

3

Case No. A12-0155

STATE OF MINNESOTA
IN COURT OF APPEALS

Farmers Insurance Exchange,

Plaintiff,

vs.

J A Letellier, Robert Letellier
and Jennifer Letellier,

Appellants,

Robert Hedberg as trustee and next-of-kin
of Shrimatie Ramoutar-Hedberg,
Robert Hedberg individually,
Brent Duane Holland, Drew Holland,
Mark Dominic Frank, Alivia Shae
Elizabeth Boddie, and Krista Boddie Letner,

Defendants,

and

J A Letellier, Robert Letellier
and Jennifer Letellier,
third party plaintiffs,

Appellants,

vs.

Illinois Farmers Insurance Company,
third party defendant,

Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX

MAHONEY, DOUGHERTY AND
MAHONEY, P.A.
Richard P. Mahoney, #6662X
Victor Lund, #160076
801 Park Avenue
Minneapolis, MN 55404
(612) 339-5863

Attorneys for Appellants Letellier

BRENDEL AND ZINN, LTD.
Burke J. Ellingson, #249294
8519 Eagle Point Boulevard
Suite 110
Lake Elmo, MN 55042
(651) 224-4959

*Attorneys for Respondent Illinois
Farmers Insurance Company*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

STATEMENT OF THE ISSUES	1
I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ILLINOIS FARMERS INSURANCE COMPANY AND FINDING NO COVERAGE UNDER ITS AUTOMOBILE POLICY	1
II. WHETHER THE TRIAL COURT PROPERLY CONSTRUED THE ILLINOIS FARMERS AUTOMOBILE POLICY	1
III. WHETHER THE TRIAL COURT PROPERLY CONSTRUED MINN. STAT. § 65B.49, Subd. 3(2)	1
IV. WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE LETELLIERS AN AWARD OF ATTORNEY’S FEES INCURRED IN THE DECLARATORY ACTION	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	6
Background	6
The Accident and The Underlying Lawsuits	7
Farmers Insurance Group of Companies	9
The Illinois Farmers Auto Policy	10
STANDARD OF REVIEW	12
SUMMARY OF ARGUMENT	13
ARGUMENT	15

I. THE FARMERS AUTO POLICY IS BROAD ENOUGH TO COVER THIS POTENTIAL LIABILITY 15

II. THE MINNESOTA NO-FAULT ACT REQUIRES THAT THE LIABILITY COVERAGE OF AN AUTO POLICY BE BROAD ENOUGH TO INCLUDE THIS POTENTIAL LIABILITY 23

 A. The legislature has plainly shown its intent to expand the scope of automobile liability coverage 29

III. THE SOCIAL HOST LIABILITY STATUTE IS A DEVICE TO SHIFT LIABILITY FOR MOTOR VEHICLE ACCIDENTS FROM THE DRIVER TO SOMEONE ELSE 33

IV. SINCE FARMERS WRONGFULLY DENIED THE DUTY TO DEFEND THE LETELLIERS, IT IS LIABLE FOR THE LETELLIERS' ATTORNEY'S FEES FOR BRINGING THIS DECLARATORY JUDGMENT ACTION TO ESTABLISH COVERAGE 35

CONCLUSION 38

CERTIFICATE OF WORD COUNT

TABLE OF AUTHORITIES

Cases

<u>Canadian Universal Insurance Company, Ltd. v. Fire Watch, Inc.</u> , 258 N.W.2d 570, (Minn. 1977)	18
<u>Carlson v. Allstate Insurance Company</u> , 749 N.W.2d 41 (Minn. 2008)	29
<u>Hibbing Education Association v. Public Employment Relations Board</u> , 369 N.W.2d 527 (Minn. 1985)	13
<u>Kwong v. Depositors Insurance Company</u> , 627 N.W.2d 52 (Minn. 2001)	13
<u>Lobeck v. State Farm Mutual Automobile Insurance Co.</u> , 582 N.W.2d 246 (Minn. 1998)	27-28
<u>Morrison v. Swenson</u> , 274 Minn. 127, 142 N.W.2d 640 (1966)	2, 36-37
<u>Progressive Specialty Insurance Company v. Widness</u> , 635 N.W.2d 516 (Minn. 2001)	1, 18, 25-27
<u>Quaderer v. Integrity Mutual Insurance Company</u> , 263 Minn. 383, 116 N.W.2d 605 (1962)	22
<u>Redeemer Covenant Church of Brooklyn Park v. Church Mutual Insurance Company</u> , 567 N.W.2d 71 (Minn.App. 1997)	2, 37-38
<u>Reiter v. Kiffmeyer</u> , 721 N.W.2d 908 (Minn. 2006)	30
<u>Sherek v. ISD No. 699</u> , 449 N.W.2d 434 (Minn. 1990)	13
<u>State Farm Insurance Companies v. Seefeld</u> , 481 N.W.2d 62 (Minn. 1992)	13
<u>State Farm Mutual Automobile Insurance Company v. Thunder</u> , 605 N.W.2d 750 (Minn.App. 2000)	30

Toomey v. Krone, 306 N.W.2d 549 (Minn. 1981) 28

United Services Automobile Association v. Howe, 208 F.Supp. 683 (D. Minn. 1962) 22

Vadnais v. State Farm Mutual Automobile Insurance Company, 354 N.W.2d 607 (Minn.App. 1984) 30

Waste Recovery Cooperative of Minnesota v. The County of Hennepin, 475 N.W.2d 892 (Minn.App. 1991) 13

Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) 29

Statutes

Minn. Stat. § 65B.49, Subd. 3 26

Minn. Stat. § 65B.49, Subd. 3(2) 1, 15, 20, 23, 26-27, 29, 31, 35

Minn. Stat. § 340A.90 3, 7, 14, 21, 31, 33

Minn. Stat. § 645.16 1, 29

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ILLINOIS FARMERS INSURANCE COMPANY AND FINDING NO COVERAGE UNDER ITS AUTOMOBILE POLICY.

The trial court granted Illinois Farmers' motion for summary judgment and found that its policy provided no coverage for the Letelliers.

Apposite Cases and Statute:

Minn. Stat. § 65B.49, Subd. 3(2); Progressive Specialty Insurance Company v. Widness, 635 N.W.2d 516 (Minn. 2001).

