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

T.H.E. INSURANCE COMPANY,

Plaintiff/Appellee,

v.

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

Defendants Booher/Appellants,

STUART R. GLEN,

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

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

DEFENDANTS'-APPELLANTS' BRIEF AND REQUEST FOR ORAL AGRUMENT

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Cases:

Swanson v. McGraw, 447 N.W.2d 541, 543 (Iowa 1989)

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(3)(a), this case involves application of existing legal principles. Transfer to the Iowa Court of Appeals would be appropriate.

STATEMENT OF THE CASE

Stephen P. Booher was fatally injured on June 7, 2016, while an employee of Adventureland Amusement Park located in Altoona, Polk County, Iowa, while serving as a loading assistant on the Raging River ride through the alleged multiple grossly negligent acts of the ride operator in prematurely and wrongfully starting the ride. (Appendix, Volume I, pages 0382, 0389; hereafter "App., Vol. I, pps. 0382-0389"). Stephen Booher was jerked off his feet and fell onto the moving belt which created the ride action. (App., Vol. I, p. 0386). He was drawn into the vortex between one of the rafts and a concrete sidewall. (Id.). His head was repeatedly rammed into the sidewall until the ride operator finally stopped the ride. (Id.).

Stephen was then taken to Mercy Hospital, Des Moines, Iowa, where he died four (4) days later on June 11, 2016. (App., Vol. I, p. 0386).

His estate, along with his widow, Gladys Booher, individually, filed a petition in the Iowa District Court in and for Polk County, Iowa, against Stuart R. Glen ("**Glen**") the ride operator on March 10, 2017. (App. Vol. I, p. 0382).

That case (Polk County Case No. CACL137365) was later removed to federal district court. It will be referenced herein as the "**Underlying Action**." Action in that court case has been temporarily stayed pursuant to federal court order.

T.H.E. Insurance Company ("**T.H.E.**") is the liability carrier for Adventureland. (App., Vol. I, pps. 0395-0400).

Its commercial lines of policy coverages include a Commercial General Liability Policy ("**CGL**") along with a Multi-Plex Liability Endorsement, and a Commercial Excess Policy ("**Excess Policy**"). (App., Vol. II, p. 0330; and, App. Vol. I, p. 0703). The Plaintiff, T.H.E. and the Booher Defendants both sought pre-trial summary judgments in their favor with respect to the twin issues of:

- T.H.E.'s duty to defend Defendant, Stuart Glen, in the Underlying Action; and,

- T.H.E.'s duty to indemnify Glen should Defendants Booher prevail in the federal companion case. (App. Vol. II, p. 0450; and, App. Vol. II, p. 0928).

After hearing the Cross Summary Judgment Motions on March 9, 2018, Polk County Trial Judge, Jeanie Vaudt denied both motions. (App., Vol. II, p. 0967). In her order entered on May 8, 2018, she generally concluded there were genuine issues of material fact which precluded the court from granting summary judgment to either party. (App., Vol. II, p. 0968).

On May 16, 2018, Plaintiff T.H.E. filed its Motion for Reconsideration contending that the issue of its duty to defend was ripe for consideration at the pre-trial stage. (App., Vol. II, p. 0971).

T.H.E. requested the court reconsider its initial ruling on summary judgment and consider the matter anew. (Id.).

Defendant Boohers' filed their response to Plaintiff T.H.E.'s Motion for Reconsideration on June 11, 2018. (App., Vol. II, p. 0977).

Following a second hearing on the matter, Judge Vaudt entered her "Order on Cross Motions for Summary Judgment" on August 11, 2018, reversing her prior order by granting Plaintiff T.H.E.'s Motion for Summary Judgment following reconsideration, but continuing with her denial of Defendant Boohers' Motion for Summary Judgment. (App., Vol. II, p. 0982).

The practical effect of the trial court's second ruling on the Cross-Summary Judgment Motions was to conclude that Plaintiff T.H.E. had neither a duty to defend Glen in the Underlying Action, nor indemnify him as a Defendant in the Underlying Action in the event Defendant Boohers' were successful in obtaining judgment against him in that venue. (Id.).

This appeal followed. (App., Vol. II, p. 1004).

STATEMENT OF FACTS

Plaintiff T.H.E. filed its petition for declaratory judgment naming Defendant Glen and Defendants Booher in this proceeding on August 2, 2017. (App., Vol. I, p. 0395).

Defendants Estate of Stephen Paul Booher, Gladys F. Booher, Administrator; and Gladys F. Booher (hereinafter "**Defendant Booher**" or "**Booher**") initiated a counterclaim for declaratory judgment action under Rule 1.1101 and Rule 1.1102, et seq. of the Iowa Rules of Civil Procedure for a judicial determination that Plaintiff, T.H.E. has a duty under its Commercial General Liability Policy, CPP 0101105 06, in effect from April 26, 2016 to April 26, 2017 (the "**CGL Policy**") and its Commercial Excess Liability Coverage, Policy No. ELP 0010252 06, in effect from April 26, 2016, to April 26, 2017 (the "**Excess Coverage**") (collectively the "**Policies**") to defend and indemnify Defendant Stuart R. Glen ("**Glen**" or "**Defendant Glen**") against the claims made in Estate of Stephen Paul Booher, Gladys F. Booher, Administrator, and Gladys F. Booher, individually v. Stuart R. Glen, Case No. 4.17-cv-119 in the United States District Court for the Southern District of Iowa, Central Division (removed from the Iowa District Court for Polk County, Iowa No. LACL137365) (the "**Underlying Action**") (App., Vol. I, p. 0741; App., Vol. II, p. 0072).

T.H.E. issued the Policies to Adventure Lands of America, Inc. ("**Adventureland**" or "**Adventure Lands**"), as the named insured. (Id.) On a combined basis the Policies exceed 350-pages in length. (Id.).

Determination of the merits of this appeal turns on whether the trial court properly interpreted and applied the relevant T.H.E. policy language and correctly concluded, as a matter of law, that the subject liability carrier had no duty to defend and indemnify Defendant Glen.

Both Glen and the Decedent, Stephen Paul Booher, were seasonal workers at the Altoona, Iowa amusement park generally referred to as Adventureland.

Stephen Booher was a loading assistant on the Raging River raft ride. (App., Vol. I, p. 0383). Stuart Glen was the ride operator. (Id.) Glen failed, repeatedly, to honor the training, policy manual instructions, posted warnings readily accessible to him and appropriate standard of care in creating conditions which caused Stephen Booher to be jerked off his feet on June 7, 2016. (App., Vol. I, pps. 0384-86) He was enveloped between the ride and the concrete sidewall where continuous action of the ride belt caused Stephen to be repeatedly thrust, head first, against the sidewall rendering him virtually unconscious. (App., Vol. I, pps. 0386-87).

He died at Mercy Hospital in Des Moines, Iowa, four (4) days later, on June 11, 2016, having never fully regained consciousness. (Id.)

