

A12-0453

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State of Minnesota
In Court of Appeals

Jonathan Schupp and Northern Pine Lodge, Inc.,
Respondents,

v.

United Fire & Casualty Company,
Appellant,

and

Ross Nesbit Agencies, Inc., and
Itasca Region Insurance Agency, Inc.,
Defendants.

**BRIEF AND ADDENDUM OF APPELLANT
UNITED FIRE & CASUALTY COMPANY**

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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).

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3 New Appleman on Insurance Law Library Edition § 16.02[3][a][vi][A] 24

4 Bruner & O’Connor, Construction Law § 11.6 (2010) 2

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STATEMENT OF THE ISSUES

- I. Where the terms of the Commercial General Liability Policy issued to the insured do not provide liability insurance for the insured's owned automobiles, is the insurance carrier entitled to summary judgment dismissal of the lawsuit brought against it by its insured seeking liability insurance coverage as a result of an August 2009 auto accident involving an insured owned automobile, or is the insurer estopped to deny liability insurance coverage for this accident, which estoppel is premised on Minn. Stat. § 60A.08?

The issue was raised in Respondents Jonathan Schupp and Northern Pine Lodge, Inc. and Appellant United Fire & Casualty Company's cross-motions for summary judgment. (Add. 1; A. 246, 248). The trial court held Respondents were entitled to summary judgment and denied summary judgment to Appellant United Fire. (Add. 1).

Eisenschenk v. Millers' Mut. Ins. Ass'n of Illinois,
353 N.W.2d 662 (Minn. Ct. App. 1985), *rev. denied*

Swanson v. Brewster,
784 N.W.2d 264 (Minn. 2010)

Bobich v. Oja,
258 Minn. 287, 104 N.W.2d 19 (1960)

- II. Did the trial court abuse its discretion in granting Respondents attorney's fees and in the amount of \$122,317, plus interest, costs and disbursements?

This issue was raised in Respondents' motion for attorney's fees and costs. (A. 250, 252). The trial court so granted over Appellant's objections. (Add. 17, 26).

Foster v. Foster,
802 N.W.2d 755 (Minn. Ct. App. 2011)

St. Paul Fire & Marine Ins. Co. v. Seagate Tech, Inc.,
570 N.W.2d 503 (Minn. Ct. App. 1997)

STATEMENT OF THE CASE AND FACTS

Since 2003, Appellant/Defendant United Fire & Casualty Company (United Fire) has insured Respondent/Plaintiff Northern Pine Lodge, Inc. (NPL) pursuant to a standard insurance policy form developed by the Insurance Services Office (ISO) which policy excludes liability coverage for automobiles pursuant to an “Aircraft, Auto or Watercraft” exclusion – exclusion 2.g. (hereinafter auto exclusion 2.g.).¹ (Appellant’s Appendix [A.] 4, 5, 8, 80). The auto portion of that exclusion has not changed since the Comprehensive General Liability (CGL) coverage was first issued to NPL by United Fire in 2003.² (A. 83, 85, 112, 115, 127, 130).

NPL nonetheless asserts that as a result of an August 2009 auto accident, NPL was entitled to liability coverage from United Fire, but is not subject to auto exclusion 2.g. because a paper copy of that CGL coverage form containing both the liability insuring agreement and its exclusions was not provided to NPL with its 2009 renewal. (A. 56).

¹ As with many types of insurance, many carriers offering CGL policies utilize standardized language for some of their policy’s language. Several organizations, including the Insurance Services Office (ISO), prepare and sanction such language, revising it from time to time. See 4 Bruner & O’Connor, Construction Law § 11.6 (2010) (explaining ISO as an insurance industry supported organization with a “primary mission” of “develop[ing] certain standard insurance policies”); Levin v. Aetna Cas. & Sur. Co., 465 N.W.2d 99, 100-101 (Minn. Ct. App. 1991), *rev. denied* (discussing ISO). The policy at issue here contains the language initially in ISO Form CG 00 01 10 01 for the Coverage A Insuring Agreement and exclusions, which language was not modified in ISO Forms CG 00 01 12 04 and CG 00 01 12 07. (A. 80; compare A. 95, 98 with A. 112, 114 and A. 127, 130).

² Exclusion 2.g. was later amended by endorsement CG7094 (06-99) as to certain watercraft. (Add. 29, 31). For an additional premium, exclusion 2.g. of Coverage A (Section 1) no longer applies to any watercraft owned or used by or rented to NPL, which watercraft are shown on the schedule. (Id.)

There is no dispute such coverage form (CG 00 01 12 07) had been previously provided to NPL and with the 2009 renewal NPL was informed that the coverage form again was part of NPL's policy. (A. 81, 83, 85, 127, 144, 145). In addition, NPL was informed with that renewal that NPL could access its insurance policy containing this coverage form on United Fire's website. (Add. 29, 41).

The trial court, the Honorable George F. McGunnigle, granted Respondents/Plaintiffs Jonathan Schupp (Schupp) and NPL³ summary judgment, ruling that auto exclusion 2.g. contained in the 2009 policy issued to NPL by United Fire was nullified for failure to comply with Minn. Stat. § 60A.08, subd. 1. (Add. 7-8). That statute states:

A statement in full of the conditions of insurance shall be incorporated in or attached to every policy, and neither the application of the insured nor the bylaws of the company shall be considered as a warranty or a part of the contract, except in so far as they are incorporated or attached.

The trial court further held that the policy was not renewed in the manner authorized by Minn. Stat. § 60A.08, subd. 3, so as to be excepted out of the requirements of subd. 1.⁴ (Add. 10-11).

³ When Schupp and NPL are collectively referred to, they will be referred to as Plaintiffs.

⁴ “**Subd. 3. Renewal; new policy.** Any insurance policy terminating by its provisions at a specified expiration date or limited as to term by any statute and not otherwise renewable may be renewed or extended at the option of the insurer, at the premium rate then required therefor, for a specific additional period or periods by a certificate, and without requiring the issuance of a new policy. The insurer must also post the current policy form on its Web site, or must inform the policyholder annually in writing that a copy of the current policy form is available on request.”

United Fire challenges those legal rulings and the resulting grant of summary judgment to Plaintiffs, including the award of attorney's fees. It is United Fire's position that it is entitled to summary judgment, resulting in a dismissal of this action against it.

A. Itasca Region Handled All of NPL and Schupp's Insurance Coverages From 1986 to 1990 and Again in 2000.

NPL is an Iowa corporation that owns and operates a resort in Hubbard County, Minnesota. Schupp owns all shares of NPL and is its general manager. (A. 45-46). Schupp is the person solely responsible for purchasing NPL's insurance. (Schupp Depo., p. 14; A. 208).