II. WHETHER THE TRIAL COURT PROPERLY CONSTRUED THE ILLINOIS FARMERS AUTOMOBILE POLICY.

The trial court granted summary judgment in favor of Illinois Farmers and concluded that its policy did not extend to the liability alleged in the underlying matter.

Apposite Cases and Statute:

Minn. Stat. § 65B.49, Subd. 3(2); Progressive Specialty Insurance Company v. Widness, 635 N.W.2d 516 (Minn. 2001).

III. WHETHER THE TRIAL COURT PROPERLY CONSTRUED MINN. STAT. § 65B.49, Subd. 3(2).

The trial court concluded that the statute did not require liability coverage reaching the potential liability alleged against the Letelliers in the underlying matters.

Apposite Cases and Statute:

Minn. Stat. § 65B.49, Subd. 3(2); Minn. Stat. § 645.16; Progressive Specialty Insurance Company v. Widness, 635 N.W.2d 516 (Minn. 2001).

IV. WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE LETELLIERS AN AWARD OF ATTORNEY'S FEES INCURRED IN THE DECLARATORY ACTION.

The trial court did not rule since it found no coverage.

Apposite Cases:

Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640 (1966); Redeemer Covenant Church of Brooklyn Park v. Church Mutual Insurance Company, 567 N.W.2d 71 (Minn.App. 1997).

STATEMENT OF THE CASE

This litigation matter arises out of a motor vehicle accident that occurred in the early morning of April 13, 2009. Earlier that evening, a number of teenagers had gathered at the home of the Letelliers in St. Michael, Wright County, for a party involving consumption of alcohol. The residents of the Letellier household were the parents, Robert and Jennifer Letellier, and a teenager, J Letellier. J was at the party; her parents were home in bed and were not aware a party was going on.

The teenagers consumed alcohol at the party. There is no showing that the Letelliers provided any of the alcohol. One of the teenagers was D M A. After consuming alcohol at the party, a sober driver brought him home. Thereafter, he drove his sister's car and caused an accident resulting in the death and injuries to underlying plaintiffs.

The underlying Complaint (A47) named the teenagers, several persons who allegedly procured alcohol for them, and the Letelliers. The theory against the Letelliers was that they were in control of the premises and knowingly or recklessly failed to prevent the teenagers from consuming alcohol thereon, thereby giving rise to liability under Minn. Stat. § 340A.90 for the injuries arising out of the motor vehicle accident.

The Letelliers tendered defense of the underlying Complaint to both their homeowners' insurer, Farmers Insurance Exchange, and their automobile insurer, third-party defendant and respondent Illinois Farmers Insurance Company (Illinois Farmers). Farmers Insurance Exchange agreed to defend subject to a reservation of rights (A23), and commenced a declaratory judgment action asking the court to find that it had no duty to indemnify or defend the Letelliers under the homeowners' policy.¹ The Letelliers answered that declaratory Complaint and asked the court for a declaration of coverage under the homeowners' policy in their favor.

Additionally, the Letelliers brought a Third-Party Complaint against their auto insurer, Illinois Farmers. (A16) Illinois Farmers denied all coverage under the auto policies issued to the Letelliers and refused to provide or contribute to the defense of the underlying matters. (A23)

After discovery, including depositions, motion practice ensued. Farmers Insurance Exchange moved for summary judgment for a declaration of no coverage under the homeowners' policy. The trial court granted that motion by

¹ Both Farmers Insurance Exchange and Illinois Farmers are member companies of the Farmers Insurance Group of insurance companies. The letter denying coverage for the auto policy issued by Illinois Farmers (A23) is written on behalf of both Farmers companies and discusses both the homeowners' and auto policies.

order dated July 7, 2011, with entry of judgment following in January 2012. The Letelliers do not intend to appeal from that decision, and it will be final in March.

This action came on for hearing before the district court on August 16, 2011 on cross-motions for summary judgment by respondent Illinois Farmers and the Letelliers. (A40, 42) By order and judgment dated and entered October 20, 2011, the trial court found no coverage under the Illinois Farmers auto policies and granted summary judgment in favor of Illinois Farmers. (ADD1) This appeal followed in due season (after a premature appeal (see order dated January 24, 2012)).

STATEMENT OF THE FACTS

Background

The Letelliers live in St. Michael, Minnesota. In April 2009, the residents of the household were Robert Letellier, his wife Jennifer Letellier, and three children, including teenager J Letellier who was then .

On April 12, 2009, teenaged friends of J and friends of friends gathered at the Letellier home for an impromptu party. April 12 was a Sunday. The Letellier parents have a rule about children not having friends over on Sunday evenings. There is no dispute that the teenagers gathered at the Letellier home without the parents being aware of the party.

The teenagers consumed alcohol at the party. Various participants were named as the ones who had procured and brought the alcohol to the party. Those questions are not germane to the coverage issues. There is no dispute that none of the Letelliers provided any of the alcohol that any of the teenagers drank. The Letellier parents had alcohol in the house, but there is no showing that any of the teenagers drank it. (A55)

One of the teenagers who drank alcohol was D M A . He became intoxicated. A sober driver brought him to his home from the Letellier residence. After he got home, he took his sister's car and drove at a high rate of

speed causing the accident. More details thereon appear in the next subsection.

By order dated October 17, 2011, Judge Tenney of Wright County District Court granted the Letelliers summary judgment in the underlying actions. (A50) The basis for the ruling in favor of J was that Minn. Stat. § 340A.90 does not create a cause of action against a person younger than 21 years of age. The basis of the decision in favor of the Letellier parents was that there was no showing as a matter of law that they knowingly or recklessly permitted consumption of alcohol by underage persons on their residential premises. The facts show that they were asleep at all times relevant. There was no showing of facts that would have put a reasonable person on notice that teenagers were having a party that evening. There was no showing that the party was particularly loud. (A60-62)

The Accident and The Underlying Lawsuits

D A consumed alcohol at the Letellier home the night of April 12-13, 2009. It is not clear who provided the alcohol that A drank, but if that is a fact issue it does not affect the coverage issues. It is undisputed that a sober driver got him home in the early morning hours of April 13, 2009. However, instead of going to bed, he took his sister's car and drove it negligently, causing a collision with a vehicle driven by Ger Vang. The accident occurred at 5:30 a.m. according to the police report. (A47-48)

The accident caused serious injuries to Ger Vang and resulted in the death of his passenger, Shrimatie Ramoutar-Hedberg. Ger Vang and the next-of-kin of Ramoutar-Hedberg brought separate personal injury and wrongful death claims. One of them is in the Appendix at A47. The other one is not reproduced because the background facts and legal theories alleged are the same.