He left behind his long-time wife, Gladys Booher, age 68, of Sioux Falls, South Dakota, and his two children, Douglas Booher, age 44, of Woods Cross, UT, and Michele Booher, age 47, of East Lansing, MI. (App., Vol. I, pps. 0382-89).

The pivotal issue on appeal is whether the T.H.E. insurance agreement was clear or ambiguous with respect to the coverage issues central to this case.

The court below ultimately concluded the multi-page insurance contract was unambiguous. (App., Vol. II, pps. 0982 and 0997-98). A closer review establishes otherwise.

The CGL insurance is broken down into five (5) sections in the policy:

- Section I – Coverages
- Section II – Who Is An Insured
- Section III – Limits of Insurance
- Section IV – Commercial General Liability Conditions
- Section V – Definitions (Policies).

The trial court exclusively focused on policy Section I which is titled "Coverages." (App., Vol. II, pps. 0994-0999).

Section II of the CGL, which the trial court wholly ignored, despite it having been pointed out as critical by Defendants Booher below, is titled "Who is an Insured." (App., Vol. II, p. 0339).

It is the ambiguity created by the obvious and material differences between the CGL Sections I and II, which should have been addressed by the trial court, but unfortunately was not.

The clear inconsistencies in the 350 + page insurance policy, drafted by T.H.E., create ambiguity for which it is solely responsible. It is highly unreasonable and legally incorrect to allow an insuring author to profit by its own drafting failures and thereby escape coverage responsibility in a tragic and senseless fatality case such as that before this court.

In the opening paragraphs of the CGL, the agreement states: "Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered. . . The word 'insured' means any person or organization qualifying as such under Section II – Who Is An Insured." (App., Vol. II, p. 0331).

Adventureland is identified in the Declarations of the Policies as a named insured. (App., Vol. II, p. 0074).

Section II of the CGL Policy further underscores Adventureland as an insured. (App., Vol. II, p. 0339 at Section II(1) (d)).

Section II – Who Is An Insured – further provides at paragraph 2 (a) as follows:

> 2. Each of the following is also an insured:
>
> > . . . your 'employees'. . ., but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." (App., Vol. II, p. 0340).

In the trial court's final order, it addressed only one provision of the insurance contract found in the CGL Policy – that which addresses coverage for "bodily injury and property damage" in Section I, paragraph (1). (App., Vol. II, pps. 0994-0995).

The lower court failed to acknowledge that in the immediately preceding paragraph on this same CGL page the following language appears:

> "The word 'insured' means any person or organization qualifying as such under Section II – Who Is An Insured." (App., Vol. II, p. 0331).

Defendant Glen is, and was, an additional insured under the language in the policy which provides, "Who Is An Insured." (App., Vol. II, p. 0339).

His acts causing damage and harm to Defendant Booher occurred within the scope of his employment, and while performing duties related to his employment on behalf of Adventureland, the latter named the insured under the subject Policies. (App., Vol. I, pps. 0383 – 0385).

Certain of the damages alleged by Defendant Booher were/are relational damages (loss of spousal and adult children consortium) and other non-bodily injury. (App., Vol. I, pps. 0387-0388).

The Policies initially carve out exposure or coverage for personal and advertising injury, bodily injury and property damage. There is no exception provided for relational or non-bodily injury damages. (App., Vol. II, p. 0340). In

the Multi-Plex Liability Endorsement "Bodily Injury" is later eliminated as a coverage exclusion for employees acting within the scope of their employment or while performing duties related to Adventureland business. (App., Vol. I, p. 0703).

The multi-page Policies were drafted by the Plaintiff carrier. (App., Vol. II, pps. 0898, 0899, 0900, 0928). They clearly state that an employee of Adventureland, such as Defendant Glen, is an insured for acts within the scope of his employment while performing duties relating to the conduct of Adventureland's business. (i.e., an employee is an insured, "for acts within the scope of their employment by [Adventureland] or while performing duties related to the conducted of [Adventureland's] business"). (App., Vol. II, p. 0340).

The acts of Defendant Glen alleged in the Underlying Action to be grossly negligent are at the heart of Defendant Booher's underlying case. (App., Vol. I, pps. 0385 – 0386).

If the Plaintiff carrier intended to except out coverage for non-bodily, relational and other damages, it should have stated that in its over 350 insuring agreement. It did not. It did initially except out coverage for "bodily injury" (later retracted) and for "personal advertising injury," "property damage" and certain "newly acquired or formed business entities." (App., Vol. II, p. 0340). Relational or consortium losses are neither excepted from coverage nor addressed.

"Bodily injury" is defined in the CGL policy as: "'Bodily Injury' means bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." (App., Vol. II, p. 0343).

As defined for use in this CGL policy, "Bodily Injury" does not include relational damages. Any exclusion of "Bodily Injury" in the Policies has no effect on relational or non-bodily injury damages, even had bodily injury been retained as an exclusion.

The Excess Policy states in part:

> "The insurance provided under this Coverage Part will follow the same provisions, exclusions, and limitations that are contained in the applicable "controlling" underlying insurance," directly by this insurance. To the extent, such provisions differ or conflict, the provisions of this Coverage Part will apply. However, the coverage provided under this Coverage Part will not be brought or not provided by the applicable 'Controlling Underlying Insurance.' There may be more than one 'Controlling Underlying Insurance' listed in the Declarations and provisions in those Policies conflict, and which are not superseded by the provisions of this Coverage Part. In such a case, the provisions, exclusions, and limitations of the 'Controlling Underlying Insurance' applicable to the particular 'event' for which a claim is made or suit is brought will apply." (App., Vol. I, p. 0357).

Underlying Action: On March 10, 2017, Defendant Gladys Booher filed a petition in the Underlying Action against Defendant Glen. (App., Vol. I, p. 0382).

The Underlying Petition includes the following allegations:

4. Defendant Glen is an individual whose current residence is 5072 Thompson Drive, The Colony, Texas 75056. He was employed at all material times herein by Adventure Lands of America, Inc. ("Adventureland" or the 'Park"), an Iowa corporation located in Altoona, Polk County, Iowa while residing in this state.
5. On June 7, 2016, while so employed by Adventureland, Glen was performing services as a ride operator on the "Raging River" ride ("Ride" or "Raging River"). On that same day Stephen Booher (hereafter "Stephen" or "Steve"), a co-employee of Glen was injured at Adventureland and later died.
6. The decedent, Steve, was hired as a seasonal employee of Adventureland starting May 7, 2016, with his first day of work being only a few days prior to his injury and later death.
7. At the time Steve was injured while working at Adventureland he was serving as a loading assistant on the Raging River ride. . . .
11. Gladys is pursuing her pre-death lost consortium claim associated with her husband Steve's death, in her individual capacity. . . .

18. On June 7, 2016, the date of the incident which caused the Plaintiff Estate's and Gladys' individual injuries, Defendant Glen was acting in the course and scope of his employment at Adventureland as was Steve, his co-employee.