Defendant Itasca Region Insurance Agency, Inc. (Itasca) handled all of NPL and Schupp's insurance coverages from 1986 to 1990 and again for the year 2000. (A. 48; Engst Depo., pp. 28-29, 156; A. 169-71). The CGL policies procured by Itasca for NPL did not provide liability insurance coverage for any autos owned by NPL. (Engst Depo., pp. 156-57; A. 171-72). Nonetheless, Schupp assumed they did, even though he admits no one made such representation to him. (Schupp Depo., pp. 67-68; A. 209-10).

After 1990, Itasca continued to be NPL/Schupp's insurance agent, but only handled their auto and health insurance coverages. (A. 49).

B. NPL's 1989 Plymouth Voyager's Insurance Was Procured by Itasca Region.

NPL purchased a 1989 Plymouth Voyager van in 1997. (Goodwin Affidavit Ex. 9 – Certificate of Title; A. 149). In order to write auto insurance coverage, Itasca obtains a host of information, including information as to the vehicle's titled owner, the make and

model of the vehicle to be insured, the use to be made of that vehicle, annual mileage it is to be driven, etc. (Engst Depo., pp. 165-67; A. 175-77).

The Plymouth Voyager is titled in the name of NPL, but Schupp used the vehicle mainly for his personal purposes since the time of its purchase. (Schupp Depo., pp. 83-84; A. 214-15). Itasca believed the vehicle was titled to Schupp personally. (Engst Depo., pp. 163-64; A. 173-74). Itasca did not require NPL/Schupp to provide title documentation. (Engst Depo., p. 167; A. 177).

Plaintiffs followed Itasca's recommendations as to auto coverage and procured liability limits of \$100,000 per person/\$300,000 per occurrence for the vehicle. (A. 51).

C. Beginning in 2003, NPL Procured General Liability Insurance Through Ross Nesbit Agencies.

Beginning in 1990, Schupp and NPL (with the exception of year 2000) obtained property and general liability insurance for NPL through other insurance agents. (A. 49; Engst Depo., pp. 28-29, 156; A. 169-70, 171). Beginning in 2003, Schupp, on behalf of NPL, procured its general liability insurance through Defendant Ross Nesbit Agencies, Inc. (Ross Nesbit), specifically agent Tom Rykken (Rykken). (A. 51-52).

United Fire CGL policies are sold through independent agents, such as Ross Nesbit. (A. 79). United Fire does not provide auto liability coverage in its standard CGL coverage; an insured would need to specifically apply for and purchase such coverage. (A. 79). The United Fire CGL policy also does not provide for umbrella coverage. (Id.) Such also requires a separate application process and policy purchase. (Id.) Rykken

explained that generally an insurance company will not write umbrella coverage on an auto where it does not write its primary coverage. (Rykken Depo., pp. 115-116; A. 193-94).

D. Plaintiffs Did Not Seek Auto Insurance Coverage From Ross Nesbit.

Schupp came to Rykken in 2003 requesting quotes on CGL coverage for NPL, first party property coverage for certain NPL buildings and homeowner's liability coverage for Schupp. (A. 154, 158). In applying for such coverages, a detailed application form was filled out and submitted to United Fire. (Goodwin Affidavit Ex. 3; A. 148).

Rykken, from his discussions with Schupp, concluded Schupp was knowledgeable about NPL's previous CGL coverage procured through Itasca. (Rykken Depo., p. 105; A. 191). NPL and Schupp did not seek automobile coverage through Rykken and no information about NPL or Schupp's vehicles was provided to Rykken. (Application for Commercial Insurance, Goodwin Affidavit Ex. 3; A. 148; A. 154; Schupp Depo., p. 91; A. 221; Rykken Depo., pp. 104-105; A. 190-91). Rykken received no auto information because "[Schupp] wasn't interested in having me quote his autos." (Rykken Depo., pp. 104-105; A. 190-91). Schupp told Rykken he used another insurance agency to provide him and NPL with automobile and health insurance coverage. (*Id.*, p. 116; A. 194; Nesbit Answer to Interrogatory No. 2; A. 158). In seeking a quote from United Fire, Rykken so informed United Fire – "He has his autos and W/C exposure placed elsewhere" (A. 154).

E. Beginning in 2003, NPL Purchased CGL Coverage From United Fire Which Excludes Auto Accident Coverage.

Through Ross Nesbit, NPL purchased a CGL policy issued by United Fire, Policy No. 85304136. (A. 3, 80, 146). The CGL policy issued begins with a Declarations Page. (A. 3). NPL was informed on the Declarations Page that coverage would begin at 12:01 a.m. on July 2, 2003 to “07-02-2004 And for successive policy periods as stated below.” (A. 3). Below, United Fire stated it would provide the insurance described in this policy “in return for the premium and compliance with all applicable policy provisions.” United Fire told NPL “[i]f we elect to continue this insurance we will renew this policy if you pay the required renewal premium for each successive policy period, subject to our premiums, rules and forms then in effect. You must pay us prior to the end of the current policy period or else this policy will terminate after any statutorily required notices are mailed to you.” (Id.)

The Declarations Page is followed by a “Forms Supplemental Declarations,” which lists the forms then in effect that make up the insured’s policy and are listed and identified by form number. (A. 4). The policy forms that correspond to those numbers were provided to NPL. (A. 79-80).

Form CG 00 01 10 01 is the standard Commercial General Liability Coverage Form identical to that issued by ISO and is 16 pages in length. (A. 5, 80). The policy issued contains the language of ISO Form CG 00 01 10 01 for Coverage A Bodily Injury

and Property Damage Liability insurance coverage. (A. 5). Coverage A's insuring agreement states in pertinent part:

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

(A. 5). Coverage A also contains the standard ISO exclusion 2.g. which excludes from Coverage A Liability Coverage bodily injury or property damage arising out of auto accidents. (A. 6, 8). It states:

2. Exclusions.

This insurance does not apply to:

...

- g. Aircraft, Auto or Watercraft.

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading"

(A. 6, 8). The term "auto" is a defined term and "means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment" (A. 16). Who is an insured is set out in Section II of the policy form.

(A. 13).

Under Section IV – Commercial General Liability Conditions, as modified by "Minnesota Changes – Cancellation and Nonrenewal" endorsement, the insured was informed when NPL would not renew NPL's CGL coverage. (A. 16, 23). The policy states:

D. Nonrenewal.

If we decide not to renew this policy, we may do so by giving the first Named Insured and any agent written notice of our intent not to renew at least 60 days before the expiration of this policy.

(A. 23).

Upon receipt of NPL's insurance policy containing Form CG 00 01 10 01, Schupp read through it. The United Fire policy provided contained the coverage Schupp thought he was buying for NPL. (Schupp Depo., p. 89; A. 219).

F. NPL Renewed Its CGL Coverage With United Fire Annually Through July 2, 2010, Which Renewals Contained the Same Auto Exclusion 2.g.