The underlying Complaints named the Letelliers as defendants on a theory of statutory social host liability under Minn. Stat. § 340A.90. The parties to the underlying lawsuits included others who may have provided alcohol, but did not include the driver, D A . The underlying plaintiffs settled with him before commencing litigation and gave him a release.

After substantial investigation and discovery, Judge Tenney, who presided over the underlying actions, granted summary judgment in favor of the Letelliers (A50), thereby removing any risk of a judgment against the Letelliers in favor of the underlying plaintiffs. Plaintiff Farmers Insurance Exchange, the homeowners' insurer, defended the Letelliers but reserved the right to deny an obligation to indemnify. (A23) In view of the court's summary judgment on liability, indemnification became a moot point. The attorney for the underlying plaintiffs has stated that he has no intention of appealing that decision.

Farmers Insurance Group of Companies

Both plaintiff Farmers Insurance Exchange and third-party defendant Illinois Farmers Insurance Company are member companies of the Farmers Insurance Group of Companies, which is a registered trade name. In order to procure the household's insurance needs, Robert Letellier dealt with one local Farmers agent who could and did place policies in any Farmers company. The agent made the decision to place the auto coverage for the Letelliers in Illinois Farmers and the homeowners' coverage with Farmers Insurance Exchange. (See Deposition of Robert Letellier attached as Exhibit B to July 19, 2011 Affidavit of Richard P. Mahoney.)

Upon receiving service of the underlying Complaints, Robert Letellier contacted his local Farmers agent. Someone at Farmers determined that Farmers Insurance Exchange would defend the Letelliers under the homeowners' policy under a reservation of rights and that the auto insurer would deny coverage altogether. The reservation of rights/denial of coverage letter from Farmers (A23) is a single letter written on Farmers Insurance Group letterhead on behalf of both Farmers companies. The letter is a reservation of rights as to Farmers Insurance Exchange and a denial of coverage as to Illinois Farmers. Farmers Insurance Exchange had already retained counsel to defend the Letelliers under the

homeowners' policy. The letter (A24) notes that the company will continue to provide that defense. However, Illinois Farmers denied coverage altogether and refused to provide or participate in the defense. (A23).

The Illinois Farmers Auto Policy

Illinois Farmers' automobile policy No. 13 18373-42-11 was in force from January 2, 2009 to July 2, 2009. (Pertinent pages at A28-39) That period of coverage included the date of the accident. The policy names Robert A. Letellier as the named insured and extends coverage to his spouse and family members. Illinois Farmers issued a second automobile policy naming both Robert and Jennifer Letellier as named insureds, Policy No. 13 13368-00-20, which was in effect on the date of the accident which insured a different vehicle. The pertinent policy language in the two policies is the same. Those pertinent provisions include the following:

DEFINITIONS

Throughout this policy "you" and "your" mean the "named insured" shown in the Declarations and spouse if a resident of the same household. "We," "us" and "our" mean the Company named in the Declarations which provides this insurance. In addition, certain words appear in bold type. They are defined as follows:

...

Family member means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

...

Private Passenger Car means a four wheel land motor vehicle of the private passenger or station wagon type actually licensed for use upon public highways.

...

Your insured car means:

...

6. Any other **private passenger car, utility car, or, utility trailer** not owned by or furnished or available for regular use by you or a **family member**. This includes such vehicles while rented by you on a daily or weekly basis. But no vehicle shall be considered as **your insured car** unless there is a sufficient reason to believe that the use is with permission of the owner, and unless it is used by you or a **family member**. (A30)

PART I - LIABILITY

Coverage A - Bodily Injury

Coverage B - Property Damage

We will pay **damages** for which any **insured person** is legally liable because of **bodily injury** to any person and/or **property damage** arising out of the ownership, maintenance or use of a **private passenger car, a utility car, or a utility trailer**.

We will defend any claim or suit asking for these **damages**. We may settle when we consider it appropriate.

Additional Definitions Used In This Part Only

Insured person as used in this part means:

1. You or any **family member**. (A31)

...

Exclusions

A section listing 15 separate exclusions follows but none of them apply to the facts of the case. (See Exclusion section at A32)

Both the Illinois Farmers auto policies and the Farmers Insurance Exchange homeowners' policy have the following provision under the **Other Insurance** portion which provides:

If any applicable insurance other than this policy is issued to you by us or by any other member company of the Farmers Insurance Group of Companies, the total amount payable among all such policies shall not exceed the limits provided by the single policy with the highest limits of liability. (A33)

The policy has a standard conformity clause which provides:

Policy terms which conflict with laws of Minnesota are hereby amended to conform to such laws. (A36.5)

STANDARD OF REVIEW

In reviewing a declaratory action decision by the district court, the court of appeals applies a clearly erroneous standard to review of factual findings, but the

court reviews issues of law on a de novo standard and need no deference to the district court's decision. Waste Recovery Cooperative of Minnesota v. The County of Hennepin, 475 N.W.2d 892, 894 (Minn.App. 1991). The trial court's application of the language of the statute to the facts of the case is a matter of law and is not binding on this court. Id. Review of a statute in the statute's proper construction is a question of law which this court reviews on a de novo standard. Hibbing Education Association v. Public Employment Relations Board, 369 N.W.2d 527, 529 (Minn. 1985). This court is not bound by the district court's conclusions regarding the scope of a statute. Sherek v. ISD No. 699, 449 N.W.2d 434, 436 (Minn. 1990). Decisions regarding the scope and construction of an insurance policy are questions of law which this court reviews de novo. State Farm Insurance Companies v. Seefeld, 481 N.W.2d 62, 64 (Minn. 1992). In reviewing auto policies, this court reviews the policy to determine if any of its policy terms conflict with the No-Fault Act in which case the conflicting policy terms are invalid. Kwong v. Depositors Insurance Company, 627 N.W.2d 52, 55 (Minn. 2001).

