IN THE COURT OF APPEALS OF IOWA

No. 6-532 / 05-1057
Filed January 18, 2007

EMPLOYERS MUTUAL CASUALTY COMPANY,
Plaintiff-Appellee/Counterclaim Defendant,

vs.

RINDERKNECHT ASSOCIATES, INC.,
Defendant-Appellant/Counterclaimant.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell, Judge.

Rinderknecht Associates, Inc. (Rinderknecht) appeals the district court's denial of its motion for summary judgment and grant of Employers Mutual Casualty Company's (EMC) motion for summary judgment on Rinderknecht's counterclaim of breach of contract against EMC. Rinderknecht also appeals the district court's denial of Rinderknecht's motion for summary judgment on EMC's claim of breach of contract. **AFFIRMED AND REMANDED.**

Sarah J. Gayer and Richard S. Fry of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellant.

Lorraine J. May of Hopkins & Huebner, P.C., Des Moines, and Jill Augustine, Des Moines, for appellee.

Heard by Huitink, P.J., Mahan, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

PER CURIAM

In this case, Employers Mutual Casualty Company (EMC) sued Rinderknecht Associates, Inc. (Rinderknecht) to recover the amount EMC paid its insured, Blackhawk Foundation Co., Inc. (Blackhawk) under an inland marine policy for damages to a crane owned by Blackhawk. EMC alleged Rinderknecht was liable for the damages claimed under both contract and tort theories of recovery. EMC's contract theory was based on a July 2000 agreement wherein Rinderknecht, as general contractor, subcontracted with Blackhawk for the installation of "cast-in-place piles" as part of a construction project at Kirkwood Community College. More specifically, EMC alleged Rinderknecht breached a contractual obligation to provide a flat and stable access allowing Blackhawk's crane to track from one pile to another.[1] Under its negligence theory, EMC alleged Rinderknecht negligently breached its duty to prepare the project site for Blackhawk's operations in several particulars.[2]

In its second amended answer, Rinderknecht alleged that pursuant to its contract with Blackhawk, Rinderknecht was named as an additional insured

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[1] The contract states:

> [Blackhawk's] bid is based upon being provided flat and stable access to each pile location for a crawler type crane. We have also assumed that we will be provided access roads, ramps, and benched out areas (where required) so that we are able to track from one pile to another without dissembling our crane.
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> Our price is based upon having level and stable access for our crawler crane. This is a must for this length of piles. If the site is not level and stable, crane boom collapse can occur. In general site preparation will require the placement and compaction of crushed rock in the area where the crane will sit or travel until piles are installed.

[2] EMC subsequently dismissed the negligence claim after concluding it may have had a duty to defend Rinderknecht on that claim.

under Blackhawk's commercial general liability policy (CGL) written by EMC.[3] Rinderknecht also alleged:

> 16. As Rinderknecht is an insured under an EMC liability policy, EMC owes a defense to Rinderknecht for the allegations raised in this case.
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> 17. EMC has sued an insured, committed fraud against an insured, breached its contract with its insured, failed to provide a defense and coverage for the insured, actually denied that it provided coverage for its insured, and then attempted to amend its claim out of coverage, all without ever telling the insured.
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> 18. EMC intentionally attempted to deceive Rinderknecht.

Based on these allegations, Rinderknecht demanded damages under theories of fraud and breach of contact. On October 14, 2004, the trial court entered an order providing that all of Rinderknecht's counterclaims with the exception of its breach of contract claim were stayed pending resolution of EMC's breach of contract claim against Rinderknecht.

