLC is an insured – period." *Id*. The district court's analysis is correct.

In its brief, Auto-Owners concedes that, "It would be impossible for a business (in this case Parker House), as a legally created, yet nonphysically existing entity, to engage in conduct that is not business related." *Auto-Owners' Proof Brief at p. 39.* In other words, everything Parker House does, including owning real estate, is business related. Parker House's ownership of the Floyd County property is business related. That's why coverage for Parker House is written on a commercial policy. Auto-Owners provides coverage for the negligence of Parker House.

As owner of the property, Parker House owed a duty to Hunter True. The straightforward application of the policy language proves that Parker House has coverage for its liability arising from the dangerous condition (loaded rifle) on its property at 1545 Foothill Avenue.

The Metropolitan and Auto-Owners policies were issued through First Insurance in Mason City. John Moran is a licensed insurance agent in Iowa

and works at First Insurance. Although Auto-Owners argues it was unaware of a dwelling on the Floyd County land, its agent knew.

Auto-Owners is bound by the knowledge of its insurance agent:

> Any officer, insurance producer, or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses, or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of the agency relationship, anything in the application, policy, contract, bylaws, or articles of incorporation of such company to the contrary notwithstanding.

Iowa Code § 515.105. The knowledge of a soliciting agent is imputed to the insurance company. *Schmidt v. Fortis Ins. Co.,* 349 F.Supp.2d 1171, 1196 (N.D. Iowa 2005). Even negligence by a soliciting agent in procuring information is a risk borne by the insurer, not the insured. *Id.* The knowledge and representations of the soliciting agent are imputed and binding on the insurer. *Grinnell Mut. Reinsurance Co. v. Voeltz,* 431 N.W.2d 783, 788 (Iowa 1988). Auto-Owners' argument that it lacked knowledge of the dwelling is especially insignificant because the policy premium would have been less if rated for a dwelling.

Auto-Owners admits the shooting occurred on property owned by Parker House Properties, L.L.C. and known as 1545 Foothill Avenue in

Nora Springs, Floyd County, Iowa, also described as Sec. 14, Twp 96N and Rge 18. *See, Plaintiffs' Ex. 12 (Petition at Law filed on or about June 13, 2014 at para. 4 and Auto-Owners' Answer filed on or about July 23, 2014 admitting the allegations in para. 4 of the Petition).* The Auto-Owners' policy lists Sec. 14, Twp 96N and Rge 18 as a location. Auto-Owners' argument that it did not provide coverage for the location is contradicted by Auto-Owners' policy, agent, adjuster, and pleadings.

Parker House sold some of the land and purchased the dwelling. At the time of the accident in 2012, Parker House owned 81 acres. *(App. 679-680) See, Plaintiffs' Ex. 13 (Auto-Owners' Response to Plaintiffs' Third Request for Admissions).* Although rated by Auto-Owners as vacant land, the Floyd County location premium was actually higher than if rated as a dwelling.

The vacant land classification code does not restrict, exclude, or limit the coverage. Immediately after the accident, Auto-Owners obtained information from the Floyd County Assessor's office which included a photograph of the dwelling where the accident occurred. In its denial letters of August 13, 2012 *(App. 464-65) (Plaintiffs' Ex. 8)* and November 4, 2013 *(App. 466-67) (Plaintiffs' Ex. 9)* Auto-Owners did not argue that coverage was excluded for the location. The only provision identified by Auto-

Owners was the definition of "who is an insured". Auto-Owners was aware that no retail business was operated from the Floyd County location.

A "dangerous weapon" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in a manner for which it was designed, *Iowa Code § 702.7*. Dangerous weapons include but are not limited to any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, knife having a blade exceeding five inches in length, or any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person. *Id.* The loaded rifle was a dangerous condition.

Deaths and injuries resulting from use of improperly stored and safeguarded guns are a mounting societal problem. *Irons v. Coal*, 734 A.2d 1052, 1055 (Conn. 1998). There is a significant societal benefit to be realized by recognizing a duty of the person in control of the premises to exercise due care with regard to the storage of guns on the premises. *Jupin v. Kask*, 849 N.E.2d 829, 840 (Mass. 2006). The costs of imposing the duty are modest. *Id.* at 838-39. The landowner must take reasonable care to ensure that guns stored on its property were either secured or

removed. *Id.* at 839. Where a property owner has agreed to permit firearms to be stored on its property it creates a duty to secure the firearms. *Id.* at 839. The duty arises from a property owner's voluntary and substantial (long-term) connection to a dangerous instrumentality. *Id.* at 840. Parker House, as owner of the property, had potential liability arising from the loaded rifle on the bed which had been there for at least two months. Auto-Owners provides coverage for the liability of Parker House.

