IN THE IOWA SUPREME COURT
NO. 18-1550

T.H.E. INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

STUART R. GLEN,

Defendant,
and

ESTATE OF STEPHEN PAUL BOOHER, GLADYS F. BOOHER, Administrator; GLADYS F. BOOHER, Individually,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT FOR POLK COUNTY
THE HONORABLE JEANIE VAUDT, JUDGE
POLK COUNTY DISTRICT COURT NO. CVCV054654

PLAINTIFF-APPELLEE'S BRIEF

(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the District Court properly conclude that the Boohers' petition for co-employee gross negligence fails to allege "bodily injury" caused by an "occurrence" within the meaning of the insuring clause of the liability insurance coverage provided by THEIC?

Authorities

First Newton Nat'l Bank v. General Cas. Co. of Wisc., 426 N.W.2d 618 (Iowa 1988)

McAndrews v. Farm Bureau Mut. Ins. Co., 349 N.W. 2d 117 (Iowa 1984)

Nat'l Sur. Corp. v. Westlake Inv., LLC, 880 N.W.2d 724 (Iowa 2016)

Ottumwa Hous. Auth. v. State Farm Fire & Cas. Co., 495 N.W.2d 723 (Iowa 1993)

State Farm Auto Ins. Co. v. Malcolm, 259 N.W.2d 833 (Iowa 1977)

Thompson v. Bohlken, 312 N.W.2d 501 (Iowa 1981)

Walker v. Mlakar, 489 N.W.2d 401 (Iowa 1992)

Walnut Grove Partners, L.P. v. American Family Mut. Ins. Co., 479 F.3d 949 (8th Cir. 2007)

Iowa Code § 85.20(2) (2015)

Windt, 1 Insurance Claims and Disputes § 4:1 (6th ed.)

Iowa R. App. P. 6.1101(3)(a)

II. Did the District Court properly conclude that the exclusion for expected or intended injuries in liability insurance coverage provided by THEIC excludes coverage for the Boohers' co-employee gross negligence claim?

Authorities

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

Walnut Grove Partners, L.P. v. American Family Mut. Ins. Co., 479 F.3d 949 (8th Cir. 2007)

Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990)

III. Did the District Court properly conclude that the Boohers' claims for loss of consortium and other consequential damages were not for "*damages because of 'bodily injury'… to which this insurance applies*" within the meaning of the liability insurance coverage provided by THEIC?

Authorities

Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821 (Iowa 1987)

Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234 (Iowa 2006)

ROUTING STATEMENT

No appellate court in Iowa has determined whether a co-employee gross negligence claim is potentially covered under a commercial general liability policy. Nevertheless, the issues raised in this appeal involve the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case arises from a dispute over coverage provided by the commercial general liability part ("CGL Coverage") and the excess coverage part ("Excess Coverage") of a commercial lines insurance policy ("Policy") which T.H.E. Insurance Company ("THEIC") issued to Adventure Lands of America, Inc ("Adventure Lands"). The Excess Coverage "follows form" with the CGL Coverage, and both provide liability coverage for the same types of claims. For this reason they will be discussed together based on the language of the CGL Coverage.

On August 2, 2017, THEIC filed a petition for declaratory judgment in the Iowa District Court for Polk County. [Joint Appendix Volume I ("App. I" at 395.] THEIC alleges that the CGL Coverage does not obligate THEIC to defend or indemnify Stuart Glen ("Glen"), a former Adventure Lands employee, against a co-employee gross negligence claim brought by Gladys Booher, as administrator for the Estate of Stephen Booher and individually (the "Boohers"), in an action now pending in the United States District Court for the Southern District of Iowa, Central Division, *Estate of Stephen Paul Booher, Gladys F. Booher, Administrator, and Gladys F. Booher,*

Individually, v. Stuart R. Glen, Case No. 4:17-cv-119 (the "Underlying Action"). [App. I at 395.][1]

The Underlying Action stems from Glen's operation of the Raging River ride at the Adventure Lands amusement park on June 7, 2016. [*See Id*.] The issue here is whether THEIC must defend and potentially indemnify Glen against the Underlying Action in which a single count—for co-employee gross negligence—is alleged. THEIC is not obligated to do so under the plain language of the CGL Coverage and Iowa law.

THEIC moved for summary judgment arguing that the duty to defend is a question of law for the Court to decide based on the language of the CGL Coverage and the allegations of the petition in the Underlying Action. [Joint Appendix Volume II ("App. II") at 0968.] The Boohers filed a cross-motion for summary judgment. [App. II at 0968.] They agreed that the case presents only issues of law. [App. II at 0967.] The District Court denied the parties' motions on May 8, 2018 on the grounds that the coverage issues raise factual disputes and could not be decided on summary judgment. [App. II at 0967-69.]