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[3] The contract also required Rinderknecht be named as an "additional insured" on Blackhawk's commercial general liability policy with EMC for the purposes of liability arising out of Blackhawk's ongoing operations for Rinderknecht. The original content of the subcontract was altered by handwritten notes initialed by both parties. The original contract included the following provision:

> The Subcontractor (Blackhawk) agrees to assume entire responsibility and liability for all damages or injury to all persons, whether employees or otherwise, and to all property arising out of, resulting from or in any manner connected with, the execution of the work provided for in this Subcontract or occurring or resulting from the use by the Subcontractor, his agents or employees, or material, equipment, instrumentalities or other property, whether the same be owned by the Contractor, Subcontractor or third parties, and the Subcontractor agrees to indemnify and save harmless the Contractor, his agents and employees from all such claims including without limiting the generality of the foregoing, claims for which the contractor may be, or may be claimed to be, liable . . . .

The language, which stated "including without limiting the generality of the foregoing, claims for which the contractor may be, or may be claimed to be, liable" was deleted and the following language was added by handwritten notes initialed by each party:

> This indemnification shall not apply for costs which result from negligence fault or breach of contract on the part of the Contractor (Rinderknecht).

On February 3, 2005, EMC filed a motion for summary judgment in its favor on Rinderknecht's counterclaim for breach of contract. EMC argued:

> The EMC policy affords protection to Rinderknecht as an additional insured "only with respect to liability arising out of your ongoing operations performed for that insured." As specifically noted in the policy, however, "you" and "your" specifically refer ONLY to the NAMED insured shown in the Declarations on the policy. . . . The only NAMED insured is Blackhawk. . . . Therefore, the only liability for which Rinderknecht would be insured under the policy would be any vicarious liability arising against it as the general contractor as a result of the work of its subcontractor, Blackhawk.

EMC's motion also addressed the general rule that an insured cannot recover by subrogation against its own insured. EMC argued:

> The rule is inapplicable, however, when, as in the instant case, the policy pursuant to which the defendant is an additional insured does not afford the defendant coverage for the loss for which recovery is sought.

In resistance to EMC's motion for summary judgment, Rinderknecht claimed it was entitled to liability coverage as an additional insured under endorsements CG 20 10 03 97 and CG 7166 to Blackhawk's CGL policy written by EMC. Rinderknecht cited the following endorsement language:

> [CG 20 10 03 97] Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.
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> [CG 7166] Who Is An Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you that are shown above.
>
> The insurance provided to the person or organization shown in the Schedule is Primary Insurance and we will not seek contribution from any other insurance available to that insured.

The trial court's resulting ruling states:

> Endorsement CG 20 10 03 97 is a coverage clause, not an exclusionary clause, and it is therefore appropriate to apply a broad construction to the phrase "arising out of" contained within the endorsement. The incident giving rise to the claims (damage to Blackhawk's crane) stated by Plaintiff and the counterclaims stated by Defendant arise out of Blackhawk's ongoing operations performed for Defendant. Were it not for the agreement between Defendant and Blackhawk, and the operations performed by Blackhawk for Defendant, there would be no liability common to the parties to this action. Therefore, the Court finds that pursuant to endorsement CG 20 10 03 97 (a modification to the Commercial General Liability issued to Blackhawk by Plaintiff), Defendant has coverage for the claims asserted by Plaintiff. The Court further finds the coverage is provided to Defendant pursuant to endorsement CG7166, as the language in endorsement CG7166 mirrors that contained in endorsement CG 20 10 03 97, and the findings made by the Court with respect to CG 20 10 03 97 are applicable to CG7166.
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> Because of the "well-settled rule preventing an insurer's recovery by right of subrogation from its own insured," Plaintiff, as Defendant's insurer, is precluded from seeking recovery from Defendant. *See Federated Ins. v. Iowa Mut. Ins. Co.*, 659 N.W.2d 207, 210 (Iowa 2003). Rather, Plaintiff "has a duty to defend whenever there is potential or possible liability to indemnify" Defendant "based on the facts appearing at the outset of the case." *See First Nat'l Bank of Missouri Valley v. Fidelity & Deposit Co. of Maryland*, 545 N.W.2d 332, 335 (Iowa Ct. App. 1996). Plaintiff has an obligation to defend Defendant in this matter, and Plaintiff's request for entry of summary judgment on Defendant's breach of contract counterclaim should be denied.