NPL thereafter renewed its CGL policy with United Fire annually. (A. 159; Schupp Depo., p. 89; A. 219). At renewal time, Rykken would contact Schupp and ask if NPL wanted to renew. To renew, NPL would not fill out a new application. Rykken would make oral inquiry of Schupp if there was anything new at the resort, such as a new building, etc. (Schupp Depo., pp. 90-91; A. 220-21). Unless the insured communicates otherwise, Rykken assumes the insured wants the same coverage on renewal. (Rykkens Depo., p. 140; A. 202). If Rykken thought the insured's policy limits were low or there was a new type of endorsement, Rykken would discuss it with the insured before renewal.

(Id.)

Schupp admits he would contact Rykken if anything changed at the resort. (Schupp Depo., p. 82; A. 213). Schupp recalled he did inquire on renewal about adding coverage for waterskiing. (Id., p. 91; A. 221). Schupp did not inquire about adding auto

coverage and accordingly did not supply Rykken with any information about NPL vehicles. (Id., p. 91; A. 221).

On renewal, United Fire provides either directly to its insured or to the insured's agent the Declarations Page and a copy of the policy provisions that have been changed, modified or added on renewal. (A. 79). Upon renewal, policy provisions that had changed with renewal or otherwise modified the policy were identified by an asterisk next to the form number followed by a brief description. (Add. 29; A. 79). Copies of the forms that were so delineated were provided to the insured on renewal. (A. 79). Forms listed that were not delineated with an asterisk are forms that had not changed from the previous policy period. They were incorporated by reference by their form number and brief description also contained on the Supplemental Declarations sheet. (Id.)

Each renewal policy issued contained the same policy number – 85304136 – as established in 2003. (Add. 28; A. 3, 83). And each policy informed NPL regarding renewal as stated when United Fire initially issued the policy in 2003. (Id.)

Updated versions of Commercial General Liability Coverage Form CG 00 01 10 01 were provided to NPL by United Fire through Ross Nesbit on May 30, 2005 (CG 00 01 12 04) and May 29, 2008 (CG 00 01 12 07). (A. 81, 112, 127). The auto exclusion contained in those subsequent CGL coverage policy forms remained unchanged from the Policy Form CG 00 01 10 01 version, as did the policy's Insuring Agreement A. (Id.)

As part of the 2009-2010 policy, NPL was specifically informed by policy provision form ST 1644 (01-09) that NPL's insurance policy was available to it on United Fire's website. (Add. 29, 41). The insured was provided with online access at www.ufgpolicy.com, where the insured "24 hours a day, seven days a week," could "[v]iew your insurance policy." (Id.)

NPL's insurance agency Ross Nesbit elected to have all forms and declarations sent to it for delivery to NPL. (A. 80). Every year on renewal, except for 2004, the renewal policy was sent by United Fire to Ross Nesbit, NPL's insurance agent, for delivery to NPL. (A. 80-81, 86-94). In 2004, the policy was sent directly by United Fire to NPL. (Id.)

On renewal, Rykken initially tried to meet with Schupp to go through NPL's renewal policy. Schupp generally chose not to meet with Rykken. (Rykkens Depo., pp. 124-25; A. 196-97). During the last four years of renewal, Rykken would call Schupp upon receipt of the renewal policy. Schupp asked for the policy to be mailed by Rykken to NPL. (Id., pp. 125, 142-43; A. 197, 204-05).

G. The CGL Policy Issued for Policy Period July 2, 2009 to July 2, 2010 Contained Auto Exclusion 2.g.

NPL again renewed its CGL policy with United Fire in 2009 for the policy period beginning July 2, 2009. (Add. 28). NPL received as part of its renewal package the Declarations Page, including "Forms Supplemental Declarations," which lists Form CG0001 (12-07) Commercial General Liability Coverage Form as the applicable coverage. (Add. 28-29). That coverage form is the same as that provided to NPL in

2008, and as was true in all previous policy periods, it contains auto exclusion 2.g.

(A. 83, 85, 127, 130). A copy of that form was not included with the renewal. (Add. 28-29).

NPL was also provided a new "Policy website stuffer" Form ST 1644 (01-09), which informed NPL it could view its policy, billing and claims information online. (Add. 29, 41). The website and a phone number, if assistance was needed with access, were provided. (Id.) That form was provided with renewal. (Id.)

Accompanying that renewal package was a letter from Rykken, NPL's agent, to Schupp stating:

Thank you for allowing Nesbit Agencies, United Fire and myself the opportunity to again take care of your business insurance needs for the 2009 season. Your insurance policy is enclosed. Renewal is a good time to examine your limits and coverages to make sure they meet your needs and that no item has been omitted.

If there are any portions of the policy that you do not understand, please feel free to call me for an explanation.

(A. 65).

H. Plaintiffs Seek Coverage for an August 12, 2009 Auto Accident Under United Fire's Policy.

In 2009, Schupp/NPL again purchased their auto insurance through Itasca, which procured an auto policy on NPL's 1989 Plymouth Voyager through Allstate. (A. 51; Goodwin Affidavit Ex. 10; A. 149). This Allstate auto policy, with \$100,000/\$300,000 liability limits was in force and effect on August 12, 2009. (Id.)

On that day, while Schupp was on his way to Hazelden Treatment Center to see his wife and while driving the Plymouth Voyager, Schupp was involved in a collision with a Honda motorcycle. (A. 53-54; Schupp Depo., p. 110; A. 227). As a result, the motorcycle occupants were killed. Wrongful death claims were brought against both Schupp and NPL. (*Id.*) After the accident, Plaintiffs asserted they were entitled to additional liability insurance coverage for this accident under the CGL policy purchased by NPL and issued by United Fire. (A. 239).

Based on the terms of the NPL policy issued by United Fire, United Fire denied coverage. (A. 241, 243). Specifically, “[t]he loss resulting from the August 12, 2009 accident arises from the use or ownership of an auto.” There is no coverage for this loss under the United Fire policy. (A. 81, 241, 243). Plaintiffs, in response, brought this lawsuit asserting a complaint for declaratory relief and damages against United Fire, Ross Nesbit and Itasca. (A. 45).

I. Plaintiffs Seek Estoppel and a Declaration That Exclusion 2.g. Cannot Be Relied on by United Fire to Deny Coverage.

In Plaintiffs’ Complaint Count One, entitled “Against United Fire – Estoppel and Declaratory Relief Due to Lack of Cited Exclusion in Delivered Policy,” Plaintiffs assert that “Policy #85304136, as delivered to [Plaintiffs] in July 2009, did not contain that portion of the policy which would have included Exclusion 2.g.” Because the policy as delivered “did not include the exclusion cited by United Fire as the basis for denying coverage, the equitable doctrine of estoppel precludes United Fire from asserting the exclusion.” (A. 56). Plaintiffs contended they were “entitled to judgment pursuant to

Minn. Stat. § 555.01, *et seq.*, declaring that exclusion 2.g. does not apply and Policy #85304136 provides coverage to Schupp and NPLI for claims arising from the 8/12/2009 accident” (Id.)