[1] Glen was served with an original notice and a copy of the Declaratory Judgment Petition [Proof of Service], but he did not enter an appearance in the district court or in the Supreme Court on this appeal.

THEIC filed a motion for reconsideration on May 16, 2018, and the Boohers filed a response on June 11, 2018. [App. at 0983.] After reconsidering the issues presented by the parties, the District Court issued an order granting THEIC's motion for summary judgment, and denying the Boohers' motion. [App. II at 0983.] The Boohers filed a timely notice of appeal.

STATEMENT OF THE FACTS

THEIC issued the Policy to Adventure Lands as the named insured. [App. I at 15.] The insuring clause of the CGL Coverage applies to sums an insured must pay because of "'bodily injury' … caused by an 'occurrence.'" [App. I at 262.] The insuring clause of the CGL Coverage states in part:

> [THEIC] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies. . . . [THEIC] will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" . . . to which this insurance does not apply.

[App. I at 262.] The CGL Coverage defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." [App. I at 276.]

The CGL Coverage has the following exclusion:

> This insurance does not apply to:
>
> **a. Expected or Intended Injury**

> "Bodily injury" . . . expected or intended from the standpoint of the insured.

[App. I at 263.]

On March 10, 2017, the Boohers filed a petition against Glen in Iowa District Court. [App. I at 382.] Glen removed the case to the United States District Court for the Southern District of Iowa. [App. I at 786.]

The Boohers allege in their petition that Glen, then an Adventure Lands employee, was acting within the scope of his employment while operating the Raging River ride on June 7, 2016. Stephen Booher ("Stephen") and Gary Reed ("Reed") were working as loading assistants, helping patrons on and off the ride. [App. I at 384, ¶ 14.] Glen allegedly started the ride prematurely, before receiving a thumbs-up signal from Stephen and Reed. [App. I at 385-86, ¶ 19.] As a result, Stephen and Reed were swept off their feet, and Stephen fell into the ride. [App. I at 385-86, ¶ 19.] Glen allegedly saw that Stephen had been knocked off his feet, saw that the ride belts had entrapped Stephen, and saw that Stephen's head was repeatedly coming into contact with the ride's concrete sidewall. [App. I at 386.] But Glen did not stop the ride immediately. [App. I at 386.] Several patrons, observing the situation, yelled at Glen to stop the ride. Only then did he stop it. [App. I at 386.] The Boohers allege that Glen's delay in stopping the ride after he realized Stephen's peril caused Stephen's

aggravated injuries and death. [App. I at 386.] In the Underlying Action, the Boohers assert one cause of action; it is against Glen for statutory co-employee gross negligence. [App. I at 387-88, ¶¶ 26-30.]

ARGUMENT

I. STEPHEN'S INJURY WAS NOT CAUSED BY AN OCCURRENCE WITHIN THE MEANING OF THE CGL COVERAGE.

A. Error preservation

The Boohers preserved error on this issue by filing a timely notice of appeal from the District Court's grant of THEIC's summary judgment motion and the denial of the Boohers' summary judgment motion.

B. Standard of review

The standard of review on this appeal of the District Court's Order on Cross Motions for Summary Judgment is for correction of legal error. (Iowa R. App. P. 6.907).

C. Argument

The District Court correctly found that the CGL Coverage does not cover the claim for Stephen's injury and death because they were not caused by a covered "occurrence." As a result, the District Court concluded, THEIC has no duty to defend Glen in the Underlying Action.

Under Iowa law, the duty to defend arises whenever, based on the facts appearing at the outset of the case, the insurer faces possible liability to

indemnify the insured. *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W. 2d 117, 119 (Iowa 1984). An insurer "is not required to defend if it would not be bound to indemnify the insured even though the claim against him should prevail in that action." *State Farm Auto Ins. Co. v. Malcolm*, 259 N.W.2d 833, 835 (Iowa 1977); *see also* Windt, 1 Insurance Claims and Disputes § 4:1 (6th ed.) (stating "the insurer must defend if, but only if, any of the allegations against the insured could result in a judgment that the insurer would be obligated to pay").

Courts review the facts at the outset of the case, as alleged in the petition, to determine as a matter of law whether the duty to defend arises. *Ottumwa Hous. Auth. v. State Farm Fire & Cas. Co.*, 495 N.W.2d 723, 726 (Iowa 1993). The pleadings are then compared with the insurance policies "to determine whether an issue of potential or possible liability is generated under the terms of the policies." *Id.*

Here, the facts alleged in the Underlying Action do not create possible liability covered by THEIC. The CGL Coverage makes clear that it applies only to "bodily injury" that is caused by an unexpected and unintended "occurrence." The insuring clause of the CGL Coverage states:

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

[App. I at 262, § 1(a).] The CGL Coverage further states that it applies only to "bodily injury" caused by an "occurrence":

> b. This insurance applies to 'bodily injury' . . . only if:
> (1) The 'bodily injury' is caused by an 'occurrence' that takes place in the "coverage territory[.]"