The cardinal principal is that the intent of the parties at the time that the policy was sold must control. *Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 231, 236 (Iowa 2015). Parker House is a limited liability company. As to Parker House, the who is an insured language is unqualified.

Auto-Owners cites the case of *Sebastiano v. Bishop*, 1997 WL 587138 (Ohio Ct. App. 1997). There, a shooting took place at the residence of a partner in E&K Construction. There is no indication that the location of the shooting at issue in *Sebastiano* occurred at a location titled to the business. While *Sebastiano* would be authority for Auto-Owners if Hunter True had been shot at the Lala home in Mason City, it is not on point where, as here, the shooting took place at a location owned by Parker House Properties, LLC.

Simonsen v. Lumber Co. Brew Pub & Eatery, LLC, 2013 WL 500395 (Wis. App. 2013) is also distinguishable. There, the policy's employer liability exclusion applied to bar coverage for claims against the Lumber Company Brew Pub & Eatery, LLC. Therefore, the question was not the potential liability of the limited liability company. The plaintiff in that case was an employee who was attacked by a co-employee. Hunter True was not an employee of Parker House.

Auto-Owners reliance on *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395 (Iowa 2005) is also misplaced. The issue there was a policy's employment related practices exclusion. The case did not involve the "who is an insured" issue. Auto-Owners cites *State Auto Property & Casualty Ins. Co. v. Furniture Deals, LLC*, 2013 WL 12143975 (W.D. Mo. 2013). That lawsuit involved an assault at Raoul's Velvet Room, not on property owned by the limited liability company. Likewise, the case of *My Phuong Tran v. Huy The Dao*, 2016 WL 4245376 (La. Ct. App. 2006) involved a sexual assault in which an employee was sexually molested at home by the partial owner and manager of Five Star Nail Spa, LLC, where the plaintiff was employed. The provisions of the policy at issue in that case included an intentional acts exclusion, employer's liability exclusion and the "who is an insured" definition. In its analysis, the court noted that "the incident

occurred after work hours and *not on Five Star's premises*." *Id*. at *4 (emphasis added).

The *Transcontinental Insurance Company v. Edwards*, 1996 WL 814532 (W.D. Ark. 1996) case cited by Auto-Owners involved an assault in which Joe Edwards drove the victim to Edwards' residence where he bound and threatened the plaintiff. Joe Edwards was an additional named insured on policies issued to Industrial Space Center, Inc. and Northwest Arkansas Bonded and Public Warehouse, Inc. Originally, the state action named Industrial Space Center and Northwest Arkansas Bonded and Public Warehouse, Inc. as defendants. However, the victim, David Stills, dropped the claims against those parties, leaving only Joe Edwards as a defendant in the suit arising from the assault and kidnapping of David Stills. The case did not involve a negligence claim against a corporation for a premises liability lawsuit. In *Travelers Ind. Co. v. Nix*, 644 F.2d 1130 (5th Cir. 1981), the language of the policy in question limited coverage to ownership, maintenance or use of the premises for garage operations. *Id*. at 1132. In that case, the court held that because of that language, no coverage existed for a personal dispute between the insured and a shooting victim. No comparable language is found in the Auto-Owners policy. Furthermore,

Parker House was established for the purpose of owning real estate. The negligence of Parker House arises from its ownership of real estate.

The case of *Nationwide Ins. Co. of America v. Calabrese*, 2015 WL 1293064 (S.D. Fla. 2015) cited by Auto-Owners involved a dispute between Nationwide Insurance and Richard Calabrese. Nationwide issued a policy to Calabrese Florida Caterers and Calabrese Investments, LLC. The business address set forth in the policy was 522 West Lantana Road. The accident occurred at 519 Minnesota Street, which was owned by 519 Minnesota Street, LLC. Neither Calabrese nor any of his affiliated companies owned or had any interest in that property. *Id*. at *3.