In Count Two, Plaintiffs asserted if the court denied relief sought by Plaintiffs in Count One, Plaintiffs then claimed Itasca had a fiduciary duty to Plaintiffs and Itasca caused harm because Plaintiffs did not have sufficient auto liability insurance. (A. 56-58). In Count Four, Plaintiffs asserted essentially the same claim against Itasca as a “negligent failure to procure appropriate insurance coverage.” (A. 59-60).

In Counts Three and Five against Ross Nesbit, Plaintiffs asserted claims of breach of fiduciary duty and negligent failure to procure appropriate insurance coverage. (A. 58-59, 60-61). Plaintiffs also asserted that because of Ross Nesbit’s actions, they did not have sufficient liability insurance. (Id.) In Count Six, also against Ross Nesbit, Plaintiffs assert breach of contract, asserting “Nesbit’s failure to recommend or procure automobile insurance liability with limits consistent with general liability limits of \$2,000,000 for automobiles either owned and/or used by the resort, was a breach of contract with Plaintiffs.” (A. 61).

In Plaintiffs’ prayer for relief, Plaintiffs demanded judgment against United Fire “for declaratory relief pursuant to Minn. Stat. § 555.01, *et seq.*, declaring that Exclusion 2.g. does not apply and Policy #85304136 provides coverage to Schupp and NPLI for claims arising from the 8/12/2009 accident.” (A. 62). Plaintiffs also asserted

entitlement to “attorney’s fees, costs and disbursements incurred in establishing coverage under the United Fire & Casualty Company policy.” (Id.)

J. Both Plaintiffs and United Fire Seek Summary Judgment.

Plaintiffs then brought a motion for summary judgment against United Fire, now asserting that Minn. Stat. § 60A.08 precludes United Fire from relying on auto exclusion 2.g. Plaintiffs asserted, however, they could rely on the insuring agreement contained in that same policy and were therefore entitled to a declaration of liability coverage for the 2009 auto accident. (A. 246; Plaintiffs’ Memorandum Supporting Motion for Summary Judgment Against Defendant United Fire & Casualty Company, p. 9, dated June 9, 2011).

In response, United Fire asserted Plaintiffs may not use the doctrine of estoppel to write automobile coverage into the CGL policy. United Fire is and was in compliance with Minnesota law. United Fire asserted that Plaintiffs’ motion for summary judgment should be denied and United Fire’s motion for summary judgment of dismissal be granted. (A. 248).

K. The Trial Court Grants Summary Judgment to Plaintiffs.

Before the trial court ruled on the cross motions for summary judgment, Plaintiffs settled their claims against Itasca. (A. 262). The trial court, based on the above facts, then ruled Plaintiffs were entitled to summary judgment and denied summary judgment to United Fire. (Add. 1). It held as a matter of law that the coverage issued by United Fire is not subject to auto exclusion 2.g. (Add. 15).

The trial court based its ruling on its interpretation of Minn. Stat. § 60A.08, subd. 1, ruling that United Fire did not comply with the requirements of that statute. (Add. 7-8). According to the trial court, to be effective every policy form on every renewal, and regardless of no coverage changes, must be physically presented to the insured to be effective. (Add. 8). And according to the trial court, “[n]ullification [of auto exclusion 2.g.] is the proper remedy for noncompliance.” (Add. 8-9).

The trial court further ruled that the policy renewal was not exempted from operation of this statute by operation of Minn. Stat. § 60A.08, subd. 3. (Add. 10-11). Plaintiffs were therefore entitled to a “declaration that the policy in force on August 12, 2009 is not subject to Exclusion G.” (Add. 12). Based on this ruling, the claims against Ross Nesbit were declared moot. (Add. 15).

On subsequent motion, Plaintiffs were awarded attorney’s fees against United Fire for prosecuting this declaratory judgment action against United Fire and Ross Nesbit, as well as those fees incurred in the underlying auto accident case brought against Plaintiffs. (Add. 17, 23). The trial court so held because United Fire “improperly denied coverage” based on auto exclusion 2.g. (Add. 23). Judgment, as amended, was awarded against United Fire in the amount of \$122,317.00 together with interest, plus costs and disbursements in the amount of \$2,280.09. (Add. 27).

United Fire challenges the final judgment, and as amended, and filed this appeal. (A. 254).

ARGUMENT

I. THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY ISSUED TO NPL BY UNITED FIRE DOES NOT PROVIDE LIABILITY INSURANCE COVERAGE FOR PLAINTIFFS' AUGUST 12, 2009 AUTO ACCIDENT.

A. This Court Reviews the Grant of Summary Judgment De Novo.

This case comes before this Court on a grant of summary judgment to Plaintiffs. Summary judgment may be granted only when the material facts of record “show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.03; Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). All doubts and factual inferences are to be resolved in favor of the nonmoving party. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981). Whether a genuine issue of material fact exists and whether the trial court erred in its application of the law is reviewed by this Court de novo. In re Collier, 726 N.W.2d 799, 803 (Minn. 2007).

Interpretation of an insurance policy and the existence of a duty to defend or indemnify an insured under that policy are questions of law, which courts review de novo. Auto-Owners Ins. Co. v. Todd, 547 N.W.2d 696, 698 (Minn. 1996).

Issues of interpretation and application of Minnesota statutes are also questions of law which this Court reviews de novo. Milner v. Farmers Ins. Exchange, 748 N.W.2d 608, 613 (Minn. 2008). The aim “is to give effect to the intention of the legislature in drafting the statute.” Id. The court is to “construe words and phrases according to their plain and ordinary meaning.” American Family Ins. Group v. Shroedl, 616 N.W.2d 273,

277 (Minn. 2000); see also Minn. Stat. § 645.08. “A statute should be interpreted, whenever possible, to give effect to all of its provisions” Shroedl, 616 N.W.2d at 277. In reading and construing a statute, it is to be read as a whole. Id. “Finally, courts should construe a statute to avoid absurd results and unjust consequences.” Id. at 278; see Minn. Stat. § 645.17.

Here, the trial court committed error in granting summary judgment to Plaintiffs and denying summary judgment to United Fire. United Fire, not Plaintiffs, was entitled to summary judgment because (1) the clear terms of NPL’s CGL policy do not provide liability coverage for Plaintiffs’ automobiles, (2) estoppel cannot be used to enlarge the coverage of an insurance policy and (3) United Fire complied with Minnesota law.