[App. I at 262, § 1(b).] The CGL Coverage plainly does not apply to bodily injuries caused by something other than an occurrence. Thus, the scope of the coverage turns on the definition of "occurrence."

The CGL Coverage defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." [App. I at 276.] Under Iowa law, "[w]hether an event amounts to an accident that constitutes an occurrence triggering coverage . . . turns on whether the event itself and the resulting harm were both 'expected or intended from the standpoint of the insured.'" *Nat'l Sur. Corp. v. Westlake Inv., LLC*, 880 N.W.2d 724, 735 (Iowa 2016). Thus, if Glen expected both the event and the resulting injury to Stephen, then coverage would not extend to any injury he caused. *See First Newton Nat'l Bank v. General Cas. Co. of Wisc.*, 426 N.W.2d 618, 625 (Iowa 1988) ("An accident, happening, event, or exposure to conditions is an unexpected and unintended 'occurrence' so long as the insured does not expect or intend both it *and* some injury.").

The Boohers do not allege in the Underlying Action that Stephen was injured by an unintended event. Rather, the Boohers contend that Glen "left the operator's station within clear visual range of the fallen loading assistants," "failed to key the ride to the 'off' position after becoming aware that the loading assistants had been jerked off their feet," and "could easily observe" Stephen's head and body were being "brought into continuous and repeated contact with [the] sidewall." [App. I at 386, ¶ 19(i), (k), (l).] The Boohers further allege that despite knowing that "both loading assistants were down and the ride was still running," Glen did not "engage the oversized, red 'E-Stop Aux.' knob located immediately in front of him." [App. I at 386, ¶ 19(e), (j), (k).]

Critically, the "event" from which the Boohers' gross negligence claim arises is *not* that Stephen fell into the ride. Rather, the event was the peril that Glen observed once Stephen fell into the ride. The Boohers allege that once Stephen had fallen into the ride, Glen had a duty to prevent further injury to Stephen, and the consequences of not doing so were clear. Thus, Glen expected both the exposure to danger, which he observed, and the injury, which he allegedly observed Stephen was in the process of suffering. [*See* App. I at 385-86, ¶ 19.] Under those circumstances, Stephen's injuries and death did not result from an "occurrence."

Importantly, not only do the factual allegations in the Underlying Action's petition show that Glen expected both the event and the injury, the Boohers also must prove the event and the injury were expected in order to recover for gross negligence. Under Iowa law, an injured worker must prove gross negligence within the meaning of the Iowa Workers' Compensation Act (the "Act") to recover against a co-employee in a civil action, as the Boohers seek to do in the Underlying Action. Iowa Code § 85.20(2) (2015). Otherwise, the Boohers' exclusive remedy is for benefits under the Act. As this Court has stated, "an injured worker may maintain a common law tort action against a coemployee to recover for injuries *only* if the employee can establish that his or her injuries were caused by the coemployee's 'gross negligence.'" *Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (citing Iowa Code § 85.20).

To establish "gross negligence amounting to such lack of care as to amount to wanton neglect" under Section 85.20 of the Act, an employee must show: "(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." *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981). Gross negligence requires that a "coemployee actually knew of a peril or hazard." *Walker*, 489 N.W.2d at

404. A plaintiff must also establish that a co-employee consciously disregarded a known peril with the knowledge that injury was probable. *Thompson*, 312 N.W.2d at 505. In short, to prevail on a gross negligence claim, a plaintiff must prove that the defendant knew of the event, *i.e.* the circumstance creating the harmful conditions, and the defendant expected harm to result. Proving these elements would place the Boohers' gross negligence claim outside the scope of the CGL Coverage. As a result, THEIC would not be required to indemnify Glen. Therefore, THEIC does not have a duty to defend Glen in the Underlying Action. *See Malcolm*, 259 N.W.2d at 835.

II. STEPHEN'S BODILY INJURY IS NOT COVERED BECAUSE OF THE GCL COVERAGE'S EXCLUSION.

A. Error preservation

The Boohers preserved error on this issue by filing a timely notice of appeal from the District Court's grant of THEIC's summary judgment motion and the denial of the Boohers' summary judgment motion.

B. Standard of Review

The standard of review on this appeal of the District Court's order on cross motions for summary judgment is for correction of legal error. (Iowa R. App. P. 6.907).