Auto-Owners cites the case of *Farm Bureau Gen. Ins. v. Estate of Stormzand*, 2016 WL 1688883 (Mich. Ct. App. 2016). The policy at issue in that case was issued to a sole proprietorship, not a limited liability corporation. The incident involved in that case was a motor vehicle accident. Andrew Stormzand, the sole proprietor of Stormzand Asphalt Maintenance, allowed his son Nicholas to attend a recreational event at the Muskegon Motorcycle Club. With Andrew's permission, Nicholas borrowed Andrew's off-road vehicle to use at the event. While driving the off-road vehicle, Nicholas was involved in the accident and one of his

passengers was injured. The lawsuit did not involve a premises liability claim.

III. WELL ESTABLISHED IOWA LAW SUPPORTS THE RULING WHEREBY AUTO-OWNERS MUST REIMBURSE $450,000 OF THE $900,000 PAID BY METROPOLITAN TO SETTLE THE HUNTER TRUE ESTATE CLAIMS, INCLUDING THE CLAIM AGAINST PARKER HOUSE.

A. Preservation of Issues. Metropolitan agrees that this issue has been preserved for appeal.

B. Standard of Review. Metropolitan agrees that the standard of review is for correction of errors at law. *Iowa R. App. P. 6.907.*

C. Discussion. Consent settlements were first approved by the Iowa Supreme Court in *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995). When an insurance company disputes coverage, the insured may consent to judgment and assign its rights in the policy. *See, Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537 (Iowa 1997). Even in situations where an insurance company defends under a reservation of rights, the insured may consent to a judgment and assign its rights to the policy. *See, Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637 (Iowa 2000). Exhibit 18 is the Settlement Agreement whereby Parker House and Metropolitan executed a *Red Giant* settlement. Parker House confessed judgment in the amount of $450,000 and assigned its coverage under the Auto-Owners' policy to Metropolitan.

Auto-Owners denied coverage for Parker House. *See, Plaintiffs' (App. 464-65) Ex. 8 and (App. 466-67) 9.* Throughout the litigation, Auto-Owners continued to deny coverage. For example, in a pleading filed December 23, 2016, Auto-Owners explained, "Metropolitan may in fact have a claim against Parker House Properties, however, that does not mean that Auto-Owners is responsible for paying that claim." *Auto-Owners' Memorandum of Arguments and Authorities at p. 2.* Auto-Owners' refusal to indemnify Parker House created the situation whereby Parker House settled with Metropolitan and assigned its coverage to Metropolitan.

(a) Parker House's liability as principal.

Nick was an agent of Parker House at the time of the shooting. An agent can act on behalf of a principal by carrying out actions which benefit the principal and where the agent's actions manifest his assent to the agency relationship. *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 96, 101 (Iowa 2011). Agency does not require the agent to expressly intend his actions to bind the principal. *Id.* The creation of the relationship may be determined from the facts and circumstances of the particular case. *Id.* The actor may be the agent of the owner if the particular action is in furtherance of the owner's business or for his benefit. *Duffy v. Harden*, 179 N.W.2d 496, 502 (Iowa 1970). In *Duffy*, an agency relationship was established even though

the act in question was performed voluntarily and without pay. *Id.* For an agent's act to be within the scope of the agency, the act must be of the same general nature as that authorized, or incidental to the conduct authorized. Restatement (Second) of Agency § 229(1).

Neither express contract nor compensation for services is necessary to constitute the relation of principal and agent or master and servant. *Napier v. Patterson*, 198 Iowa 257, 196 N.W. 73 (Iowa 1923). Nick Lala was securing the property at the time of the accident. By securing the property, Nick was benefiting Parker House. Whether Nick was paid is irrelevant. Whether Nick considered himself an agent of Parker House is also irrelevant. A finding Nick was an agent of Parker House could have made Parker House liable for the entire $900,000 paid to settle the True Estate claims. The $450,000 judgment by confession was fair and reasonable.

(b) Parker House's liability as property owner.

In 2009, the Iowa Supreme Court changed the law concerning premises liability by abandoning the common law distinctions between invitees and licensees. *Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 909 (Iowa 2017) (*citing Koenig v. Koenig*, 766 N.W.2d 635, 645 (Iowa 2009)). In *Koenig*, Iowa adopted a general negligence standard

for possessors of land to invitees and licensees. *Id.* In *Koenig*, the Restatement (Third) of Torts was adopted as the Iowa Supreme Court's position on premises liability. *Id.*

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

> Subject to section 52, a land possessor owes a duty of reasonable care to entrants 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. Comment i to § 51 sets forth the duty of reasonable care incorporating the same factors adopted in *Koenig*. *Ludman*, 895 N.W.2d at 910. Illustrations 2 and 3 of that Restatement section address liability arising from a container of anhydrous ammonia, contradicting conclusions of Auto-Owners' experts that only conditions permanently affixed to the land are within the scope of premises liability.