19. Furthermore, at the time of the incident which is the subject of this suit, Defendant Glen acted in a grossly negligent manner towards Steve, as follows:

    a. He failed to visually check the Raging River ride before starting it;

    b. He failed to watch the ride during its entire operation;

    c. He failed to be on guard;

    d. He failed to know his role in handling the incident involving Steve;

    e. He failed to stop the ride once he became aware of the incident involving Steve and Reed, the loading assistants, which had knocked them both off their feet due to his reckless, unexpected, wanton and premature ride start;

    f. He failed to assure himself that ride loading assistants were not standing on any boat, pre-start;

    g. He started the ride without first obtaining the required thumbs-up signal from Steve and Reed;

h. He failed to follow the instructions prominently displayed on the ride control board located directly in front of him which warned him to first obtain a thumbs-up from loading assistant before moving any boats;

i. He left the operator's station within clear visual range of the fallen loading assistants, without shutting down the ride;

j. He failed to engage the oversized, red "E-Stop Aux." knob located immediately in front of him after he was aware both loading assistants were down, and the ride was still running;

k. He failed to key the ride to the "off" position after becoming aware that the loading assistants had been jerked off their feet due to his premature start of the ride, allowing the ride to continue operating;

l. From his operator's platform above and in close proximity to the ride and the loading assistants, he could easily observe that Steve had been knocked down onto the moving ride belts and was being pulled by continuous belt action into the confluence of a ride boat and the abutting Raging River concrete sidewall where Steve's head and body were brought into continuous and repeated contact with that sidewall, yet failed to stop the ride and instead, left his station;

m. Defendant Glen only returned to his operator's station and stopped the ride after several ride patrons, waiting to board, repeatedly yelled at him to "stop the ride";

n. Glen admitted that he caused the assistants to topple onto the exposed ride conveyor belts; and,

o. Glen failed to consider Steve's injury, once he was knocked down onto the ride conveyor belts, as serious, and treat it accordingly.

20. Steve was taken by ambulance to Mercy Medical Center (Main) ("**Mercy**") in Des Moines, Iowa where he was admitted on June 7, 2016, at 5:52 p.m.

21. Steve remained at Mercy until his death on June 11, 2016, at approximately 4:53 p.m. . . . . Defendant Glen's conduct constitutes a reckless and wanton disregard for the rights of Steve, as a co-employee, and it was the result of conscious indifference to the rights, welfare, and safety of Steve, a fellow employee. Accordingly, Defendant Glen was grossly negligent.

24. Defendant Glen's gross negligence was a proximate cause of the death of Steve and the Plaintiff Estate's and Gladys' individual damages. . . .

29. As a direct and proximate result of Glen's gross negligence, Steve suffered a traumatic injury to his head, and additional injuries to his arms, hand, chest, and leg. He later died. Craniocerebral trauma was determined as the immediate cause of his death.

30. As a proximate result of the grossly negligent actions and omissions of Defendant Glen, evidencing extremely careless, reckless, wanton and willful disregard for Steve's rights and safety as described herein, Steve died at Mercy on June 11, 2016.

31. Defendant Glen is liable to the Plaintiff Estate and Gladys, individually, for the following injury, damage, and loss:

a. Steve's loss of future earning capacity;

b. Steve's physical and mental pain and suffering;

c. Steve's wife Gladys' loss of spousal consortium both before and after Steve died;

d. Steve's children, Doug and Michele's loss of parental consortium as a result of the loss of their father;

e. Interest in Steve's reasonable burial expense; and,

f. Punitive damages. (App., Vol. I, pps. 0383 – 0388).

"Bodily Injury" is a defined term under the CGL Policy as previously noted. It means, "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." (App., Vol. II, p. 0343).

Nowhere in the Underlying Petition does Defendant Booher claim damages based on "bodily injury to Booher," except for Steve's physical and mental pain and suffering.

Rather, Defendant Booher's claims virtually exclusively relate to damages associated with loss of future earning capacity; loss of spousal and parental consortium sustained by Steve's wife and two children; interest based on Steve's

reasonable burial expense; and, punitive damages. Nowhere does a claim for bodily injury appear in the Underlying Petition, except the reference to Steve's pain and suffering. (App., Vol. I, pps. 0382 – 0389).

The trial court, unfortunately, and exclusively, focused on Glen as not being an insured under the Policies for bodily injury alleged in the Underlying Petition. (App., Vol. II, pps. 0994 – 95). It did, however, conclude "contrary to some of what T.H.E. argues in support of its position on this issue, the CGL Policy would recognize some of the Boohers' consequential damage claims [but only if Stephen's bodily injury is covered]." (App., Vol. II, p. 0996). It is that blocked language which constitutes error.

Not only is bodily injury sustained by Steve not a basis of Defendant Booher's claims; (except his pain and suffering claim); but as noted employees are insureds under the policies for acts within the scope of their employment by Adventureland or while performing duties related to the conduct of its business unless the claim relates to "bodily injury" (later removed as a coverage exception) or "personal and advertising injury," "property damage," or a "newly acquired or formed" business entity. (App., Vol. II, p. 0340).

The various damage claims alleged by Defendant Booher (except for Steve's pain and suffering) do not fall within those categories of exceptions to coverage for Defendant Glen's actions. (App., Vol. II, p. 0340).

Defendant Booher is a third party incidental beneficiary under the Policies for the non-bodily injury claims alleged in its Underlying Petition occasioned by the grossly negligent conduct of Defendant Glen.

The non-bodily and non-property injury to Booher alleged in the Underlying Petition arose out of and in the course of his and Glen's employment with the named insured, Adventureland. (App., Vol. I, p. 0385).

The non-bodily and non-property injury to Booher alleged in the Underlying Petition occurred while Booher and Glen were performing duties related to the conduct of the named insured's business. (Id.).

Glen is an insured under the Policies for the non-bodily and non-property injury alleged in the Underlying Petition. (App., Vol. II, p. 0340).

The Policies do cover damages Glen may become legally obligated to pay because of non-bodily and non-property injury to which the Policies apply. (App., Vol. II, pps. 0331, 0340).

The non-bodily and non-property injury caused by the events described in the Underlying Petition and ensuing damages are covered within the terms of the Policies. (Id.).

Defendant Booher is entitled to a judicial declaration that Plaintiff T.H.E. has a duty under the Policies to defend and indemnify Defendant Glen against the claims made by Defendant Booher in the Underlying Petition. The trial court erred in determining otherwise.

STATEMENT OF LAW AND ARGUMENT

A. T.H.E. is bound to defend against and, indemnify Glen for, the significant Booher claims (i.e., relational damages).

Preservation of Error. Error was preserved on this issue by the timely filing of a Notice of Appeal on September 6, 2018. (Notice of Appeal).