SUMMARY OF ARGUMENT

The underlying plaintiffs alleged that the Letelliers were liable to them for damages arising out of the motor vehicle accident caused by the negligent driving

of D A .. The underlying plaintiffs allege that the liability of the Letelliers arose through the social host statute, Minn. Stat. § 340A.90. The bodily injuries which were the subject of the underlying actions obviously arose at the moment of the automobile collision. Under these circumstances, the Letelliers' potential liability is a legal liability to pay damages for bodily injury to another arising out of the operation of any motor vehicle. The Letelliers should have coverage for that potential liability under their auto policy issued to them by respondent Illinois Farmers Insurance Company. The Letelliers did not own the car and neither of them were driving. But that makes no difference by the terms of their auto policy. The Farmers policy does not state that the alleged liability must arise out of **an insured person's** operation of a vehicle, only that the insured's liability be alleged to arise out of operation of a motor vehicle.

Although that may sound like an expansion of the scope of automobile liability coverage beyond the usual understanding, it is simply a matter of applying the language of the insuring agreement to the facts of the case. The policy, as written by Illinois Farmers, is broad enough to cover the Letelliers for this liability.

The Minnesota No-Fault Act requires an automobile policy written in Minnesota to be that broad following the most recent amendment to Minn. Stat. § 65B.49, Subd. 3(2).

Since Illinois Farmers wrongfully denied coverage to the Letelliers, and wrongfully refused to provide or participate in their defense, it is liable to the Letelliers for their expenses in bringing this declaratory judgment action to establish coverage under the Illinois Farmers policy.

ARGUMENT

I. THE FARMERS AUTO POLICY IS BROAD ENOUGH TO COVER THIS POTENTIAL LIABILITY.

The issue is the scope of the liability insuring agreement. In the Illinois Farmers policy issued to the Letelliers, that grant of coverage reads as follows:

We will pay **damages** for which any **insured person** is legally liable because of **bodily injury** to any person and/or **property damage** arising out of the ownership, maintenance or use of a **private passenger car, . . .**

We will defend any claim or suit asking for these **damages**. We may settle when we consider it appropriate.

(A31) (Bold in original)

Plaintiffs sought damages from the Letelliers (insured persons) and claimed that the Letelliers were legally liable for the bodily injury to Ger Fong Vang and

the death of Shrimatie Ramoutar-Hedberg arising out of the use of a private passenger car driven by D A .

It is elementary that the insurance company is the one that drafts the policy. Illinois Farmers drafted the above insuring agreement in the broadest possible terms. It is broad enough to cover the Letelliers' potential liability arising out of A 's use of his sister's car. The underlying lawsuits certainly seek damages for bodily injury. The underlying plaintiffs claim that the Letelliers should be liable for those damages for bodily injury. The damages arise out of the ownership, maintenance or use of a private passenger car. Illinois Farmers' language is broad enough to include the Letelliers' potential liability in the underlying matters. Nothing in the policy excludes that potential liability. Therefore, Illinois Farmers owed the Letelliers the duty of defense.

The trial court concluded that because the at-fault vehicle was neither owned by any of the Letelliers nor driven by one of them or one of their permittees, "the accident is not covered by the policy." (ADD8) This reasoning is erroneous. The Letelliers are not asking for coverage for the accident. Auto policies do not cover accidents. They cover persons and those persons' liability for damages arising out of motor vehicle accidents. The trial court seems to have concluded incorrectly that the Letelliers are asking to extend their policy to

provide coverage in favor of D A . The Letelliers are asking for no such thing. They are asking for coverage in favor of themselves. They paid the premium. They are the named insureds on the policy. The policy provides coverage in their favor for liability alleged to arise out of the use or operation of any motor vehicle. That is what the underlying Complaint alleges. It was immaterial to the underlying plaintiffs that the vehicle was not driven or owned by any of the Letelliers. The underlying plaintiffs still alleged that the Letelliers should have liability for the injuries arising out of the use of that motor vehicle. It is that liability which is covered by the Farmers policy.

The policy says that the company will pay damages that insured persons (the Letelliers) are legally liable because of bodily injury “arising out of the ownership, maintenance or use of a **private passenger car, . . .**” (A31) The policy does not say that the company will only pay damages for which the Letelliers are legally liable “arising out of [an insured person’s] ownership, maintenance or use of a **private passenger car, . . .**” The company is trying to read an exclusion or other limitation into the policy which is simply not there. The company succeeded in persuading the trial court that the limitation should be there. That reasoning is erroneous and this court should reverse.

The trial court further concluded that no reasonable person could expect an auto policy would extend coverage to these facts. (ADD7) This line of reasoning is puzzling. None of the parties raised reasonable expectations in their memoranda. The Letelliers did not ask the court to extend the scope of the coverage of the Farmers policy, in spite of its plain language, based on their reasonable expectations. Instead, the Letelliers asked the trial court to find that the policy language by its terms plainly extended to their potential liability and that no exclusion applied. As written, the Illinois Farmers insuring agreement extends to the Letelliers' potential liability arising out of D A 's use of his sister's car. That's the way Illinois Farmers drafted the clause.

It is true that a court should construe the terms of an auto policy in light of how a reasonable person would have understood those terms. Canadian Universal Insurance Company, Ltd. v. Fire Watch, Inc., 258 N.W.2d 570, 572 (Minn. 1977).² It is equally true that injuries arising out of the ownership, maintenance or use of motor vehicles can happen in an infinite number of ways, some of them fairly surprising, and that reasonable policyholders do not necessarily anticipate all of the myriad ways of causing injuries when they buy auto policies. The fact that

² Another way to phrase the standard is that terms in a policy are to be given their "usual and accepted meaning." Progressive Specialty Insurance Company v. Widness, 635 N.W.2d 516 (Minn. 2001)

convoluted circumstances give rise to allegations of liability arising out of the use of a car should have no bearing on coverage where the application of the policy is otherwise plain.