There is no dispute that Hunter True was an entrant on the land owned by Parker House. Furthermore, the conduct of Jay Lala as owner and manager of Parker House created the risk which harmed Hunter. The Ithaca rifle and a Winchester rifle were kept in the house. Jay Lala was at the location on the day of the accident, and had also been at the location when the loaded gun was left on the bed. Nick and Hunter were locking the house when the accident occurred. In the process of locking the house, they came in contact with the loaded rifle on the bed.

A land possessor owes a duty of reasonable care to entrants on the land with regard to conduct by the land possessor that creates risks to entrants on the land. Restatement (Third) of Torts § 51. Reasonable care must be exercised with regard to *all* risks. Restatement (Third) of Torts § 51 cmt. a, at p. 243 (emphasis added). A land possessor owes a duty of reasonable care to entrants on the land with regard to all risks that exist on the land. Restatement (Third) of Torts § 51 cmt. g, at p. 246. The duty of reasonable care includes reasonable care to discover dangerous conditions on the land and to eliminate or ameliorate them. *Id.* cmt. i, at p. 248. A land possessor has a duty to identify risks that exist on the land. *Id.* cmt. e, at p. 246.

The owner of a premises is presumed to know all conditions on the premises that are caused or created by the owner or the owner's occupants, agents, or employee. *Iowa Uniform Civil Jury Instruction 900.5.* "Premises liability" is defined as "a landowners or landholders tort liability for conditions or activities on the premises". *Black's Law Dictionary* 1219 (8th Ed. 2004). Invitees are entitled to expect reasonable care not only in the original construction of the premises, and in any activities of the possessor or his employees which may affect their condition, but also an inspection to discover their actual condition or any latent defects followed by such repair, safeguards or warnings as may reasonably be necessary for their protection. *Hanson v. Town & Country Shopping Ctr., Inc.*, 144 N.W.2d 870, 873 (Iowa 1966).

Restatement (Third) of Torts § 51 reflects the evolution of a general duty of reasonable care to avoid physical harm. *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 909 n. 28 (Ky. 2013). The general duty of reasonable care is the focus of the newly adopted Restatement (Third) of Torts. *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 155 (Nev. 2012). In *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) the Iowa Supreme Court adopted the framework proposed in the Restatement (Third) of Torts for the determination of the existence of a general duty to exercise

reasonable care. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696 (Iowa 2009). Parker House Properties owed a duty of care to Hunter True. Parker House breached its duty by failing to warn or eliminate the dangerous condition. The dangerous condition caused the death of Hunter True. Parker House was subject to liability even if Neck was not its agent. Therefore, the judgment by confession was fair and reasonable.

Metropolitan insured Jay, Lorrie, Nick, and Sam Lala. Metropolitan is not subrogating against those individuals. As clearly established by the pleadings, Metropolitan is subrogating against Auto-Owners Mutual Insurance Company. This action was necessary to force Auto-Owners to pay its fair share of the settlement with Hunter True's estate.

The principles of indemnity, contribution, and subrogation are equitable and employed to correct or prevent unjust enrichment. *State Ex. Rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 156 (Iowa 2001). Equitable subrogation permits a person who is satisfying an obligation owed by another to a third person to be placed in the obligee's position against the primary obligor. *Id.* Where a customer's automobile insurer satisfied a joint judgment against the customer and dealership, that insurer was entitled to contribution from the dealership's insurer for a proportional share of the defense and liability costs. *Aid Ins. Co. v. United Fire & Cas. Co.*, 445

N.W.2d 767 (Iowa 1989). The insurer's right to subrogation attaches by operation of law upon payment of the loss based on principles of equity. *Wilson v. Farm Bureau Mut. Ins. Co.*, 770 N.W.2d 324, 328 (Iowa 2009).