B. Based on the Terms of United Fire’s Policy, There Is No Coverage for Plaintiffs’ August 2009 Auto Accident.

General principles of contract interpretation apply to insurance policies. Lobeck v. State Farm Mut. Auto. Ins. Co., 582 N.W.2d 246, 249 (Minn. 1998). When insurance policy language is clear and unambiguous, “the language used must be given its usual and accepted meaning.” Bobich v. Oja, 258 Minn. 287, 104 N.W.2d 19, 24 (1960). Moreover, “[e]xclusions in a policy . . . are as much a part of the contract as other parts thereof and must be given the same consideration in determining what is the coverage.” Id. at 24-25.

United Fire’s insurance policy issued to NPL for the 2009-2010 policy period, as was true in the CGL policies issued by it to NPL in the preceding years, contained auto exclusion 2.g. (A. 130). This exclusion was a part of the exclusions section of all issued

CGL policies to NPL and was clearly designated as such. See Bd. of Regents v. Royal Ins. Co. of Am., 517 N.W.2d 888, 891 (Minn. 1994) (rejecting argument pollution exclusion was hidden or obscure when it was clearly designated as such in the policy). This exclusion is as much a part of an insurance policy as its other parts.

It goes without saying that a liability insurer's duty to defend an insured is contractual. Meadowbrook, Inc. v. Tower Ins. Co., 559 N.W.2d 411, 415 (Minn. 1997), *reh'g denied*. Minnesota courts determine whether an insurer has a duty to defend a particular lawsuit by comparing the allegations in the complaint to the relevant language in the insurance policy. *Id.*; see Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 880 (Minn. 2002). Minnesota does not impose a defense obligation on insurers when no portion of the lawsuit is covered. See, e.g., Metropolitan Prop. & Cas. Ins. Co. v. Miller, 589 N.W.2d 297, 299-300 (Minn. 1999) (insurer not obligated to defend negligence claim in which so alleged "bodily injury" was sexual molestation, which was excluded).

Auto exclusion 2.g. states that Liability Coverage A does not apply to bodily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any auto owned or operated by or rented or loaned to any insured. There is no dispute that the loss for which Plaintiffs seek liability insurance coverage resulted from the August 12, 2009 auto accident involving the use of or ownership of an NPL auto. Since the loss at issue undisputedly falls within the terms of auto exclusion 2.g., there is no coverage under the NPL policy issued by United Fire. United Fire had no duty to

defend and/or indemnify Plaintiffs. United Fire was entitled to summary judgment dismissal of this lawsuit.

C. The Terms of United Fire's Policy Issued to NPL Are Unambiguous and When a Renewed Policy Is Issued It Is Presumed the Renewed Policy Contains the Same Terms, Conditions and Coverage of the Former Policy.

It is undisputed that United Fire had been writing CGL coverage for NPL since July 2003 and every policy issued by United Fire to NPL contained auto exclusion 2.g.⁵ There is no basis under Minnesota law to read into NPL's policy for the August 2009 policy period auto insurance coverage NPL never procured from United Fire and to do so by reading out of it auto exclusion 2.g.

“A binding renewal cannot be effected without the mutual assent of the parties.” Royal Ins. Co. v. The Western Cas. Co., 444 N.W.2d 846, 848 (Minn. Ct. App. 1989). When a renewal policy is issued, it is presumed under Minnesota law that unless a contrary intention appears, the parties intended to adopt in the renewal policy the terms, conditions and coverage of the former policy. Eisenschenk v. Millers' Mut. Ins. Ass'n of Illinois, 353 N.W.2d 662, 664 (Minn. Ct. App. 1985), *rev. denied*, citing Schmidt v. Agric. Ins. Co., 190 Minn. 585, 252 N.W. 671, 673 (1934) (when a policy is renewed and the precise terms are not stated, new insurance like the expiring insurance is intended), and Glaser v. Alexander, 247 Minn. 130, 76 N.W.2d 682, 687 (1956) (insurer has a duty to renew on the same terms and conditions as the original policy).

⁵ In fact, such an exclusion has existed in standard CGL policies for decades. 22 Minn. Prac. Insurance Law & Practice § 5:15 (2011 ed.).

The formality required for the issuance of the original policy is not necessary for renewal. A new application is not required. The Minnesota Supreme Court has even held an insurance contract can be renewed orally. Schmidt, 252 N.W. at 672. “When insurance is renewed, and the precise terms are not stated in the oral negotiations, new insurance like the expiring insurance is intended.” Id.; 2 Couch on Insurance § 29:40 (Nov. 2011). And generally no particular form of renewal is necessary. 44 C.J.S. Insurance § 552 (March 2012), and cases cited therein. “In other words, the terms of the old policy are effective unless contrary intent is clearly demonstrated or the insurer makes the insured aware of the changes in the new policy.” 2 Couch on Insurance § 29:42 (Nov. 2011), citing Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc., 258 N.W.2d 570 (1977).

The purpose behind the renewal rule is that when an insured already owns a policy issued by a particular insurer, the insured can, absent notice from the insurer to the contrary, justifiably assume that a renewal of the same policy by the insurer provides the same coverage.

In Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc., 258 N.W.2d 570 (1977), the Minnesota Supreme Court addressed the predecessor statute to present Minn. Stat. § 60A.351 regarding renewal of commercial liability insurance policies. In that case, the original policy was amended on renewal to remove coverage for losses arising out of negligent installation of fire protection equipment. This amendment was effectuated by substituting the word “regardless” for the word “if.” The insurance company did not

specifically notify Fire Watch of this change in coverage. Id. at 574. The Supreme Court held:

[W]hen an insurer by renewal of a policy or by an endorsement to an existing policy substantially reduces the prior insurance coverage provided the insured, the insurer has an affirmative duty to notify the insured in writing of the change in coverage. Failure to do so shall render the purported reduction in coverage void.

Id. at 575.

The penalty for the insurer's noncompliance was the coverage issued before renewal remained in place. The Supreme Court stated:

Any question of an individual's insurance coverage shall then be determined in accordance with the terms of the original policy prior to the renewal or endorsement.

Id.

It has been held that if the change in the renewal policy is immaterial, because the prior policy contained an equivalent exclusion, notice to the insured of the change is not even necessary. St. Paul Fire & Marine Ins. Co. v. Futura Coatings, Inc., 993 F. Supp. 1258, 1263 (D. Minn. 1998) (so holding and further stating even with a substantial reduction in coverage, the exclusion would be effective in all policies renewed by Futura after modification by St. Paul Fire). And as the Minnesota Supreme Court explained in Safeco Ins. Co. v. Lindberg, 394 N.W.2d 146, 147 (Minn. 1986), policy renewals are new contracts to the extent they are governed by statutes in effect on the date of renewal.