Standard of Review: The applicable standard of review on this non-equity appeal of the District Court's Order on Cross Motions for Summary Judgment dated August 11, 2018 is for correction of legal error. (Iowa R. App. P. 6.907).

Who are the insureds and what coverage is provided them?

The CGL policy defines "Who Is An Insured" in its Section II provisions. Included in the definition is the following:

"Each of the following is also an insured

a. . . . your 'employees'. . . "but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." (App., Vol. II, p. 0340).

Those representations are set out in the voluminous CGL and Excess Policies provided by Adventure Lands.

Glen, as an Adventureland employee at all material times, was insured for "his acts" within the scope of his employment under Section II of the CGL.

It was during the course of loading and unloading patrons of the Park that the acts of Glen caused the consortium loss to Steve's family. The material events occurred well within the scope of Glen's employment by Adventure Lands; the named insured.

There is no limitation, distinction, nor condition providing that only acts of simple negligence occasioned by Glen are covered. Rather, all of his acts while at work were insured subject to the following exceptions only:

1. Bodily injury (subsequently removed as an exclusion) or personal and advertising injury to co-employees, such as Steve Booher;

2. Similar injury to Steve's wife and children; and,

3. Several other categories of damage or injury irrelevant to this case. (Id.)

Nowhere does it provide in that express coverage definition for a restriction or limitation of Steve's immediate family's ability to recover relational damages (i.e., loss of spousal and adult children consortium) unrelated to bodily injury.

Furthermore, "Bodily Injury" is a defined phrase in the policy provisions: "SECTION V – DEFINITIONS

> b. . . . 3. " 'Bodily Injury' means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." (App., Vol. II, p. 0343).

There is no mention of consortium loss damages in that definition. The phrase instead relates to physical injuries or conditions only.

If T.H.E. intended to remove insurance coverage for of acts of co-employees, who, like Glen, caused consortium loss to a fellow employee's family members while acting within the scope of employment and performing workday duties on behalf of Adventure Lands, the liability carrier drafting the voluminous and adhesive contract should have so provided. It didn't. It now apparently wants this court to protect it against its own failing.

As written, the CGL contract provides coverage for Glen's work-related acts of both simple and gross negligence which result in lost consortium to a co-employee's family members. (App., Vol. II, p. 0340).

When T.H.E. and the trial court contend there is no duty to defend Glen from a gross negligence claim for consortium loss, they are wrong. (Id.).

Where is their support for that position in the Section II CGL clause which defines – "Who Is An Insured"? (App., Vol. II, pps. 0339 – 40). There is none. Not one of the exceptions to coverage detailed there refers to consortium claims. (App., Vol. II, p. 0340).

And in further support of that conclusion, this court has noted that insurance policies are contracts of adhesion. Therefore their provisions are to be construed in a light most favorable to the insured. *City of Cedar Rapids v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 304 N.W.2d 228, 231 (Iowa 1981).

366 total pages of insuring clause language, all drafted at the behest of T.H.E. – now being used to advise Glen that by working in a short-term and low-wage position at Adventure Lands he was putting himself at risk of catastrophic, personal exposure and loss while operating mechanical rides for his employer's monetary benefit.

He is being further told that his unintentional acts of gross negligence are not covered by T.H.E. He stands alone, unsupported by his employer and its carrier, to cover the consortium damages sustained by a fellow employee's family. T.H.E. Insurance has abandoned him, leaving him uninsured and defenseless against huge financial exposure, if you accept the carrier's position.

In T.H.E.'s Motion and the trial court's ruling, Glen has been advised that his summer job leaves him at risk of losing his entire, non-exempt net worth. That is T.H.E.'s position boiled down.

Who would take a summer job at Adventure Lands if that prospect was known?

Given the adhesive nature of T.H.E.'s policies, its provisions are properly construed against it and in favor of its insured – Stuart Glen (Id.).

Courts interpret insurance policy language from the viewpoint of an ordinary person, not a specialist or expert. *Witcraft v. Sundstrand Health & Disability Group Benefits Plan*, 420 N.W.2d 785, 790 (Iowa 1988).

And where the insurance contract language may be viewed as inconsistent, when comparing the coverage and exclusion language of Section I of the CGL to the coverage and exclusion language of Section II (along with the Multi-Plex Liability Endorsement which followed), any ambiguity is to be construed in favor of coverage and thus the express coverage language found in Section II prevails. *City of Cedar Rapids v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 304 N.W.2d 228, 231 (Iowa 1981).

T.H.E. claims it "did not issue an insurance policy to Glen." (T.H.E. brief at page 2).

That is a distinction without a difference. What T.H.E. issued was a policy which expressly defined Glen as an insured. (App., Vol. II, p. 0340). Whether he is a named insured or an additional insured is wholly irrelevant to this case.

T.H.E. claimed, and the trial court agreed in error, that: The policies at issue do not cover claims brought under Iowa law for statutory gross negligence against a co-employee. (App., Vol. II, pps. 0988 – 0999).

Clearly, that is inaccurate as it relates to consortium claims by Steve's family members. Those claims have never been excepted from the "general employment acts" coverage provided by the policies in the CGL's Section II. (App., Vol. II, p. 0340).

T.H.E.'s Motion below used misdirection to urge the court to ignore the risk its policies cover and instead focus on non-coverage issues (e.g., what claims does Section 85.20 (2) (2015) of the Iowa Code allow; and, how does the Iowa Supreme Court identify gross negligence?) (App., Vol. II, p. 006 and Vol. II, p. 0971).

None of that is relevant if a carrier has agreed to generalized coverage as T.H.E. did here in Section II of the CGL. (App., Vol. II., p. 0340).

T.H.E. candidly admitted below that if it is bound to indemnify Glen for a gross negligence claim, it has a duty to defend him in the underlying action. (Brief, p. 7).

An insurance policy is a contract among the parties involved. It allows a carrier and its insureds the freedom of contract to provide for risk coverage not otherwise deemed invalid under Iowa nor inconsistent with public policy.

"It is not the court's function to curtail the liberty to contract by enabling parties to escape their valid contractual obligation unless the preservation of the general public so demands." *Walker v. American Family Mut. Ins. Co.*, 340 N.W.2d 599, 601 (Iowa 1983) (citing authority).

Freedom to contract is involved when provisions of insurance contracts are placed in issue. (Id.) "The terms of insurance policies are or can be, controlled by the parties." *Shook v. Crab*, 281 N.W.2d 616, 620 (Iowa 1979).

Also informative are two well-established rules:

- "In the construction of written contracts the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says." Iowa R. App. P. 6.904(3)(n).

- If coverages provided under Section I and II are deemed ambiguous the definition of insureds and coverages are to be construed against T.H.E. as the drafter of the voluminous insuring agreement. *Iowa Fuels & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991).

That is as far as this court has to go in reversing the trial court's determination. T.H.E. has committed in its own policy language to coverage of consortium loss claims of an injured co-employee's family members under the CGL's Section II. (App., Vol. II, p. 0340).

