IN THE COURT OF APPEALS OF IOWA

No. 9-1053 / 09-0699
Filed February 24, 2010

MCNEILUS HOG FARMS,
LEON MCNEILUS, and LLOYD MCNEILUS,
Plaintiffs-Appellants,

vs.

FARM BUREAU MUTUAL
INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Bremer County, Colleen D. Weiland, Judge.

The plaintiffs appeal a summary judgment ruling in favor of their insurance company. **AFFIRMED.**

Kevin J. Caster of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellants.

William H. Roemerman of Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Potterfield, JJ.

VAITHESWARAN, P.J.

McNeilus Hog Farms, Leon McNeilus, and Lloyd McNeilus (the McNeiluses) appeal a summary judgment ruling in favor of their insurance company, Farm Bureau Mutual Insurance Company.

I. Background Facts and Proceedings

The McNeiluses entered into a contract feeding agreement with Leon Sheets and Schneiders' Milling, Inc. The McNeiluses agreed to provide the hogs owned by Sheets with feed purchased from Schneiders' Milling, and they agreed to lease a building to Sheets for housing the hogs.

The hog building was equipped with a ventilation system to allow gases from the manure pits to escape when the pits were pumped. On one occasion, the ventilation system failed to activate during the pumping process. Pit gases displaced the oxygen in the building, causing 808 hogs to suffocate. Sheets sued the McNeiluses, among others, "for losses sustained due to the death of hogs."

The McNeiluses notified Farm Bureau, the insurance company with whom they had a "Farm and Ranch Owners" policy. Farm Bureau declined to provide coverage for the Sheets lawsuit. The McNeiluses consequently sued Farm Bureau, claiming it owed a duty to defend and indemnify them for their legal costs in the Sheets lawsuit. Both parties filed motions for summary judgment. Following a hearing, the district court considered and rejected several exclusions to coverage raised by Farm Bureau, but ultimately agreed with Farm Bureau that a "pollution" exclusion in the insurance policy applied. Based on that exclusion,

the court concluded Farm Bureau did not have a duty to defend and indemnify the McNeiluses in the underlying litigation. This appeal followed.

II. Analysis

The law governing an insurer's duty to defend and indemnify is well established:

> An insurer's duty to defend arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case. "The insurer has no duty to defend if after construing both the policy in question, the pleadings of the injured party and any other admissible and relevant facts in the record, it appears the claim made is not covered by the indemnity insurance contract."

Weber v. IMT Ins. Co., 462 N.W.2d 283, 285 (Iowa 1990) (citations omitted).[1] The law governing review of summary judgment rulings is also well established. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

The McNeiluses assert that the district court erred in applying the policy's "pollution" exclusion. Farm Bureau counters that this exclusion applied, as did others. *See Venard v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994) ("[A] successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected by the district court."). We find dispositive the "business pursuits" exclusion on which Farm Bureau alternately relied.

That exclusion provides:

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[1] Farm Bureau appears to argue that we should not consider any facts outside the petition in determining whether it has a duty to defend the McNeiluses in the Sheets litigation. *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 405–06 (Iowa 2005) states otherwise.

> We do not cover under:
>
> 1. Coverage L and Coverage M bodily injury or property damage:
>
> . . . .
>
> b. arising out of business pursuits of any insured or the rental or holding for rental of any part of any premises by any insured;
>
> . . . .
>
> 3. Business means a trade, profession or occupation, other than farming, and includes any activities likely or expected to produce an annualized gross income exceeding $1,000.
>
> Business does not include:
>
> . . . .
>
> c. custom farming, including garden plowing, performed by an insured where the gross annual receipts for all such activities do not exceed $3,000 . . . .
>
> . . . .
>
> 5. Custom Farming means any farming operation performed by you for others for a charge under any contract or agreement, written or oral.
>
> . . . .
>
> 7. Farming means the process of investment, management or labor to produce agricultural products.

Farm Bureau argues that because the hogs were part of the McNeiluses' custom farming operation, which grossed more than $3000 annually, the business pursuits exclusion barred coverage. In response, the McNeiluses do not seriously dispute that they were engaged in custom farming. Instead, they contend:

> The business pursuits exclusion does not apply because "business" is something "other than farming." Farm Bureau's policy does NOT exclude custom farming. Those words are just not in the policy.
>
> Of course custom farming is a type of farming.

The McNeiluses' argument is facially appealing because "business" is defined as "a trade, profession or occupation, *other than farming*" and "custom

farming" would appear to be a type of farming.[2] (Emphasis added). However, the policy separately defines "farming" and "custom farming," with "farming" defined as "the process of investment management or labor to produce agricultural products" and "custom farming" defined as "any farming operation performed by you for others for a charge under any contract or agreement, written or oral." *See Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 681 (Iowa 2008) (stating an insurance policy is to be read "as an entirety rather than seriatim by clauses"). In addition, by excepting from the definition of "business" custom farming grossing less than $3000, the policy plainly includes within the definition of "business" custom farming grossing more than $3000. *See RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 324 (Iowa 2006) (recognizing that the rule expressio unius est exclusio alterius applies in the construction of contracts); *see also* Black's Law Dictionary 620 (8th ed. 2004) (defining expressio unius est exclusio alterius as "a canon of construction holding that to express or include one thing implies the exclusion of the other, or of the

[2] Indeed, in rejecting the applicability of this exclusion, the district court noted that a "reasonable insured" would understand the provision to be read as the McNeiluses read it. The rule of interpretation directing a court to "ascertain what the insured as a reasonable person would understand the policy to mean, rather than what the insurer actually intended," *First Newton Nat'l Bank v. Gen. Cas. Co.*, 426 N.W.2d 618, 628 (Iowa 1988), is "part of the broader concept of reasonable expectations we apply in construction of insurance policies." *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 786 (Iowa 1988). The McNeiluses did not present any evidence in support of this concept in the district court proceedings and do not argue that it applies here. *See Aid (Mut.) Ins. v. Steffen*, 423 N.W.2d 189, 192 (Iowa 1988) (determining reasonable expectations doctrine did not apply in case interpreting business pursuits exclusion because no evidence was presented as to insured's expectations); *see also Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995) (detailing preliminary criterion that must be established by the insured in order for the doctrine to be invoked).

alternative"). Finally, the "custom farming" language would be rendered superfluous if the McNeiluses' argument were adopted. This is impermissible. *See Kibbee v. State Farm Fire & Cas. Co.*, 525 N.W.2d 866, 869 (Iowa 1994) (stating we strive to give each word a meaning that does not render it superfluous).

For these reasons, we conclude the "business pursuits" exclusion applied and, based on that exclusion, Farm Bureau was not obligated to defend and indemnify the McNeiluses. Accordingly, the district court did not err in granting summary judgment in favor of Farm Bureau.

AFFIRMED.