Here, we do not have a question of the applicability of new legislative enactment. Nor do we have the situation of any material change in the general liability coverage at issue from the preceding prior policy periods. No argument has been made that the parties, upon the policy's renewal in 2009, agreed to add insurance coverage for autos and eliminate auto exclusion 2.g. Neither Insuring Agreement A nor its auto exclusion 2.g. were changed from the previous policy periods. Nonetheless, the trial court has refused to honor auto exclusion 2.g. in the 2009 renewal, even though the auto exclusion has remained unchanged from the policy's inception. Even in those situations where coverage was changed on renewal without specific notification to the insured (a situation not present before this Court), the Supreme Court says coverage on renewal is to be in accord with the terms of the policy prior to renewal. The Supreme Court has never read out of a policy an exclusion always contained therein, as the trial court has ruled here.

D. An Insurance Policy Cannot Be Enlarged by Waiver or Estoppel.

The Supreme Court's refusal to read into a policy coverage never procured is based on the general rule in Minnesota that insurance policy coverage cannot be enlarged by waiver or estoppel. Shannon v. Great American Ins. Co., 276 N.W.2d 77, 78 (Minn. 1979); Malakowsky v. Johannsen, 374 N.W.2d 816, 819 (Minn. Ct. App. 1985). The rationale for this rule is that "[c]overage may not be imposed upon an insurer for a risk not specifically undertaken and for which no consideration has been paid." Minnesota Mut. Fire & Cas. Co. v. Rudzinski, 347 N.W.2d 848, 851 (Minn. Ct. App. 1984) (stating also that insurance coverage cannot be created by waiver). In essence, as made clear in

their Complaint, Plaintiffs sought, through estoppel, to establish auto insurance coverage that never existed and auto coverage for which no premium was paid. (A. 55). To allow Plaintiffs to do so is not only contrary to the law, it is fundamentally unfair.

Long before Schupp began purchasing CGL insurance from United Fire, Schupp had apparently formed the mistaken assumption that the CGL policy issued for the resort provided liability coverage for its automobiles. (Schupp Depo., p. 68; A. 210). Schupp admits no one ever told him that a CGL policy would provide liability insurance coverage for NPL's autos. (*Id.*) Liability coverage for Plaintiffs' automobiles simply was never a part of the contract between United Fire and NPL, as was true on the policies previously procured for NPL by Itasca through a different insurer. (Engst Depo., pp. 156-57; A. 171-72).

Automobile liability insurance and commercial general liability insurance cover an entirely different class of risks:

The risks associated with large moving objects are fundamentally different from the risks associated with stationary business operations. Accordingly, CGL policies typically exclude liability arising from the use of the insured's motor vehicle, aircraft and watercraft.

3 New Appleman on Insurance Law Library Edition § 16.02[3][a][vi][A].

The Minnesota Supreme Court has long recognized autos are not a risk that is covered under a business policy, recognizing that businesses already have separate auto liability policies insuring such risks:

Because the ownership, maintenance, operation, and use of automobiles involve special and peculiar risks as an incident thereof, to which the general business of the insured is not subject, such risks are excluded from the general coverage and are covered as a special class by automobile liability policies.

St. Paul Mercury Indem. Co. v. Standard Accident Ins. Co., 216 Minn. 103, 11 N.W.2d 794, 797 (1943).

Insurers, including United Fire, will typically only provide coverage for owned automobiles in a separate policy, which is separately underwritten. (A. 79). In this case, United Fire was never asked to write such coverage. It was provided no information about auto liability exposure upon which it could have underwritten automobile coverage for NPL. (A. 65; Schupp Depo., p. 67; A. 209). No CGL policy issued by United Fire to NPL contained such auto coverage.

E. Under Minnesota Law, Plaintiffs Are Not Entitled to Insurance Coverage From NPL.

If generally applicable insurance rules govern this case, as enunciated by the Minnesota Supreme Court, then it is clear that auto exclusion 2.g. precludes coverage for Plaintiffs' August 2009 accident. The trial court held, however, that the plain language of auto exclusion 2.g. was nullified based on United Fire's alleged noncompliance with Minn. Stat. § 60A.08. (Add. 1, 7).

The trial court has ruled that by operation of law – specifically, Minn. Stat. § 60A.08 – NPL has Coverage A bodily injury and property damage liability coverage from United Fire, but Coverage A now, by judicial fiat, has no auto exclusion 2.g. (Id.) The trial court reaches this conclusion by stating that § 60A.08 “requires all the terms and

conditions of the policy to be physically included with the policy” and the penalty to be imposed for United Fire’s alleged noncompliance is nullification of auto exclusion 2.g. (Add. 8-10). Such a ruling has no support in Minnesota law.

F. Minn. Stat. § 60A.08 Does Not Support the Trial Court’s Ruling.

1. The trial court’s interpretation is contrary to the language of the statute.

Minn. Stat. § 60A.08, subd. 1 states “[a] statement in full of the conditions of insurance shall be incorporated in or attached to every policy” (Emphasis added). Courts construe undefined words of a statute according to their plain and ordinary meaning. Minn. Stat. § 645.08(1); Swanson v. Brewster, 784 N.W.2d 264, 274 (Minn. 2010). The plain meaning of “incorporate” is “[t]o make the terms of another (esp. earlier) document part of the document by specific reference.” Black’s Law Dictionary 834 (9th ed. 2009); State v. Hawk, 616 N.W.2d 527, 529 (Iowa 2000) (citing Black’s for plain meaning of incorporate). And the word “or” connecting clauses in a statute is disjunctive. Gassler v. State, 787 N.W.2d 575, 585 (Minn. 2010). The statute, by its terms, does not impose an obligation on the insurer to provide a paper copy of each policy form that is in force every time a policy is renewed.

The trial court reasoned that for the statute to permit incorporation by reference, it would need to state that all conditions must be “incorporated by or attached to the policy.” (Add. 7) (emphasis added). The trial court concluded the Legislature’s choice of the word “in” after incorporated is “telling.” (Id.) The trial court’s reasoning does not withstand scrutiny.

As other courts have stated, such as when discussing a facial attack on a complaint pursuant to Rule 12 – “[a] complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference and documents that, although not incorporated by reference, are integral to the complaint.” Sira v. Morton, 380 F.3d 57, 67 (2nd Cir. 2004) (citations omitted) (emphasis added). Accordingly, the common usage of “incorporated in” and “incorporated by” are not distinct and the trial court’s reading of the statute is not supported.