With that admission of coverage comes the duty to provide Glen a defense and indemnification against Defendant Booher's relational claims.

As the trial court noted: "For purposes of deciding the Cross Motions for Summary Judgment it is undisputed that under Section II of the CGL policy, Stuart [Glen] is an insured employee." (App., Vol. II, p. 0986).

Glen is an insured under the policies. Coverage for his general acts within the scope of his employment is provided in that same Section II. There is no carve out of T.H.E.'s responsibility to cover consortium loss to Steve's family members caused by Glen. It is consistent with law and sound public policy to hold T.H.E. responsible to perform as it has agreed under the policies drafted and put in place by it. Especially obvious here where the tragic loss was so senseless and the harm so devastating.

This court should so conclude.

B. The facts of this case defeat T.H.E.'s below Summary Judgment Motion and support entry of Summary Judgment in Defendant Boohers' favor.

Preservation of Error. Error was preserved on this issue by the timely filing of a Notice of Appeal on September 6, 2018. (Notice of Appeal).

Standard of Review: The applicable standard of review on this non-equity appeal of the District Court's Order on Cross Motions for Summary Judgment dated August 11, 2018 is for correction of legal error. (Iowa R. App. P. 6.907).

T.H.E.'s insuring agreements do not limit coverage as the court below found to acts of gross negligence.

The elements necessary to establish gross negligence under Iowa Code §85.20 are:

1. Knowledge of the peril to be apprehended;

2. Knowledge that injury is a probable, as opposed to a possible, result of the danger; and,

3. A conscious failure to avoid the peril. *Swanson v. McGraw*, 447 N.W.2d 541, 543 (Iowa 1989).

In the context of the trial court's ruling, the question then becomes whether there are genuine issues of material fact which remain in order to resolve the applicability of those elements? There are not, except as improperly concluded by the lower court and later explained.

Did Glen have knowledge of the peril to be apprehended as it related to Steve?

Of course, he did. He was provided a "2016 Operations Manual" ("Operations Manual") at the beginning of this employment with Adventureland. (App., Vol. II, pps. 0934 – 0939). That document, provided to all Park employees, outlined several employee responsibilities including the following:

- Visually check the ride again before starting the ride.

- Operators remain at the controls and watch the ride during the entire operation.

- Keep your eyes on the ride while the ride is operating.

- (In the event of an accident) "**Consider all injuries as serious. Stop the ride if an accident occurs while ride is in motion**. Station an operator or assistant with the injured guest until security arrives if needed." (emphasis added). (Id.).

The same manual also outlines employee responsibilities with respect to the "Raging River" ride which Steve had been assigned to work as a loading assistant prior to his death:

- "**Loading Assistant**: Once all guests have entered the boat and have been seated wait for the operator's "clear" signal. After the operator has given the "clear" signal, visually check the station area including the boats ready to dispatch, if all is clear give a thumbs-up signal to the operator.

- **Operator**: Once the area is clear and boats are ready to dispatch say "clear" over the PA system and wait for the thumbs-up signal from both assistants, once you have both thumbs-up then press the "Start" button for "Conveyor 6" to launch boat into water.

  NOTE: The "clear" signal lets both the guests and the assistants know that the boats are about to move. Check to make sure that all guests are loaded and seated, and the assistants are not standing on boat, then press "Start" button for "Conveyor 4" to advance boat to Conveyor 5". (emphasis added.) (App., Vol. II, pps. 0938 – 39).

The ride operator's control board clearly also notes: "Operators: You must have thumbs up from assistants before moving any boats." (App., Vol. I, p. 0385).

It is clear that all ride operators are to keep their eyes on the ride before starting it; watch the ride during the entire operation; make certain ride assistants are not standing on the boat, pre-start; wait for a thumbs up from the assistants; and most importantly consider all injuries as serious and stop the ride if an accident occurs while the ride is in motion.

The ride operator on the day Steve was injured, as noted previously, was an individual by the name of Stuart "Rusty" Glen ("Glen"). He candidly admits that he saw the incident; was the ride operator; called the clear signal, turned his back on the assistants and the boat they were standing on, and without receiving the thumbs-up from either of the two (2), ride assistants launched a raft "automatically" and then moved the next raft on Conveyor 2 forward exposing the conveyor. (App., Vol. II, p. 0940). He states that "this was not my deliberate intention. I did it more by reflex. The raft the assistants were standing on had just been emptied of passengers, and as turned (around?) looking behind me to check on the boat I had launched, I pressed the next button for Conveyor 3. This caused the assistants to topple onto the exposed conveyor. I ran to assist them, but then ran back to hit the E stops and then called for medics while other people were assisting the injured assistant, Stephen." (Id.)

Important to an analysis of causation here are the following:

- Did Glen check the ride before it started?
- Watch the ride during the entire operation.
- Make sure loading assistants were not standing on the boat prior to launching.
- Did he wait for a thumbs-up signal from the loading assistants? Contrary to the trial court's determination there was no simple negligence which caused Stephen Booher to fall, followed by claimed gross negligence in failing to prevent further injury later. And in so

concluding the trial court wrongfully usurped the jury's role in determining the level of negligence involved. It is not for the trial court to determine negligence levels, when they occur and if gross negligence occurred. It is the jury's responsibility as the fact finder.

- The ride operator, Glen, had been specifically directed, advised and trained to consider all injuries as serious. So when he saw that Steve had fallen and knew he was down on the conveyor belt, he was to consider that injury as serious.

- He also had been directed, advised and trained to stop the ride if an accident occurred while the ride was in motion. Despite knowing that an "accident" had occurred while the ride was in motion, and even though witnesses were yelling at him to stop the ride, he nonetheless left the operator's station with the ride still operating and proceeded down the steps from the operator's station where he had just seen the assistants topple onto the exposed conveyor.

- As several additional witnesses, to be explained later, joined in yelling at Glen to stop the ride he then turned around and went back up (or nonchalantly walked, according to one eyewitness) to the operator's station where he hit the "E stops" which stopped the ride from further movement. (App., Vol. II, pps. 0944 – 0947; 0958 – 0966).

- In the meantime, however, Steve not only toppled onto the conveyor belt, but the movement of the belt wedged him between one of the boats and the concrete wall of the ride where eyewitness Gary Reed stated that "he believed Booher fell approximately 6 foot. Reed believed that the conveyor belt might have taken Booher to the side of the conveyor belt where it meets the concrete on the exit side of the ride. (Id.). (App., Vol. II, pps. 0941 – 42).