C. Argument

The District Court correctly concluded that the CGL Coverage does not cover Stephen's bodily injury because of the CGL Coverage's exclusions for injuries that were expected or intended. The analysis of the CGL Coverage exclusions is similar to the analysis of why Stephen's injury was not caused by a covered "occurrence."

The CGL Coverage excludes coverage for "[b]odily injury . . . expected or intended from the standpoint of the insured." [App. at 262, § 2(1).] The Iowa Supreme Court has defined the word "expected" in the context of an exclusionary clause as "'denot[ing] that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions.'" *Weber v. IMT Ins. Co*., 462 N.W.2d 283, 287 (Iowa 1990) (quoting *City of Carter Lake v. Aetna Casualty & Surety Co*., 604 F.2d 1052, 1058-59 (8th Cir. 1979)). Thus, the application of the exclusionary provision turns on whether Glen knew or should have known that there was a "substantial probability" Stephen would be injured as a result of Glen's actions. "Substantial probability" exists where "[t]he indications [are] strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but [also where] the indications [are] sufficient to forewarn him that the results are highly likely to occur." *Walnut Grove Partners, L.P. v. American Family Mut. Ins. Co*., 479 F.3d 949, 955 (8th Cir. 2007) (applying

Iowa law) ("Substantial probability requires more than reasonable foreseeability.").

A reasonably prudent person would have known that Stephen—who was sweeping through the water, hitting his head against the sidewall—would be seriously injured unless the ride was immediately stopped. For that reason, Stephen's injury was allegedly expected by Glen for purposes of the CGL Coverage, and coverage for Stephen's injuries is excluded.

III. THE GCL COVERAGE PRECLUDES COVERAGE FOR ALL OF THE DAMAGES THE BOOHERS SEEK IN THE UNDERLYING ACTION.

A. Error preservation

The Boohers preserved error on this issue by filing a timely notice of appeal from the District Court's grant of THEIC's summary judgment motion and the denial of the Boohers' summary judgment motion.

B. Standard of Review

The standard of review on this appeal of the District Court's Order on Cross Motions for Summary Judgment is for correction of legal error. *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 238 (Iowa 2006); Iowa R. App. P. 6.907.

C. Argument

The Boohers contend the claims in the Underlying Action relate exclusively to loss of consortium, reasonable burial expense, other

consequential damages, punitive damages, and not to "bodily injury." The Boohers allege that the CGL Coverage does not restrict or limit damages for these kinds of consequential damages that are not for "bodily injury." [Appellant Brief at 19.] In support of this argument, the Boohers draw on language in Section II of the CGL Coverage, entitled "Who is an Insured." [App. I at 270.] As modified by the endorsement, Section II states that employees are insureds for "acts within the scope of their employment . . . or while performing duties related to the conduct of your business." [App. I at 271, 316.] The Boohers argue that Glen was an insured for acts within the scope of his employment, which include operating the Raging River ride.

Although Section II defines "insured," it does *not* define the risks that are covered. Section I of the Policy—the insuring clause and exclusions—defines the risks covered. The insuring clause states that THEIC will pay "those sums that the insured becomes legally obligated to pay as damages *because of 'bodily injury' … to which this insurance applies*." [App. I at 262 (emphasis added).] This clause plainly requires THEIC to pay sums that an insured becomes obligated to pay but only for damages caused by a covered "bodily injury."

The Iowa Supreme Court has adopted the immediate antecedent ruling for interpreting insurance policies. *Cairns v. Grinnell Mut. Reinsurance Co.*,

398 N.W.2d 821, 824–25 (Iowa 1987). Under this rule, "qualifying words and phrases ordinarily refer only to the immediately preceding antecedent." The immediate antecedent of the words "to which this insurance applies" is "bodily injury," not damages generally. Thus, regardless of whether Glen is an insured, THEIC is required to provide coverage for damages he caused—including loss of consortium damages—*only* if those damages were caused by a "bodily injury" to which the insurance applies. The Boohers' damage claims, including their consequential damage claims, could be covered only if the insurance applies to a bodily injury that is covered.

Stephen's bodily injury was not covered. As discussed above, the bodily injury was not caused by an accident; it was expected or intended. Accordingly, the CGL Coverage precludes coverage for the Boohers' damage claims, which arise from that injury.

CONCLUSION

Appellee THEIC respectfully requests that the Court affirm the judgment of the District Court.

REQUEST FOR ORAL SUBMISSION

Plaintiff/Appellee THEIC does not believe that oral argument is necessary for the Court to resolve the issues presented on appeal. However, if the Court grants the Defendants /Appellants Boohers' request for oral argument, THEIC respectfully requests the same opportunity and allotted time to present oral argument.

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CERTIFICATE OF COMPLIANCE
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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,153 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. 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(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

/s/ Thomas C. Goodhue

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 15, 2019, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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