The right of one party, who has satisfied a claim, to seek reimbursement from another party can generally be pursued by three interrelated common law principles: indemnity, contribution, and subrogation. *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2 142, 149 (Iowa 2001). All three principles are equitable in nature and employed to correct or prevent unjust enrichment. *Id.* In essence, these doctrines form the most basic legal concept of preventing injustice. *Id.* The idea of unjust enrichment is deeply engrained in our law and is widely applied. *Id.* It not only cuts across many areas of the law, such as contract and torts, but it also occupies much territory that is it its sole preserve. *Id.* It is a theory to support restitution, with or without the existence of some underlying wrongful conduct. *Id.* at 149-150. Unjust enrichment gives rise to specific derivative theories, such as contribution and indemnity. *Id.*

The ability of one insurance company to recover from another is not new or unusual. *See, e.g., Union Ins. Co. v. Iowa Hardware Mut. Ins. Co.*, 175 N.W.2d 413 (Iowa 1970); *Illinois Nat'l Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 578 N.W.2d 670 (Iowa 1998); and *John Deere Ins. Co. v. DeSmet*

Ins. Co., 650 N.W.2d 601 (Iowa 2002). When faced with the tragic death of Hunter True, Metropolitan worked to settle the claims. Auto-Owners tried to avoid its obligation. The principles of equitable subrogation and contribution prevent Auto-Owners from avoiding its responsibility.

Auto-Owners argues that its experts, two Iowa attorneys, were better than Metropolitan's experts, also Iowa attorneys. While Auto-Owners may like its experts' opinions better, that does not justify reversing the district court's ruling. The initial reports of Auto-Owners' experts failed to evaluate the fault of Parker House using the Restatement (Third) of Torts. It should go without saying that in order to properly evaluate the negligence of Parker House, the experts should consider current Iowa law and thoroughly evaluate the issue of Nick Lala's status as an agent of Parker House. Auto-Owners' experts failed to do so. In the end, the district court was at liberty to accept or reject whatever testimony it found most reliable.

It is also important to note that the trial was to the bench, not a jury. The court's role as "gatekeeper" for expert testimony was designed to protect juries and is largely irrelevant in the context of a bench trial. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004). Iowa courts favor a liberal view on the admissibility of expert testimony. *Haskenoff v. Homeland Energy Solutions*, 897 N.W.2d 553, 600 (Iowa 2017). Objections

raised to the admissibility of an expert's testimony are irrelevant to a bench trial. *Bishop of Charleston v. Century Indem. Co.*, 225 F.Supp.3d 554, 567 (D. S.C. 2016). There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself. *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

Iowa law recognizes a claim of contribution. *Iowa Code § 668.5.* Contribution is available if the liability of the person against whom contribution is sought has been extinguished. *Iowa Code § 668.5(2).* The liability of Parker House was extinguished by Metropolitan pursuant to the settlement reached in 2014 with the estate and parents of Hunter True. Metropolitan pursued contribution against Parker House. Parker House offered to confess for half of the amount Metropolitan paid. Parker House assigned its rights in the Auto-Owners policy to Metropolitan. The district court correctly concluded that the settlement was fair and reasonable. There is nothing abnormal or unusual about these proceedings. Auto-Owners desperate attempt to avoid honoring its obligation was understandably rejected by the district court.

IV. PARKER HOUSE DID NOT BREACH THE COOPERATION CLAUSE OF THE AUTO-OWNERS POLICY WHEN, IN FEBRUARY OF 2017, PARKER HOUSE ASSIGNED ITS RIGHTS AGAINST AUTO-OWNERS TO METROPOLITAN AS PART OF A LEGALLY ENFORCEABLE CONSENT JUDGMENT.

A. Preservation of Issues. Metropolitan agrees that this issue has been preserved for appeal.

B. Standard of Review. Metropolitan agrees that the standard of review is for correction of errors at law. *Iowa R. App. P. 6.907.*

C. Discussion. An anti-assignment clause that prohibits an insured from transferring rights under a policy without the insurer's written consent does not apply to the assignment of claims arising after the loss. *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237 (Iowa 2001). Stipulations prohibiting assignments absent an insurer's consent have been held to apply only to pre-loss assignments. *Id.* The great weight of authority supports the rule that an anti-assignment clause does not apply to the assignment of claims arising after the loss. *Id.* Moreover, even if the provision specifically prohibits post-loss assignments, it would most likely be in contravention of public policy and the general purpose of indemnity contracts. *Id.*

The primary reason for the prohibition of assignments prior to loss absent an insurer's consent is to protect the insurer against increased risks of

loss resulting from an assignment of coverage to a new insured. *Id.* However, the need to protect the insurer no longer exists after the insured sustains the loss because the liability of the insurer is essentially fixed. *Id.* Furthermore, once the loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy. *Id.* Instead, it is a transfer of a choice in action under the policy. *Id.* at 238. Moreover, if the court permitted an insurer to void its contractual obligations by prohibiting all post loss assignments, it would grant the insurer a windfall. *Id.*