- Eyewitness Melissa Karnatz also stated the following to the Altoona Police Department who investigated the incident after it occurred: "Karnatz advised [reporting to Officer Tyler Palmer] that while she was standing in line waiting to get on the boat, she looked up at the operator and noticed that he looked bored and it appeared like he was going to

fall asleep. . . . Karnatz advised that when Booher fell backward, he struck his head on the side of the big raft, the black part and then his head hit again down on the conveyor belt. . . . After Booher had fell and was apparently injured, Karnatz yelled at the operator to turn the ride off. Karnatz said that the operator did not turn off the ride, but [instead] started walking down the stairs. Karnatz informed [the reporting officer] that Booher was positioned on the conveyor belt with his legs and arm down in the space between the conveyor belt and the cement landing. Steve's head was in between the raft and the concrete landing." (App., Vol. II, pps. 0943 – 44).

- Melissa Karnatz has also given a statement to a second investigator indicating as follows: She and her family were next in line to board the ride and were standing on the concrete. She was on the side where the other Adventureland employee was helping people out of the raft. The injured man [Booher] was on the opposite side. She stated that she had a clear view of everything that happened. The raft was stationary, but the conveyor was moving. She stated that everyone was off the raft, but the victim had one foot on the raft and one foot on the concrete when the raft suddenly lurched forward, and he fell. He did not fall on his own but was caused to fall by the moving raft. He fell backward and struck his head on part of the raft, and his leg and arm became entangled between the conveyor belt and the concrete. She does not think he hit his head on the concrete. . . . She stated that the operator came walking down from above, and he did not seem to be in much of a hurry. He had come down the stairs and left the conveyor in motion. They had to shout at him several times to shut the conveyor off. He finally walked back up the stairs and turned it off. She stated that he seemed extremely nonchalant considering what had happened. After the incident was over, the other worker [ride assistant] stayed there, but the operator disappeared. (Id.).

- Leslie Peacock of Crawfordsville, Indiana was also a witness that day. She stated as follows: "When I looked down, I saw one of the workers clinging to a handrail, lying on the concrete. I also saw Mr. Booher on the conveyor belt - having fallen from the concrete platform. . . . At this time, the operator from the bridge had run down to see what had

happened. Mr. Booher was now positioned partially on the conveyor belt, with his legs dangling between the conveyor belt and the concrete wall. He was slumped over so that he was bending at the waist, with his top half folded down toward his legs. I could not see, but I assume that his head was between the belt and the concrete platform, just like his legs. The belt was still moving, causing Mr. Booher to be rammed into the concrete over and over. I yelled "TURN OFF THE RIDE! TURN OFF THE RIDE" as loud as I could along with many other people. The operator then ran back to his position, and the ride immediately stopped." (App., Vol. II, pps. 0945 – 0947).

- Gary Reed, the ride assistant who was also working the Raging River ride the day Steve was injured gave the following statement:

"Ride operator released boat without getting thumbs-up from assistants. I was knocked down on the dock - some guests grabbed and stopped me from falling on the belt. Stephen fell into the belts. Some of the guests jumped onto the belts to stop Stephen from falling down between the belts and the wall." (App., Vol. II, p. 0941).

The Altoona Police Department as earlier noted, investigated the matter. In its report, it was noted "the original caller thinks Booher was hit on the head by a ride. The caller also reported that Booher had grease on his ankles. The caller reported a cut and bump on Steve's head and that Steve's left ear was bloody. . . . Sgt. Tinker (the reporting officer) was able to contact the Polk County Medical Examiner's office and later received a call back from Dr. Schmunk. Dr. Schmunk advised that an autopsy had been done on 6/13/16 and that Booher died from a head

injury. Dr. Schmunk advised that no other medical conditions were found and that a stroke was ruled out. Dr. Schmunk advised that he could not find a medical reason that would of lead to Booher falling." (App., Vol. II, p. 0953).

Witness Jeff Haverland also gave a report to Altoona Police Reporting Officer, Tyler Palmer: "I spoke with Jeff Haverland who was in line for the Raging River at Adventureland Park on 6/7/16, at the time of Stephen Booher's fall. However, he was standing on the overpass bridge above the loading docks when this incident occurred. Haverland did not see Booher fall but reacted when he heard people yelling to help Booher and telling the operator to stop the ride. Haverland looked down below him and witnessed Booher on the ride. Haverland went down to where Booher was located and jumped into the pit to help. When Haverland entered the pit, Booher was in an upright position, straight up and down. Haverland informed me that it appeared as though Booher was wedged between the belt and the concrete wall, looking toward the platform. Haverland stated that Booher was slumped over with his head forward. Haverland advised me that Booher was making a horrible noise. . . . Haverland stated that while Booher was lying on the conveyor belt, he was looking around and had labored breathing. Haverland advised that the labored breathe ceased after about a minute or two, and Booher's breathing became relaxed and was still looking around. Haverland said that Booher reached across his body in an attempt to grab something, but nothing was there to touch. Haverland

advised me that Booher was conscious, but "not at the level you and I would be." Haverland stated that Booher moaned and looked around. Haverland went on to tell me that when EMT's arrived, Booher began to vomit about 4 to 5 times." (App., Vol. II, p. 0956).

It is clear from the consistency of the eyewitnesses to Steve's fall and injury that day that Rusty Glen, the ride operator, first improperly started the ride before receiving the thumbs-up signal from both of the ride assistants, while the ride assistants were still standing on the boat. He did that with his back turned to the area he was to be watching. He then compounded his action, creating the fatal condition. He saw there was an injury which had occurred involving the ride, failed to consider it serious as he had been advised by his employer and ignored the directive given to him by Adventureland to, "stop the ride if an accident occurs while the ride is in motion." He further exhibited his reckless and wanton behavior by failing to shut down the ride after seeing the events, in spite of the fact that witnesses were yelling at him to "stop the ride." Instead, he left the operator's station and proceeded down the stairs with the belts still in motion which allowed Steve's body to be pulled between one of the boats and the concrete wall, in an upright position with his feet down in the belts, his body slumped over at the waist and his head being repeatedly

rammed into the concrete wall by the continuous action of the still - moving conveyor belt. He left his station even though witnesses were yelling at him to stop the ride.

It is was only after several people continued to yell at the ride operator that he turned around, and according to one witness , nonchalantly walked back up and stopped the belts from moving.

The ride assistant who did survive his fall that day has confirmed, as did other witnesses, that Rusty Glen violated the directives provided by his employer in the Operations Manual to first make sure that the area was clear and that the boats were ready to dispatch by saying "clear" over the PA system and then wait for the thumbs-up signal from both assistants. Only then was the operator to press the "start" button for the conveyors to operate and launch boats into the water.

The operator was not given the thumbs-up signal from the assistants yet started the ride creating the fatal condition. Operator Glen admits that he prematurely started the ride causing the assistants to fall as they were both yet standing on the boat.

The combination of those events - prematurely starting the ride in violation of multiple Park employee rules, seeing that a fellow employee was down with injuries to be considered serious, Park patrons yelling at him to shut off the ride and ignoring

all of that while leaving the ride in operation - constitutes gross negligence on the part of Rusty Glen the day Steve was fatally injured.