The trial court's memorandum makes an argument based on the policy definition of "**your insured car**" (ADD8). The judge noted that the definition of "**your insured car**" provides that "no vehicle shall be considered as **your insured car** unless there is a sufficient reason to believe that the use is with permission of the owner, and unless it is used by you or a **family member**." (A30) The trial court found this language supported the denial of coverage on the theory that the policy definitions specify that the policy only insures the named insureds and family members for their own use of their automobiles or permissive use of other automobiles.

But this policy language supports coverage. The trial court misconstrued the policy. The Farmers auto policy does define "**your insured car**" in that manner, and the policy uses that definition or the phrase "**your insured car**" for certain purposes,³ but the policy does not use the phrase "**your insured car**" in

³ The policy uses the phrase "**your insured car**" in the following policy provisions:

- Additional Definition No. 2 extending definition of **insured person** for purposes of liability coverage to "any person using **your insured**

connection with the general grant of liability coverage. Farmers could have drafted the grant of liability coverage as an obligation to pay damages that an insured person is liable to pay for bodily injury to any person arising out of the use of “**your insured car.**” That would have accomplished what Farmers says its policy is intended to accomplish. Since the definition of “**your insured car**” includes the concept of driving by named insureds or family members only, that would probably exclude D A driving his sister’s car.⁴

But Farmers did not draft the liability coverage in those terms. Instead, it

-
- **car.” (A31)**
 - Supplementary payments for bail bonds because of traffic accidents. (A32)
 - An exception to Exclusion No. 5 for operating a vehicle engaged in business. (A32)
 - Exclusion No. 10 excluding coverages for vehicles other than your insured car owned or regularly available for you or a family member. (A32)
 - Exclusion No. 13 for races. (A32)
 - Out-of-state coverage. (A33)
 - Uninsured motorist coverage. (A33)
 - Property damage coverage. (A35)
 - Underinsured coverage. (A37)

⁴ Whether such a policy provision would be permissible under the No-Fault Act is a separate question. As argued in Section II, the Letelliers take the position that the legislature’s latest amendment in 2002 to Minn.Stat. § 65B.49, Subd. 3(2) broadened liability coverage to the point where such a limitation is no longer permitted.

agreed to pay damages that any insured person is legally liable to pay because of bodily injury to any person “arising out of the ownership, maintenance or use of a **private passenger car, . . .**” (A31) Private passenger car is another defined term, and its definition has no limitation on who is doing the driving.

This is an unusual case. The coverage issues present unusual facts. Ordinarily an insured person faces no issue of liability to be imposed on him because of the negligent driving by a complete stranger who does not live in the same household with the insured person and who is driving an automobile not listed on the insured person’s policy. But the circumstances here are not ordinary. D A is a complete stranger to the Letelliers (at least the parents), and he drove a car that the Letelliers had never heard of, much less ever had any thought of insuring. Nevertheless, A’s negligent driving of that automobile had the potential of imposing liability on the Letelliers by virtue of the statute, i.e., Minn. Stat. § 340A.90. The harm giving rise to the potential liability did not arise until the collision of the two automobiles. The policy that Illinois Farmers sold to the Letelliers provides the broadest possible coverage of any liability that may be imposed upon the Letelliers by virtue of negligent operation of any motor vehicle. The policy does not specify whose driving must be involved. The policy does not require that the involved vehicle be owned by the

Letelliers. It does not even require that one of the Letelliers, or their permittees, be driving. It does not require that involved car be named in the policy or a premium paid for it. The Letelliers were facing potential liability even though the involved vehicle does not belong to them, and the driver is not their resident relative, permittee, or even subpermittee. But since the potential liability is real, and arises out of the use of a motor vehicle, the Letelliers have coverage for that potential liability under their auto policy.⁵

The underlying Complaints allege that the Letelliers' liability arises out of bodily injury sustained in the motor vehicle accident when D A operated a private passenger car. The grant of coverage in the Farmers policy is broad enough to encompass that alleged potential liability. The language of the policy is Farmers'. It is elementary that the language should be construed against Farmers and broadly in favor of coverage. The limitation Farmers asserts simply is not there in the policy language. No exclusion applies. Farmers has pointed to no exclusion that could conceivably apply. The trial court erred in declaring no coverage. This court should reverse.

⁵ Since the Letelliers' potential liability is real, that is their insurable interest. Quaderer v. Integrity Mutual Insurance Company, 263 Minn. 383, 116 N.W.2d 605, 609 (1962); United Services Automobile Association v. Howe, 208 F.Supp. 683, 685-86 (D. Minn. 1962).

II. THE MINNESOTA NO-FAULT ACT REQUIRES THAT THE LIABILITY COVERAGE OF AN AUTO POLICY BE BROAD ENOUGH TO INCLUDE THIS POTENTIAL LIABILITY.

As argued above in Section I, the plain language of the Illinois Farmers policy plainly provides coverage in favor of the Letelliers for the facts of the accident alleged here. The liability coverage as drafted by Farmers is broad enough to include the Letelliers' potential liability. The language of the Illinois Farmers auto policy must be that broad. The Minnesota No-Fault Act (Minn. Stat. § 65B.49, Subd. 3(2)) requires liability coverage to be that broad. That provision provides:

65B.49. INSURERS

Subdivision 1. **Mandatory offer of insurance benefits.** On and after January 1, 1975, no insurance policy providing benefits for injuries arising out of the maintenance or use of a motor vehicle shall be issued, renewed, continued, delivered, issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, under provisions approved by the commissioner, requiring the insurer to pay, regardless of the fault of the insured, basic economic loss benefits.

A plan of reparation security shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged, the term and limits of liability, and shall contain an agreement or endorsement that insurance is provided thereunder in accordance with and subject to the provisions of sections 65B.41 to 65B.71.

...

Subd. 3. **Residual liability insurance.**

...