On March 24, 2005, Rinderknecht moved for summary judgment in its favor on both EMC's breach of contract claim as well as liability on Rinderknecht's counterclaim for breach of contract against EMC. Rinderknecht argued that the trial court's resolution of the underlying antisubrogation, duty to defend, and indemnify issues against EMC warranted entry of partial summary judgment in Rinderknecht's favor. The only issue remaining on the parties' respective breach

of contract claims according to Rinderknecht was the amount of breach of contract damages to which Rinderknecht was entitled.

On March 28, 2005, EMC filed a motion pursuant to Iowa Rule of Civil Procedure 1.904 requesting the trial court reconsider and amend the court's ruling denying EMC's motion for partial summary judgment. EMC argued the trial court's ruling failed to address and conflicted with the Iowa Supreme Court's decision in *Regent Insurance Co. v. Estes Co.*, 564 N.W.2d 846 (Iowa 1997). According to EMC, *Regent* stands for the proposition that the "arising out of" language of the additional insured endorsements at issue do not afford an additional insured liability coverage for the additional insured's affirmative acts of negligence. EMC also argued that the trial court's earlier ruling failed to consider the "plain language of the underlying contract between Rinderknecht and Black Hawk" that "specifically limited indemnity to be provided to Rinderknecht to claims resulting from vicarious liability to Rinderknecht resulting from the negligence of Blackhawk." EMC additionally claimed that the trial court failed to address the availability of coverage even if Rinderknecht were an "additional insured under the terms of the EMC policy." Specifically EMC argued that the facts underlying its breach of contract claim did not trigger liability coverage under Blackhawk's CGL policy because a breach of contract claim is by definition not an occurrence resulting in bodily injury or property damage under the coverage provisions of Blackhawk's CGL policy. Lastly, EMC argued that the antisubrogation rule cited by the trial court was not implicated because the "precise claim for which recovery is sought is not covered by the policy itself."

The trial court's resulting ruling entered on April 29, 2005, resolved both Rinderknecht's motion for partial summary judgment and EMC's motion to reconsider. The court first addressed EMC's motion for reconsideration by rejecting EMC's claim that *Regent* precluded coverage under these circumstances. The court's ruling states:

> In this case, Blackhawk, the subcontractor, was running the equipment at the time the property damage was sustained, and it is disputed whether the damage was sustained as a result of the actions of Rinderknecht (the general contractor) or Blackhawk (the subcontractor). The holding of the Iowa Supreme Court in *Regent* appears to turn directly on the fact that there were no negligent acts performed by the subcontractor; in this case, it cannot be said with certainty that Blackhawk was not responsible for any negligent acts at the worksite. Plaintiff has chosen to utilize the strategy of dismissing its negligence claim, and therefore, evidence of negligence acts are not before this Court. Further, a determination of whether Defendant breached the contract between the parties by failing to provide stable soil conditions for movement of a crane will not be determined until trial of this matter, as it is clear that issue is riddled with factual disputes between the parties. This distinction renders the *Regent* holding inapplicable to this case, and Planitiff's argument that *Regent* is directly on point fails.

The court, for the same reason, rejected EMC's arguments based on the terms of Rinderknecht's contract with Blackhawk. The court, however, determined there was merit to EMC's argument concerning coverage for breach of contract claims under the policy. The court's ruling provides:

> Defendant's breach of contract counterclaim specifically seeks damages for Plaintiff's alleged breach of its obligation to provide coverage to Defendant. Endorsement CG 20 10 03 97 (a modification to the Commercial Liability issued to Blackhawk by Plaintiff) provided commercial general liability coverage to Defendant. The commercial general liability policy provides that it "applies to 'bodily injury' and 'property damage'" claims "only if (1) the 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the coverage territory'; and (2) the 'bodily injury' or 'property damage' occurs during the policy period." . . . The policy goes on to define "occurrence" as "an accident, including