Glen was extensively trained, pre-incident, as provided in the Operations Manual to make certain safe ride conditions were observed at all times, harm to passengers avoided and/or minimized; and put on express notice that failure to do so should be assumed to be dangerous and harmful to patrons.

The several points on which Glen had been instructed and trained, pre-incident all drove home the same message. The Raging River Ride, if not operated as directed, was dangerous to guests and loading assistants. It could seriously hurt people if the written safety standards weren't followed.

So Glen unquestionably knew, before he ever prematurely started the ride which resulted in Steve's death, that failure to follow his assigned safety guidelines when operating the ride would probably result in significant injury and loss to a ride assistant like Steve.

Did Glen know that injury was probable, as opposed to possible, resulting from the inherent danger involved in ride operations?

Again, the answer is "yes." Why would Glen's employer train him to check the ride pre-start; watch it through its entire operation; always be on guard; consider all injuries serious; stop the ride if an accident occurred; wait for loading assistants to signal before the ride was operated; warn passengers and loading assistant by the

signal "clear" before the boat moved; visually insure the ride assistants were not standing on the boats before they started to move; and why would Glen otherwise be trained to hit the emergency stop button when an emergency happens?

All those pre-incident directives given Glen educated him to the fact that the ride he was operating was inherently dangerous to guests and loading assistants and that failure to observe them would result in probable injury. Why else would all of those precautionary advisos be necessary?

Did Glen consciously fail to avoid the peril to which he exposed Steve?

Again, "Yes." He literally and figuratively turned his back on Steve and all the pre-incident advice and training he was given regarding ride safety when he, in his own words, stated: "The raft the assistants [Steve and one other] were standing on had just been emptied of passengers & as [I] turned (around?) looking behind me to check on the boat I had launched I pressed the next button for conveyor & this caused the assistants to topple onto the exposed conveyor." (App., Vol. II, p. 0940).

Instead of doing as he had been instructed and trained, he consciously failed to follow every ride safety guideline he had been given by his employer to follow before he started the ride and after he saw Steve down on the conveyor belt.

Observation, experience and common sense should and would have informed Glen that his conscious act of turning his back on Steve and starting the ride in wholesale violation of every training rule he had been taught was a recipe for damage and injury to follow, given the perilous ride conditions.

Steve was in the danger zone when Glen started the ride improperly, and Glen knew it.

His total lack of care amounting to wanton neglect for Steve's safety clearly established gross negligence.

And with that result so readily achievable, T.H.E. is responsible to indemnify Glen for his action, as well as defend him in the Underlying Action.

T.H.E. contends that "expected or intended bodily injury is not covered under its policies" (Brief at page 3) even if gross negligence can be established.

The trial court, unfortunately, agreed in error – determining fact issues properly left to the jury and improperly focusing only on Section I of the CGL Policy, building its ruling inaccurately around a "bodily injury" base. (Iowa R. App. P. 6.904(3)(j)).

As explained in the previous argument, Defendant Boohers' significant damages are not a result of bodily injury, and thus as relational, or consortium losses, they have not been excluded from policy coverage.

For the foregoing reasons, the lower court's decision should be reversed.

CGL insurance for a gross negligence claim seeking lost consortium damages is a covered event under T.H.E.'s policy as written, as Section II clearly provides. This court should so conclude in reversing the ruling entered below.

C. The lower court's decision, concluding T.H.E.'s policies only cover "bodily injury" to Booher family members caused by an "accident" and are thus beyond the reach of a gross negligence claim under §85.20(2) of the Iowa Code is flawed.

Preservation of Error. Error was preserved on this issue by the timely filing of a Notice of Appeal on September 6, 2018. (Notice of Appeal).

Standard of Review: The applicable standard of review on this non-equity appeal of the District Court's Order on Cross Motions for Summary Judgment dated August 11, 2018 is for correction of legal error. (Iowa R. App. P. 6.907).

T.H.E.'s obligation to defend Glen and indemnify him against loss is not limited to "bodily injury claims" only, as those terms are defined in the policies.

As explained earlier in detail, the policies cover Glen's acts within the scope of his employment while performing his duties related to Adventureland's business operations, subject only to a few limitations none of which apply here.

Section I of the CGL details how "bodily injury and property damage liability" matters will be covered under the insuring agreement. Several conditions and restrictions on that coverage are thereafter addressed in that same Section I.

Section II next describes who is an insured under the policies and again addresses what acts are covered. It does not simply identify who an "insured" is but specifically proceeds to explain how, and under what circumstances, insureds will be covered. "Each of the following is also an insured:

> a. Your . . . 'employees'. . . but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these 'employees' . . . are insureds for: (i) ['bodily injury' or 'personal and advertising injury'. . . 'property damage'. . . newly acquired or formed business entities. . . .] (App., Vol. II, p. 0340).

As noted previously, the subsequent Multi-Plex Liability Endorsement modifies Section II of the CGL by eliminating "Bodily Injury" as a coverage exception. (App., Vol. I, p. 0703).

So, hundreds of pages later when attempting to evaluate what events are covered and which are not, there is only one legitimate and logical conclusion – the policies are inconsistent in their terms and otherwise ambiguous.

Section I of the CGL appears to suggest one conclusion, while Section II of the same agreement expressly makes it clear that employees are covered "for acts within the scope of their employment" by Adventureland or "while performing duties relating to the conduct of [Adventureland]" unless those employees are specifically excepted from coverage for:

- Personal and advertising injury;
- Property damage; and,
- Events related to newly acquired or formed business entities of Adventureland (App., Vol. II, p. 0340).

It is critical that this court now interpret the insurance policy language from the viewpoint of an ordinary person, not a specialist or expert, different than the perspective undertaken by the lower court. *Witcraft v. Sundstrand Health & Disability Group Benefits Plan*, 420 N.W.2d 785, 790 (Iowa 1988).

The trial court failed to note that insurance policies are contracts of adhesion. Their provisions are to be construed in a light most favorable to the insured. *City of Cedar Rapids v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 304 N.W.2d 228, 231 (Iowa 1981).

"Ambuguity exists when, after application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty exists concerning which of two reasonable constructions is proper." *Iowa Fuel & Minerals, Inc. v. Iowa State Board of Regents*, 471 N.W.2d, 859, 863 (Iowa 1991) (citations omitted). "The test for ambiguity is an objective one: 'Is the language fairly susceptible to two interpretations?'" (Id.) (quoting *Central Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 445 (Iowa 1970)). Contracts are to be interpreted in their entirety. (Id.) Courts must

assume there are no superfluous parts and interpret contracts in a manner that 'gives a reasonable, lawful, and effective meaning to all terms.'" (Id.) (citations omitted).

Contracts are not to be interpreted giving discretion to one party in a manner which would put one party at the mercy of another," unless such interpretation is "clearly" required. *Iowa Fuels & Minerals, Inc. v. Iowa State Board of Regents*, 471 N.W.2d at 863 (citing) *Midwest Management Corp. v. Stephens*, 291 N.W.2d 896, 913 (Iowa 1980); *Harvey Constr. Co. v. Parmele*, 253 Iowa 731, 741 – 42, 113 N.W.2d 760, 766 (1962)).