Moreover, the Legislature has made clear when a document cannot be incorporated by reference into an insurance policy. In Minn. Stat. § 61A.05, governing life insurance policies, for example, the Legislature stated: “Every policy which contains a reference to the application . . . shall have a copy of such application attached thereto or set out therein.” Notably, the Minnesota Supreme Court held the failure of the life insurer to attach the application did not preclude the life insurer from asserting as a defense, misrepresentations made in a written application for increased coverage. Larson v. Union Central Life Ins. Co., 272 Minn. 177, 137 N.W.2d 327, 335 (1965) (distinguishing application for increased coverage from application for initial coverage). And the reason for this statutory provision is to leave a complete written record of the transaction when the insured dies. Goshey v. ITT Life Ins. Corp., 590 F.2d 737, 740 (8th Cir. 1979) (citing Minnesota law).

2. The trial court's interpretation is contrary to the interpretation of other courts under similar circumstances.

New York has a statute similar to Minn. Stat. § 60A.08, subd. 1.⁶ And the New York courts have held under circumstances similar to that here that the insurer complied with the statute.

In Hirshfeld v. Maryland Cas. Co., 671 N.Y.S.2d 100, 101 (N.Y. Sup. Ct. App. Div. 1998), plaintiffs claimed they received the policy with a declarations page and a supplemental declarations page, but never received the water backup damage endorsement. The declarations page and the supplemental declarations page referred to the water backup damage endorsement. There, the New York Appellate Court held that the trial court erred in refusing to grant summary judgment to the insurance company.

The New York court explained:

As indicated in the supplemental declarations page, the water backup endorsement was “made a part of” the policy and was thereby incorporated by reference regardless of whether the plaintiffs received actual delivery of the endorsement.

Id.

The New York appeals court continued:

Under the circumstances, the plaintiffs cannot seek the benefit of the coverage provided by the endorsement without being subject to the limitations of that coverage.

⁶ “Every policy of life, accident or health insurance, or contract of annuity, delivered or issued for delivery in this state, shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any writing, unless a copy thereof is endorsed upon or attached to the policy or contract when issued.” McKinney's Insurance Law § 3204(a)(1).

Id.; see also Shaw v. Aetna Life & Cas. Co., 413 N.Y.S.2d 832, 833 (N.Y. Sup. Ct. 1979) (there the “renewal declarations” included a reference to “coverage form HO-2 (10-72) C,” a basic policy form which included the limitation of liability relied upon by the insurance company, and the New York court held the incorporation by reference of certain provisions of the original policy by form number was proper).

Other jurisdictions have reached the same result as New York. See also State v. Allendale Mut. Ins. Co., 154 P.3d 1233, 1238 (Mont. 2007) (insured could not reasonably claim lack of notice of policy exclusions when policy forms were delivered to the insured and renewal binders specifically listed all applicable coverage forms); National Farmers Union Prop. & Cas. Co. v. Moore, 882 P.2d 1168, 1169 (Utah Ct. App. 1994) (exclusion in renewal policy was enforceable where plaintiff received the original policy and thereafter received declarations sheets); Kanter v. Louisiana Farm Bureau Mut. Ins. Co., 587 So.2d 9, 12 (La. Ct. App. 1991) (declaration sheet specifically referring to endorsement is acceptable); Economy Fire & Cas. Co. v. Pearce, 399 N.E.2d 151, 153-54 (Ill. Ct. App. 1979) (youthful driver endorsement was in force on renewal because renewal certificate referred to form number of endorsement, indicating intent that it was part of renewal contract); Southern Trust Ins. Co. v. Georgia Farm Bureau Mut. Ins. Co., 391 S.E.2d 793, 795 (Ga. Ct. App. 1990) (where the fleet policy was issued to insured three years prior to the accident and the renewal policy declarations indicated the actual policy number, the insured had notice of the actual policy as a matter of law and his non-receipt of the policy form did not serve to excuse him from its operative terms).

3. The trial court's interpretation is contrary to the statute's purpose and its nullification of an exclusion has no legal or logical support.

Here, the document incorporated was specified on the renewal's "Forms Supplemental Declarations" as CG0001 (12-07) and was further identified as COMM GENERAL LIAB COVG FORM. (Add. 29). This specific commercial general liability coverage form was provided to NPL with Policy No. 85304136 effective July 2008. (A. 85, 127). NPL's non-receipt of Form CG0001 (12-07) with the 2009 renewal cannot serve to excuse NPL from the policy's operative exclusions, as the trial court has ruled. And to interpret Minn. Stat. § 60A.08 as does the trial court would be to now require an insurer to drown its insureds in a sea of paper on every renewal.

The obvious purpose of Minn. Stat. § 60A.08, subd. 1 is to provide the insured with the opportunity to examine the terms of the contract. Not only did the insured have that opportunity – because the CGL coverage at issue had not changed since its inception, and certainly not since that form had been provided to NPL in May 2008 – but because NPL also had the opportunity to access its policy via United Fire's website at any time.

Here, Plaintiffs' argument for coverage is premised on the very existence of its July 2009 renewal of its CGL coverage. Under Plaintiffs' argument, the CGL coverage form must be physically attached to the renewal papers to be effective. But to assert, as Plaintiffs have done, that without attachment only the exclusions in that same coverage form are nullified is "devoid of merit." Plaintiffs cannot seek the benefit of the coverage provided by the CGL coverage form CG0001 (12-07) without being subject to the stated

limitations of that coverage. Hirshfeld, 671 N.Y.S.2d at 101; see, e.g., Aaberg v. Minnesota Commercial Men's Ass'n, 143 Minn. 354, 173 N.W. 708, 711 (1919) (must consider entire insurance policy in determining insurer's obligation to insured); Galaska v. State Farm Mut. Auto. Ins. Co., 577 N.Y.S.2d 988, 989 (N.Y. App. Div. 1991) (same argument rejected where insured sought to avoid clear and explicit arbitration provisions contained in the policy). But that is the trial court's unsupportable ruling here.

4. The reason for Minn. Stat. § 60A.08 was to eradicate concealment by the insurer of a secret provision affecting liability.

The reason for the enactment of Minn. Stat. § 60A.08, subd. 1⁷ and other similar statutes across the country was based generally on the concern at that time that insurance companies were utilizing representations made by the insured in the application process as warranties. Arnold v. New York Life Ins. Co., 177 S.W. 78, 79 (Tenn. 1915), quoting Kirkpatrick v. London Ins. Co., 115 N.W. 1107, 1109 (Iowa 1908), and citing other cases across the country. A warranty is a written promise of the insured which, if not fulfilled, will make the policy voidable by the insurer. The Aetna Ins. Co. v. Grube, 6 Minn. 82, 1861 WL 1844 at *5 (Minn. 1861), 6 Gil. 2 (1861). The fear was an insured could lose the protection of its insurance after many years of paying premiums without knowledge that the application filled out by the avid salesperson for that insurance contains representations which can be declared by the insurance company to be warranties and therefore part of the policy.

⁷ Minn. Stat. § 60A.08, subd. 1 has been in existence, albeit by different statutory cites, for over 100 years. Aaberg, 173 N.W. at 709 (quoting statute).