(2) Under residual liability insurance the reparation obligor shall be liable to pay, on behalf of the insured, sums which the insured is legally obligated to pay as damages because of bodily injury and property damage arising out of the ownership, maintenance or use of **any motor vehicle**, including a motor vehicle permissively operated by an insured as that term is defined in section 65B.43, subdivision 5, if the injury or damage occurs within this state, the United States of America, its territories or possessions, or Canada. . . . (Emphasis ours)

The cited section, 65B.43, Subd. 5, provides as follows:

Subd. 5. **Insured.** "Insured" means an insured under a plan of reparation security as provided by sections 65B.41 to 65B.71 (i.e., the no-fault law), including the named insured and the following persons not identified by name as an insured while (a) residing in the same household with the named insured and (b) not identified by name in any other contract for a plan of reparation security complying with sections 65B.41 to 65B.71 as an insured:

- (1) a spouse,
- (2) other relative of a named insured, or
- (3) a minor in the custody of a named insured or of a relative residing in the same household with a named insured.

...

The named insured on the Illinois Farmers policy is Robert Letellier. Jennifer Letellier is his spouse. J Letellier is his minor daughter. All were living in the same household at the time of the accident. That statute required, and the Illinois Farmers policy provides, the residual liability insurance coverage for any liability that the Letelliers may have to the plaintiffs in the underlying lawsuits.

The Minnesota Supreme Court addressed the scope of a typical auto liability policy insuring agreement in the case of Progressive Specialty Insurance Company v. Widness, 635 N.W.2d 516 (Minn. 2001). The Widness court held that Progressive's policy provided liability coverage in favor of the named insured only while permissively driving any non-owned vehicle. However, the policy did not extend liability coverage to an unnamed teenaged additional insured while permissively driving a non-owned vehicle. The teenaged driver was a member of her mother's household. As such, she was an additional unnamed insured under the definition of insured in the No-Fault Act. She got in an accident while driving the neighbor's car with the neighbor's permission. The supreme court, reversing the court of appeals and the district court, held that Progressive owed no coverage to the teenager while driving the neighbor's car. Liability coverage as mandated by the No-Fault Act at that time was tied to specific insured vehicles. The No-

Fault Act in 2001 did not require any company to extend liability coverage to any insured for permissive use of vehicles owned by someone else. If companies choose to do so through an omnibus clause, that is permissive coverage, and they are permitted to limit that coverage to named insureds only. 635 N.W.2d at 521-22.

The Widness case might support Illinois Farmers' arguments, but Widness is no longer the law of Minnesota. The legislature effectively overruled it by amending Minn. Stat. § 65B.49, Subd. 3 in 2002. The Widness court quoted the statute that it interpreted as follows:

[Section 65B.49, Subd. 3(2) (2000)] requires a residual liability insurer to “pay, on behalf of the insured, sums which the insured is legally obligated to pay as damages because of bodily injury * * * arising out of the ownership, maintenance or use of a motor vehicle * * *.” 635 N.W.2d at 520.

The legislature overruled Widness by amending 65B.49, Subd. 3(2) to read as follows:

Under residual liability insurance the reparation obligor shall be liable to pay, on behalf of the insured, sums which the insured is legally obligated to pay as damages because of bodily injury and property damage arising out of the ownership, maintenance or use of any motor vehicle, including a motor vehicle permissively operated by an insured as that term is defined in section 65B.43, subdivision 5. . . . (Amendment Laws 2002, Chapter 234, Section 1 effective March 15, 2002.) (Underlining ours; amended terms given in bold.)

By virtue of the amendment in 2002, the supreme court's restrictive reading of liability coverage in Widness is no longer the law of Minnesota. The legislature decided that residual liability coverage under the No-Fault Act should be broader than the supreme court thought it should be. The Widness majority based its decision in part on the reasoning that:

The reading of section 65B.49, subd. 3(2), that is urged upon us by respondent **Widness** would untether liability insurance from the vehicle and make it dependent upon where the driver of an uninsured vehicle happens to live.

635 N.W.2d at 522. However, that is precisely what the legislature has done. Omnibus clauses had to some extent always untethered liability coverage from specifically designated autos.⁶ The legislature in its 2002 amendment has further untethered liability coverage from specific designated cars.

It is well established that the No-Fault Act is primarily concerned with no-fault benefits, UIM coverage and other first-party coverages. The No-Fault Act does not particularly address liability coverages. Lobeck v. State Farm Mutual

⁶ Even before 2002, liability coverage was imperfectly tethered to specifically described vehicles. By virtue of the omnibus clause, a named insured had liability coverage for any motor vehicle he or she permissively operated. The Widness court acknowledged that named insureds had such untethered liability coverage for any permissively operated vehicle. The Widness court ruled that the statute did not extend that coverage to unnamed, additional insureds such as resident teenagers.

Automobile Insurance Co., 582 N.W.2d 246, 250-51 (Minn. 1998); Toomey v. Krone, 306 N.W.2d 549, 550 (Minn. 1981) (“The Minnesota No-Fault Act has not altered the basic framework of liability law”). But it would be improper to conclude that Chapter 65B has nothing to do with liability coverage. It obviously does.

In 2002, the legislature untethered liability coverage from any vehicle specifically named in an automobile policy. The legislature broadened liability coverage to extend to liability arising out of operation of “any” motor vehicle. The Illinois Farmers policy issued to the Letelliers comports with that statutory requirement. The underlying plaintiffs allege that the Letelliers have liability arising out of D A ’s operation of his sister’s car. A ’s sister’s car falls within the scope of “any motor vehicle.” The policy, in conformity with the requirements of the No-Fault Act, provides coverage broad enough to cover that potential liability. The interest in protection against a lawsuit is the Letelliers’ insurable interest.

Automobile liability coverage has never been completely tethered to specifically identified vehicles. Auto policies have always been issued with omnibus clauses extending coverage to permissive use of additional vehicles. The supreme court’s 2001 Widness decision attempted to restrict the scope of the

protection provided by liability coverage, but the legislature saw things differently. The legislature promptly amended the statute in 2002 to further untether liability coverage from specifically identified vehicles. All policies issued in Minnesota must conform to that statute. The Illinois Farmers policy has a standard conformity clause acknowledging that its policy will conform to Minnesota law. The liability coverage required by the statute is broad enough to extend to the Letelliers' potential liability alleged by the underlying plaintiffs. The trial court erred in concluding otherwise. This court should reverse.