> continuous or repeated exposure to substantially the same general harmful conditions." . . .
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> The breach of contract claimed by Defendant in its counterclaim goes directly to a "deliberate refusal" of Plaintiff to provide coverage under the terms of the insurance agreement; therefore, the facts alleged by Defendant (failure to provide coverage) cannot be viewed as accidental. Because the policy does not provide coverage for deliberate acts taken by Plaintiff, the Court finds that there are no factual disputes in existence with regard to Defendant's counterclaim, and as a matter of law, the counterclaim for breach of contract must be dismissed. Further, because there is no duty on the part of Plaintiff to defend its own, deliberate actions, there is no duty for Plaintiff to indemnify Defendant.

The court, based on the foregoing, also concluded EMC's lawsuit against Rinderknecht did not violate the antisubrogation rule. The court denied Rinderknecht's motion for partial summary judgment, stating:

> Defendant relies on the language of the endorsement providing coverage to Defendant, which, as this Court concluded in its March 17, 2005, ruling, that pursuant to endorsement CG 20 10 03 97 (a modification to the Commercial General Liability issued to Blackhawk by Plaintiff), Defendant has coverage for its claims. The disparity between the language used in the commercial general liability policy (i.e., defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions") and the endorsement language, which appears to provide for greater coverage (utilizing a broad construction to the phrase "with regard to liability arising out of Blackhawk's 'ongoing operations performed for' Defendant"), is troubling to the Court, and has led to much of the confusion surrounding this case.
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> . . . .
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> In this case, the endorsement providing coverage for Defendant does not specifically alter the definition of "occurrence" as set out in the commercial general liability portion of the policy, nor does it explicitly change the intent of the commercial general liability portion of the policy to provide coverage only for "an accident including continuous or repeated exposure to substantially the same general harmful conditions." Therefore, despite the conflicting language, Defendant's Motion for Summary Judgment must be denied.

Rinderknecht thereafter filed a motion requesting the court reconsider the ruling denying Rinderknecht's motion for summary judgment and granting EMC's motion for summary judgment. Rinderknecht argued the trial court misconstrued Rinderknecht's theory of the occurrence triggering coverage under Blackhawk's CGL policy. The issue, according to Rinderknecht, was not whether EMC's refusal to provide coverage was the triggering occurrence, but it was rather Rinderknecht's breach of its tort and contract duties and resulting crane accident that constituted the occurrence triggering coverage under the policy. In resistance to Rinderknecht's motion to reconsider, EMC renewed and expanded its argument that a breach of contract claim is not an occurrence triggering coverage under Blackhawk's CGL policy. In addition to its argument that breach of contract is by definition not an occurrence, EMC argued that contractual liability is expressly excluded under the following CGL policy exclusion:

> 2. Exclusions
> This insurance does not apply to:
> . . . .
> b. Contractual Liability
> "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

EMC acknowledged policy exceptions to this exclusion but argued they were not implicated because the sole basis of Rinderknecht's liability was its breach of a contractual duty to provide a flat and stable access and adequately prepare the construction site surface for Blackhawk's crane operation.

The trial court summarily denied Rinderknecht's motion to reconsider the court's earlier ruling on the parties' motions for summary judgment. The supreme court granted Rinderknecht's application for interlocutory appeal.

On appeal, Rinderknecht raises the following issues:

I. Did the District Court err in granting summary judgment for EMC rather than Rinderknecht on Rinderknecht's breach of contract counterclaim?
II. Did the District Court err in refusing to grant summary judgment for Rinderknecht on EMC's breach of contract claim?