Parker House assigned its rights in the Auto-Owners' policy to Metropolitan as part of a settlement reached in February of 2017. Auto-Owners has alleged that its anti-assignment provision was breached by that settlement. The loss at issue occurred on April 22, 2012 when Hunter True was shot. The settlement between Parker House and Metropolitan was five years after the incident. The anti-assignment language does not apply. The anti-assignment language is a contravention of public policy. Auto-Owners breached the contract first by refusing to indemnify Parker House. The anti-assignment language does not defeat the Plaintiffs' claims against the Defendant. An insured may assign its claim against the liability insurer. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 (Iowa 1995).

CONCLUSION

Auto-Owners insured Parker House Properties, LLC, a named insured on its policy. Auto-Owners also listed Jay Lala d/b/a Parker House Properties as another named insured. Auto-Owners provided coverage for various properties Parker House owned, including the four contiguous parcels identified on the policy as location 2, and described as Section 14, Township 96, Range 18. The 2.82 acre parcel where the fatal shooting occurred is within that description. Although Auto-Owners rated the location as vacant land and charged a premium of $125, the premium would have been less if Auto-Owners rated the location using a dwelling classification code. The Auto-Owners underwriting manual pages define the dwelling code for use when a dwelling is used by the corporation's employees, regardless whether rent is charged. Although forms can be used to restrict coverage with specified classification codes, Auto-Owners did not use that endorsement. Auto-Owners argument that the location of the shooting was not insured is without merit. Likewise, Auto-Owners insistence that only business conduct at the location is insured ignores the policy language.

Parker House is an insured. Unless excluded, its liability is covered. Auto-Owners does not claim any exclusion. Parker House faced substantial

liability because it owned the property and because the loaded rifle left on the bed for at least two months prior to the shooting created significant premises liability exposure. Parker House had a duty to discover or warn of the dangerous condition. It failed to do so. The potential exposure of Parker House was enhanced by the evidence proving that Nick Lala was locking up the house at the time of the accident, making him an agent of Parker House. Nick was locking the dwelling at the request of Jay Lala, the manager and part owner of Parker House Properties, LLC. Based on its potential liability, Parker House confessed judgment in favor of Metropolitan and assigned its rights against Auto Owners. The settlement between Parker House and Metropolitan was fair and reasonable. Because Parker House assigned its rights after the April 22, 2012 accident, it did not violate the terms of the Auto-Owners policy. The district court ruled in favor of Metropolitan. That ruling should be affirmed.

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees, Metropolitan Property and Casualty Insurance Company d/b/a MetLife Auto & Home and Economy Premier Assurance Company, respectfully request to be heard orally upon the submission of this appeal.

PATTERSON LAW FIRM, L.L.P.
505 5th Avenue, Suite 729
Des Moines, IA 50309
Phone: 515-283-2147
FAX: 515-283-1002
E-mail: mjones@pattersonfirm.com

By: */s/ Michael S. Jones*
Michael S. Jones

ATTORNEYS FOR PLAINTIFFS/APPELLEES.

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, filed the Final Brief of Appellees with the Clerk of the Iowa Supreme Court via EDMS on June 14, 2018.

The undersigned further certifies that on June 14, 2018 he, or a person acting on his behalf, did serve the Final Brief of Appellees on the other party to this appeal via EDMS to each of the following counsel of record:

Timothy W. Hamann
Joshua L. Christensen
CLARK, BUTLER, WALSH & HAMANN
315 East 5th St.
P. O. Box 596
Waterloo, Iowa 50704

By: */s/ Michael S. Jones*

PATTERSON LAW FIRM, L.L.P.
505 Fifth Avenue, Suite 729
Des Moines, IA 50309-2390
Telephone: 515-283-2147
Facsimile: 515-283-1002
E-mail: mjones@pattersonfirm.com

ATTORNEYS FOR PLAINTIFFS/APPELLEES.

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Dated: June 14, 2018.

Michael S. Jones
PATTERSON LAW FIRM, L.L.P.
505 5th Avenue, Suite 729
Des Moines, IA 50309
Phone: 515-283-2147
FAX: 515-283-1002
E-mail: mjones@pattersonfirm.com

ATTORNEYS FOR PLAINTIFFS/APPELLEES.