A. The legislature has plainly shown its intent to expand the scope of automobile liability coverage.

The current version of Minn. Stat. § 65B.49, Subd. 3(2), cited above, represents an amendment of statute by the legislature. The overall purpose of construing statutes is “to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16; Carlson v. Allstate Insurance Company, 749 N.W.2d 41, 46 (Minn. 2008). The legislature has the power to determine the law and the policy of the law. “The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.” Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 812 (1957). This court has no power to amend statutes, including Chapter 65B,

“under the guise of construction.” Vadnais v. State Farm Mutual Automobile Insurance Company, 354 N.W.2d 607, 609 (Minn.App. 1984). If the language of a statute is clear and unambiguous, the court should give effect to its plain meaning. State Farm Mutual Automobile Insurance Company v. Thunder, 605 N.W.2d 750, 753 (Minn.App. 2000). In construing a statute, the courts may not “read into a statute a provision that the legislature has omitted, either purposely or inadvertently.” Reiter v. Kiffmeyer, 721 N.W.2d 908, 911 (Minn. 2006); State Farm v. Thunder, 605 N.W.2d at 753.

In the present case, the district court read an additional limiting phrase into the statute that the legislature did not put there. The statute provides that a policy of automobile liability insurance issued in Minnesota must cover all insured persons for any legal obligation that they may incur to pay damages to somebody else arising out of the ownership, maintenance or use of “any motor vehicle.” (Underlining ours; amended terms given in bold) The district court read an additional limiting phrase into the statute, i.e., arising out of an **insured person’s** ownership, maintenance or use of any motor vehicle.

That additional limiting phrase is not in the statute as the legislature amended it. The district court committed the error of adding a provision that the legislature chose to omit. The district court had no power to do so even if the

legislature's omission is inadvertent. It is probably true that in more than 99% of cases arising out of motor vehicle accidents, the allegations of liability will arise out of an insured person's ownership, maintenance or use of a motor vehicle.

However, there are situations where the allegations of liability against insured persons arise out of operation of a motor vehicle by someone else. In this case, for example, there is the additional factor of Minn. Stat. § 340A.90 which means that the allegations of liability against the Letelliers certainly were strong enough to survive dismissal. It turns out they were not strong enough to withstand summary judgment, but no one knew that at the beginning of the underlying lawsuits.

The transcript of the motion hearing shows that the trial court had plainly read § 65B.49, Subd. 3(2) to mean that any use of a motor vehicle insured by a policy must be the insured's use of the vehicle. (See Transcript at 22, 24) In other words, the trial court read a limitation into the statute which simply is not there. The statute does not say that liability coverage must extend to an insured's legal obligation to pay arising out of **an insured person's operation** of a motor vehicle. The limiting phrase simply is not there, as counsel pointed out. (See Transcript at 24) The trial court continued with this line of reasoning in its order and memorandum. ("The term 'any motor vehicle' therefore applies to any motor

vehicle that an insured individual is driving, and not as the Letelliers argue to any motor vehicle whether or not they are driving it or own it.”) (ADD10)

The court erroneously read language limiting language into the statute that simply is not there. Contrary to the trial court’s statement in the memorandum, the Letelliers were not arguing for coverage for every vehicle in the state. The Letelliers’ argument adds an important limiting factor, that coverage is extended in favor of the Letelliers to anybody’s use of any motor vehicle as long as someone is claiming that the Letelliers should be liable because of that use of that motor vehicle.

The Letelliers should have had coverage under their automobile policies issued by Illinois Farmers for the simple reason that the underlying Complaints alleged potential liability against them arising out of the operation of a motor vehicle. It was not an insured person’s operation of the motor vehicle, but the statute does not require that. For that matter, neither does the Illinois Farmers policy. In finding no coverage, the district court had to add an additional limiting factor to its construction of the statute, i.e., that the legislature could not have intended to extend coverage to insured persons for allegations of liability arising out of a non-insured person’s operation of his own (or his sister’s) car. But the legislature did not see fit to add that limiting condition. The district court added

what the legislature chose to omit. That was error which this court should correct.

III. THE SOCIAL HOST LIABILITY STATUTE IS A DEVICE TO SHIFT LIABILITY FOR MOTOR VEHICLE ACCIDENTS FROM THE DRIVER TO SOMEONE ELSE.

The person who drives a motor vehicle negligently thereby causing an accident is always the at-fault primary person. The law has developed doctrines or legal fictions to shift responsibility for negligent driving to someone other than the driver. These legal devices include respondeat superior, shifting responsibility for a driver's negligent driving to an employer, vicarious liability, to compel owners of vehicles to accept liability for negligent driving, and commercial vendors of alcoholic beverages who can share the fault of an intoxicated driver who causes an accident. There may be other examples.

Minn. Stat. § 340A.90 is another device to shift responsibility for negligent driving to someone other than the driver. The statute has been the law of Minnesota for only about 10 years. It is reasonably clear that no one has given much thought to the question of how to insure potential liability under the statute.

It would be unreasonable for this court to take the position that there should be no coverage for alleged liability under § 340A.90 because the statute creates the cause of action for knowing or reckless conduct, but not mere negligence. Under this view, if a plaintiff succeeds in proving liability under the statute, the

plaintiff will also have proven conduct so contrary to public policy that no one should get coverage for it as a matter of law; if the homeowner succeeds in defending himself from the claim, then there is no liability.

However, it can cost thousands of dollars to defend oneself from a claim brought under the statute. The Letelliers successfully defended against such a claim because they were able to show their actions were not knowing or reckless, and probably not even negligent. (A61-62) They had a defense provided by their homeowner insurer, Farmers Insurance Exchange, but if Farmers Insurance Exchange had declined to provide the defense, it would have cost the Letelliers thousands of dollars. That would amount to an extremely high penalty for the parental decision to have children who eventually grow into teenagers who do stupid things on the way towards becoming adults. That should not be the policy of the State of Minnesota. In the Widness case cited above, the Minnesota Supreme Court construed the No-Fault Act narrowly in such a way as to amount to a penalty on the parents of teenage drivers. The legislature promptly overruled the decision.

IV. SINCE FARMERS WRONGFULLY DENIED THE DUTY TO DEFEND THE LETELLIERS, IT IS LIABLE FOR THE LETELLIERS' ATTORNEY'S FEES FOR BRINGING THIS DECLARATORY JUDGMENT ACTION TO ESTABLISH COVERAGE.