II. *Standard of Review*.

We review a district court's ruling on a motion for summary judgment for correction of errors of law. *Financial Mktg*. *Servs*., *Inc*. *v*. *Hawkeye Bank & Trust*, 588 N.W.2d 450, 455 (Iowa 1999). Summary judgment will be upheld when the moving party shows there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. *See* Iowa R. Civ. P. 1.981(3). In reviewing a motion for summary judgment, we consider the evidence in a light most favorable to the party opposing the motion. *Smith v*. *Shagnasty's*, 688 N.W.2d 67, 71 (Iowa 2004).

III. *Rinderknecht's Breach of Contract Counterclaim*.

We initially note that both parties disagree with the trial court's reasoning supporting the ruling granting EMC's motion for summary judgment. We may, however, affirm on any basis appearing in the summary judgment record that was urged by the prevailing party below even if the trial court did not grant summary judgment on that basis. *In re Estate of Voss*, 553 N.W.2d 878, 880 n.1 (Iowa 1996).

As mentioned earlier, Blackhawk's contract with Rinderknecht required Blackhawk to name Rinderknecht as an additional insured under Blackhawk's CGL policy. EMC's duties under Blackhawk's CGL policies are, however,

defined by its contractual obligations under the policy, and not what Blackhawk contracted to do with Rinderknecht. *Regent*, 564 N.W.2d at 848 (obligation under subcontract entirely different issue than insurer's obligation to additional insured).

The issues involving EMC's duties to defend and indemnify Rinderknecht as an additional insured require interpretation of the provisions of Blackhawk's CGL policy implicated by the claims made against Rinderknecht. Although the parties' various motions for summary judgment, resistances to motions for summary judgment, replies to resistances to motions for summary judgment, motions to reconsider and amend rulings on motions for summary judgment, resistances to motions to reconsider and amend rulings on motions for summary judgment, replies to resistances to motion to reconsider and amend rulings on motions for summary judgment, as well as the briefs filed on appeal, raise a petri dish of coverage and related issues, we believe the outcome of this case is controlled by our interpretation of the "arising out of" endorsement language contained in Blackhawk's CGL policy.

"Insurance policies are contracts between the insurer and the insured and must be interpreted like other contracts, the objects being to ascertain the intent of the parties." *Talen v. Employers Mut. Cas. Co*., 703 N.W.2d 395, 407 (Iowa 2005). "[W]e strive to ascertain the intent of the parties at the time the policy was sold." *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296, 299 (Iowa 1994).

> "Interpretation" and "construction" are technically distinct exercises with regard to resolving insurance contract problems. "Interpretation" calls for this court to determine the meaning of contractual words. These questions are legal in nature unless the meaning of the language "depends on extrinsic evidence or on a

> choice among reasonable inferences from extrinsic evidence." Construing a contract, on the other hand, calls this court to determine the legal effect of a contract. The proper construction of an insurance contract is always an issue of law for the court to resolve.
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> Insurance contracts are construed in the light most favorable to the insured. Exclusion provisions in insurance policies are construed strictly against the insurer. When construing insurance policies "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."

Id. (citations omitted). "Words in an insurance policy are to be applied to subjects that seem most properly related by context and applicability." *Talen*, 703 N.W.2d at 407.

As noted earlier, endorsement CG 20 10 03 97 states that Rinderknecht is an additional insured "with respect to liability arising out of your ongoing operations for that insured." Endorsement CG7166 states that Rinderknecht is an additional insured "with respect to liability arising out of your operations or premises owned by or rented to you that are shown above." The terms "your" and "you" refer to the "named insured" which is Blackhawk. The term "arising out of" is not defined in the insurance policy. The phrase must be given a "broad, comprehensive meaning." *Id*. at 405. "Arising out of" must be understood "to mean originating from, growing out of, or flowing from, and require only that there be some causal relationship between injury and risk for which coverage is provided." *Kalell v. Mutual Fire & Auto. Ins. Co*., 471 N.W.2d 865, 867 (Iowa 1991) (citations omitted).