And, in the context of interpreting insurance policies since they are contracts of adhesion and are drafted by the insuring company, they must construed in light most favorable to the insured. *City of Cedar Rapids v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 304 N.W.2d 228, 231 (Iowa 1981).

For reasons unknown, the trial court simply ignored the Section II CGL policy language setting out events covered under T.H.E.'s policies in entering its ruling below. The court failed to acknowledge and accept the agreement's obvious and clear ambiguity with respect to coverages. (App., Vol. II, p. 1001).

The "accident" "bodily injury" and "claims analysis" definitions and review engaged in by the court below were unduly limited in scope and failed to consider this matter fully as Iowa law required. T.H.E. is not properly allowed to escape responsibility for coverage in the gross negligence context here.

T.H.E. and the trial court argue that an "accident" and "occurrence" paired for comparative purposes with a "gross negligence claim" are incompatible. That is inaccurate.

"An 'accident' for example, is a 'sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result.'" *State v. Carpenter*, 334 N.W.2d 137, 140 (Iowa 1983). (Emphasis added).

Gross negligence is unintentional and non-volitional. It involves "lack of care as to amount to wanton neglect for the safety of another" in the context of this case. §85.20(2), Code of Iowa (2015).

It is decidedly different than an intentional act, by definition. Lack of care does not equate to an intent to harm.

In *Swanson v. McGraw*, 447 N.W.2d, 541, 543 (Iowa 1989) this court noted that "wanton conduct lies somewhere between the mere unreasonable risk of harm in ordinary negligence and intent to harm." (Citing authority).

If an "accident" is the absence of the intent to harm, then "gross negligence" which is also by definition not intentional, can include an accident.

In fact in *Swanson* this court, in allowing a gross negligence claim to go forward held that the matter involved "an accident waiting to happen." *Swanson v. McGraw*, 447 N.W.2d, 541, 545 (Iowa 1989). (emphasis added)

The "expected" injury definition in the insuring documents does not provide T.H.E. with an excuse to avoid coverage of Glen's actions, either. Nowhere, there, is consortium loss addressed as an exclusion.

That set of exclusions address:

- Bodily injury;
- Property damage;
- Contractual liability;
- Liquor liability;
- Workers Compensation and similar laws;
- Employer's liability; and,
- Many other categories of risk none of which exclude relational or consortium loss claims. (App., Vol. II, pps. 0332 – 0336).

Under Iowa law a statutory gross negligence claim exists where there was knowledge of a peril for Glen to apprehend; he knew that injury was a probable, as

opposed to a possible result of the danger; and he turned away from Steve, the ride and all safety instructions and directives he had been given when starting the Raging River ride.

All that, if proven at trial, constitutes substantial evidence warranting recovery for consortium damages, for which T.H.E. is obligated to defend Glen from, as well as indemnify him for if the fact-finder so concludes.

T.H.E. and the trial court attempted wrongfully, to redefine Defendant Booher's allegations of gross negligence in stating:

> "In this case, the 'event' which gives use to the gross negligence claim is not that Steve fell into the ride. Glen's conduct up to that point rises no higher than ordinary negligence. Rather, once Glen knew of Steve's actual peril, caused by Glen's conduct, i.e., that Steve had fallen into the ride and was caught up in it, the Booher's claim Glen had a duty to prevent *further* injury to Steve.
>
> The gist of the Booher's gross negligence claim against Glen is that he did not stop the ride after he became aware that Steve had been knocked into the moving ride belts and was repeatedly striking his head against the ride's concrete sidewall. (Brief, p. 9; App., Vol. II, p. 0993). (This same language was copied virtually verbatim by the trial court from T.H.E.'s post-hearing brief in its ruling).

All of that is misdirection. It is, instead, the totality of Glen's actions, as plead, occurring before and after Steve fell into the ride due to Glen's actions, which constitute the basis for the Booher's gross negligence claims. It was the repeated, grossly negligent acts and omissions of Glen which, collectively, caused the tragedy

which has now befallen the surviving Booher family members. There is, and was, no simple negligence to a certain point followed by grossly negligent acts of Glen, as T.H.E. and the trial court would have this court believe.

Rather, it was the numerous and collective violations of known safety standards in the face of a known peril and probable resulting danger that Glen consciously ignored when he turned away from those standards and Steve Booher, started the ride and, in the process, caused tragic loss to Steve's family.

And the trial court had no business in determining what may be simple negligence or gross negligence, and basing its ruling thereon. That is the jury's role. (Iowa R. App. P. 6.904(3)(j)).

Furthermore, the lower court's improper tying of an "occurrence" as defined in the policies to "bodily injury" claims only, is incorrect. Section II of the CGL Policy does not require that connection for coverage to apply and defense/indemnity of defendant Glen to be triggered, all as previously explained.

CONCLUSION

The District Court committed error in concluding that there is no ambiguity in the CGL Policy. It compounded that error in ultimately finding and concluding that the Boohers' Petition in the underlying action does not contain any allegations that arguably or potentially would bring the claims alleged in the action within the CGL Policy coverage for recovery on the consortium claims pursued by Stephen

Booher's widow and two (2) adult children. When the Boohers' Underlying Petition and the CGL Policy are compared, and all relevant policy limitations and exclusions applied, it is patently obvious that the policy language is ambiguous and does require a determination of coverage here. Finally, the court's ruling was flawed when it determined that T.H.E. was not bound to indemnify Glen nor defend him, for the gross negligence claims alleged against him by the Boohers; should the Boohers receive a judgment in their favor against Glen in the Underlying Action. The lower court then wrongfully based its ruling on the foregoing in ultimately deciding T.H.E. had no duty to defend Glen against the Boohers' claims in the Underlying Action.

The order of the District Court should be reversed as the critical language in the insuring contracts, drafted by T.H.E., is ambiguous and subject to more than one interpretation regarding coverage and resulting duty obligations. The trial court incorrectly held otherwise.

This matter should be remanded with a directive that the trial court's "Order on Cross Motions for Summary Judgment" be reversed; Defendant Boohers' Motion for Summary Judgment be granted as a matter of law; and, that T.H.E. be required to both defend Glen against the Boohers' claims in the Underlying Action, as well as, indemnify Glen in the event of a favorable judgment on the Boohers' gross negligence claims in the Underlying Action; and all costs associated herewith be taxed against Plaintiff T.H.E. Insurance Company.

REQUEST FOR ORAL ARGUMENT

Defendants/Appellants Booher, in and through the undersigned counsel, hereby state their request to be heard orally.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(l)(g)(1) because this brief contains 10,714 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

01/14/2019
Date

/s/ Fred L. Dorr
Fred L. Dorr

CERTIFICATE OF SERVICE AND FILING

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

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