When they received service of the underlying Complaints, the Letelliers brought them to their Farmers agent with a request for a defense. Someone at Farmers decided to provide the Letelliers a defense under the homeowners' insurance subject to a reservation of rights. Illinois Farmers, their auto insurer, denied coverage altogether and did nothing. Illinois Farmers did not agree to provide a defense. They did not agree to participate in the defense that Farmers Insurance Exchange was already providing. Illinois Farmers cut the Letelliers loose and left them to the vagaries of litigation notwithstanding that the Letelliers had purchased automobile liability coverage that provided coverage for the plaintiff's claims.

This refusal was wrongful, as argued above. The Illinois Farmers policy is broad enough to provide coverage in favor of the Letelliers. The Illinois Farmers policy must be so broad by virtue of Minn. Stat. § 65B.49, Subd. 3(2). Illinois Farmers' refusal to defend was wrongful.

Meanwhile, Farmers Insurance Exchange was defending, but doing so under a reservation of rights. Farmers Insurance Exchange commenced this declaratory

judgment action for the purpose of determining that it provided no coverage under the Letelliers' homeowners' policy and was entitled to withdraw from the defense. At the time that Farmers Insurance Exchange commenced the declaratory action, no one knew that the proceedings would result in an order finding no coverage under the homeowners' policy at about the same time as summary judgment in favor of the Letelliers in the underlying matter was granted. The Letelliers might not have received summary judgment in the underlying matters, and the Insurance Exchange might have been entitled to withdraw from the defense, leaving the Letelliers in a position of having to fend for themselves. Under those circumstances, in order to protect themselves, the Letelliers were compelled to bring this declaratory action against their auto insurer by third-party complaint in order to get the coverage they had purchased in the event the homeowners' insurer was entitled to withdraw.

Therefore, the Letelliers are entitled to obtain an award of attorney's fees incurred in the declaratory judgment action for the purpose of determining Illinois Farmers' duty to defend which it wrongfully denied. Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640, 647 (1966). ("Legal fees incurred in the declaratory judgment action were damages arising directly as the result of the breach [denial

of duty of defense]. We think that the injured party in an action of this kind ought to be permitted to recover whatever expenses he has been compelled to incur in asserting his rights, as a direct loss incident to the breach of contract.”)

The fact that Farmers Insurance Exchange picked up the defense does not change the result. The fact that an insured has no out-of-pocket loss for cost of defense does not preclude an award of fees under Morrison v. Swenson. This court allowed an award of declaratory judgment fees to an insured who had no out-of-pocket cost of defense in Redeemer Covenant Church of Brooklyn Park v. Church Mutual Insurance Company, 567 N.W.2d 71 (Minn.App. 1997).

Redeemer Covenant Church was sued in more than a dozen underlying matters by youths of the church alleging that the minister had induced them to engage in improper licentious behavior. Redeemer had four insurers. Three of them (later reduced to two) agreed to participate in a joint defense arrangement. Atlantic Mutual denied all coverage and refused to participate in the defense. This court found that Atlantic had wrongfully breached the duty to defend and awarded Redeemer 100% of the fees it incurred in the declaratory judgment action even though the three other insurers were raising their own coverage issues. More to the point, the court allowed the insured Redeemer to recover its costs in the

declaratory action even though it had incurred no out-of-pocket expenses in defending the underlying matters. The court simply held as follows:

When an action leads to a determination that an insurer breached its duty to defend, the insured may recover from the insurer the legal fees incurred in bringing that action. [citation omitted] Our determination that Atlantic breached its duty to defend imposes on Atlantic the obligation to pay Redeemer's attorney's fees. Redeemer Covenant, 567 N.W.2d at 82.

The fees that Atlantic was obligated to pay were 25% of the cost of defending the underlying matters and 100% of the declaratory action fees. Id.

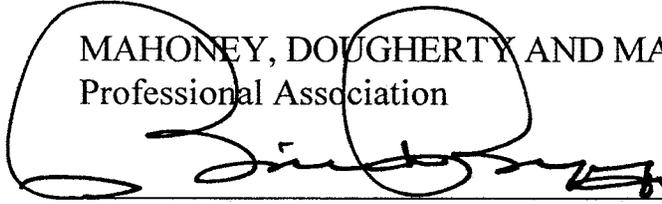
The same rule applies to Illinois Farmers in the present case. Illinois Farmers wrongfully refused to defend thereby leaving the Letelliers to the hazards of litigation. If the homeowners' insurer had succeeded in withdrawing the defense before the underlying litigation concluded, the Letelliers would have been on their own. This court should reverse and remand to the district court to award attorney's fees upon a proper motion for that relief.

CONCLUSION

For all the above reasons, this court should reverse the district court and remand for further proceedings, including a determination of attorney's fees.

Dated: February 23, 2012.

MAHONEY, DOUGHERTY AND MAHONEY
Professional Association

A handwritten signature in black ink, appearing to read 'Richard P. Mahoney', is written over a horizontal line. The signature is somewhat stylized and cursive.

Richard P. Mahoney #6662X

Victor Lund #160076

Attorneys for Appellants

801 Park Avenue

Minneapolis, MN 55404

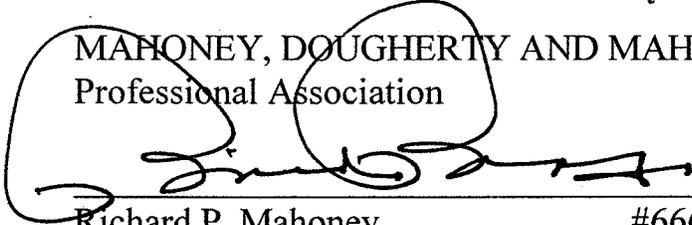
(612) 339-5863

CERTIFICATE OF WORD COUNT

I certify that the foregoing brief contains 8,156 words, as calculated by WordPerfect 13.

Dated: February 23, 2012.

MAHONEY, DOUGHERTY AND MAHONEY
Professional Association



Richard P. Mahoney #6662X

Victor Lund #160076

Attorneys for Appellants
801 Park Avenue
Minneapolis, MN 55404
(612) 339-5863