Despite the broad comprehensive meaning given the term "arising out of," Iowa courts have taken a narrow view of the scope of liability coverage for

additional insureds under CGL policies. As far as we can determine, the supreme court has resolved coverage disputes based on the "arising out of" language of an additional insured endorsement to a CGL policy in two cases. In *Regent,* 564 N.W.2d at 846, the court resolved a coverage dispute involving a general contractor claiming liability coverage as an additional insured under a subcontractor's CGL policy. There the court said:

> Regent Insurance Company also urged as a basis for its motion for summary judgment that Estes was added as an additional insured "only with respect to liability arising out of [Crawford's work for Estes]." Because the word "you" is defined in the policy as referring to the named insured, we agree with Regent's argument concerning the limited scope of the endorsement adding Estes as an additional insured. Regent urges, and we agree, that under the undisputed facts of the case Martin's right of recovery against Estes was in no way attributable to the work performed or to be performed by Crawford under its contract with Estes.

Id. at 848. In G*abes Construction Co., Inc. v. United Capitol Insurance Co.*, 539 N.W.2d 144, 148 (Iowa 1995), the court resolved a similar coverage dispute in favor of a general contractor. There the court said:

> United urges liability for the claims of negligence against Gabe arises out of Gabe's own work, not out of Sovde's work, and therefore the claims are beyond the coverage extended to an additional insured under the United endorsement. The endorsement listed Gabe as an insured "but only for liability which arises out of 'your work' for that insured by or for you." The parties agree that this policy language provides coverage to Gabe only for liability arising out of work performed by Sovde.
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> We conclude that Gabe's liability arose out of Sovde's work. The accident occurred at the construction site during the course of Sovde's work. Rhodes' petition alleged Gabe "is liable for the negligence of Defendant Sovde Brothers, Inc." in various nonvehicle-related particulars. This claim is within the coverage extended by the endorsement.

Gabes Constr. Co., 539 N.W.2d at 147. Under our reading of these decisions, the dispositive coverage consideration appears to be whether the third party

claims against the additional insured contractor were based on the contractor's individual fault or whether the named insured subcontractor is also alleged to be at fault and liable to an injured party. We accordingly agree with EMC's assertion that the controlling consideration is *not* whether the work of the subcontractor was being conducted at the time of the injury, but whether the alleged fault that caused the injury "arose out of" the named insured subcontractor's operations or the operations of the additional insured general contractor. We also agree with EMC's argument that Rinderknecht's claim that Blackhawk was at fault for the damages to its crane is a distinction without consequence to the coverage issue implicated in this case. Although those fault allegations are relevant to Rinderknecht's defense, they do not implicate any liability for which Blackhawk would be covered under the policy. Like the court in *Regent*, we conclude that under the facts of this case, EMC's right to recover against Rinderknecht is not attributable to liability arising out of Blackhawk's work for Rinderknecht.

Lastly, we note EMC's duties under Blackhawk's CGL policy included the duty to defend Rinderknecht if there is potential or possible liability based on the facts at the outset of the case. *McAndrews v. Farm Bureau Mut. Ins. Co.*, 349 N.W.2d 117, 119 (Iowa 1984). In resolving duty to defend issues, we consider the insuring agreement of the policy in question, the pleadings filed in the underlying lawsuit, as well as any other admissible and relevant facts in the record. *Id.* For the reasons already mentioned, we conclude EMC had no duty to defend Rinderknecht as an additional insured under Blackhawk's CGL policy.

Because EMC's claims against Rinderknecht triggered neither EMC's duty to defend or indemnify Rinderknecht as an additional insured under Blackhawk's

CGL policy, we affirm the trial court's ruling granting EMC's motion for summary judgment dismissing Rinderknecht's counterclaim for breach of contract. Although the parties have raised additional issues on appeal, we conclude our resolution of the foregoing issues is dispositive. This case is accordingly remanded to the district court for further proceedings in conformity with our opinion.

AFFIRMED AND REMANDED.