The evil which was sought to be eradicated by these statutes was some wrongful concealment by the insurer of a secret provision or condition affecting liability. In Lennox v. Greenwich Ins. Co., 165 Pa. 575, 30 A. 940, 941 (Pa. 1895), the Pennsylvania Supreme Court expressed what was regarded as the aim of such legislation:

It is well known that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements to be answered or made by the applicant, printed usually in very small type, and the relevancy or materiality not always apparent to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. The general intent was to keep these statements before the eyes of the insured, so that he might know his contract, and if it contained errors, have them rectified before it became too late.

Id.

To avoid having this cataclysmic effect on insureds, states – such as Minnesota – enacted statutes requiring a warranty to be clearly set out in the policy or to be expressly incorporated into the policy by reference.⁸ That is why Minn. Stat. § 60A.08, subd. 1 additionally states “neither the application of the insured nor the bylaws of the company shall be considered as a warranty or a part of the contract, except in so far as they are so incorporated or attached.” See William Vance, The History of the Development of the Warranty in Insurance Law, 20 Yale L.J. 523 (May 1911); 16 Williston on Contracts § 49:47 (4th ed. 2011); Note, The Warranty in Insurance Contracts, 36 Harv. L. Rev. 597 (March 1923).

⁸ Also enacted were statutes such as present Minn. Stat. § 61A.03, declaring that in the absence of fraud, all statements made by the insured are representations, not warranties.

5. The trial court's holding leads to an absurd result.

Here, there is no secret provision affecting liability coverage under the contract. To affirm the trial court's holding here is to sanction an absurd result that is not in accord with the statute's obvious intent. There is no basis in the law to hold that CGL Form CG0001 (12-07) Coverage A applies but to disregard an exclusion contained in that form and which exclusion has always existed in the policy. A court cannot rewrite an insurance contract. To find auto exclusion 2.g. is not part of the policy violates the fundamental principle of contract interpretation: a correct policy interpretation requires that one make use of all of the policy's terms. Auto-Owners Ins. Co. v. Evergreen, Inc., 608 N.W.2d 900, 903 (Minn. Ct. App. 2003). The auto exclusion was part and parcel of every CGL policy, including the 2009 policy, issued to NPL by United Fire.

G. The Case Law Cited by the Trial Court Does Not Support Its Holding.

1. Aaberg v. Minnesota Commercial Men's Ass'n does not allow an insured to proceed on only a portion of the insurance policy.

The trial court cites to Aaberg v. Minnesota Commercial Men's Ass'n, 143 Minn. 354, 173 N.W. 708 (1919), to support its ruling here. (Add. 8). United Fire disagrees with the trial court's analysis of Aaberg. Aaberg came before the Minnesota Supreme Court three times – 143 Minn. 354, 173 N.W. 708 (1919); 152 Minn. 478, 189 N.W. 434 (1922) and 161 Minn. 384, 201 N.W. 626 (1925). Aaberg involved an accident insurance policy issued to Aaberg by the Minnesota Commercial Men's Association (Men's Association). A certificate of insurance was issued on Aaberg's written application just two days before Aaberg's horse and buggy accident. 201 N.W. at 626.

The Men's Association issued insurance to its membership, and the membership was limited to "men engaged in commercial and professional pursuits," and composed primarily of traveling salesmen. When a member such as Aaberg was accepted, a certificate of membership was issued simply stating "his application and the by-laws constitute his contract of insurance." 173 N.W. at 709. Therein, the insured actually stipulated that certain representations in his application were warranties, that the Men's Association is relieved of liability if the insured took out other accident insurance, and that if any difference should arise at any time respecting the validity or adjustment of any claim, it was to be arbitrated. 173 N.W. at 709; 189 N.W. at 434.

As a result of Aaberg being thrown from his buggy, he sought \$25 per week under the Men's Association policy. When the Men's Association refused to pay, Aaberg brought a lawsuit, and in answer the Men's Association asserted that Aaberg had taken out additional accident insurance of which he had given the Men's Association no notice, and therefore, the Men's Association had no liability. It also asserted Aaberg's claim was subject to arbitration. 173 N.W. at 709.

At trial, Aaberg, after offering into evidence his certificate of membership, also offered into evidence Section 7 of the by-laws, which describes the indemnity a member is entitled to for disabilities resulting from accidental injury. Id. at 709. The Men's Association objected that this section introduced into evidence constituted only a part of the parties' insurance contract and that the entire contract should be offered into evidence, including the application and the other by-laws. Id. at 709-10. The application and the

by-laws, however, were excluded by the trial court on the ground that, not being attached to the certificate of membership, they were not part of the contract. Id. at 710.

The case was tried and a verdict was entered in favor of Aaberg. The Men's Association appealed and the Minnesota Supreme Court reversed, granting the Men's Association a new trial. 173 N.W. at 711; 189 N.W. at 434. The Minnesota Supreme Court ruled that a new trial was to be granted on the ground that the trial court wrongly excluded from evidence the by-laws of the Men's Association which constituted part of the parties' contract. Id.

In so ruling, the Minnesota Supreme Court cites to a host of statutes then governing insurance policies, including G.S. 1913 § 3292, the predecessor citation to present Minn. Stat. § 60A.08, subd. 1. 173 N.W. at 709. Ultimately, the Minnesota Supreme Court holds that “[t]he certificate of membership issued to plaintiff is in no sense a policy of insurance. It does not purport to contain any of the substantive terms of the contract, but states that his application and the by-laws constitute the contract.” Unless the application and by-laws are included with the certificate of membership, as constituting the policy, there is no policy whatsoever. These documents constitute the only contract and only policy contemplated by the parties.” Id. at 711.

The Supreme Court went on to hold that the certificate did not “conform to the statute,” but then turned to Minnesota Statutes Section 3530, which provided that a policy issued in violation of the statutes was valid, but if any policy provisions therein contravened the provisions of the Minnesota Statutes, the provisions of the statute

governed. Id. Accordingly, the provisions of the statute were to be substituted for those of the parties' contract "insofar as the two conflict." Id. at 711.

The Supreme Court found there was a conflict between the terms of the Men's Association policy with regard to buying additional insurance without giving written notice to the insured and that provided by Minnesota statute. The Supreme Court substituted the statutory provision. Id. The Supreme Court found no statutory provision conflicted with the contract's provision relative to arbitration. Therefore, that policy provision remained in force. Id.; Lommen v. Modern Life Ins. Co., 206 Minn. 608, 289 N.W. 582, 587 (1940) (citing Aaberg and stating "[o]nly the illegal part will be disregarded and the policies so reformed as to comply with the law").

The Supreme Court ultimately held the insured was not entitled to present only part of the documents to establish the obligation of an insurer to indemnify him and ignore the rest. The insurer had the right "to put other pertinent provisions of the application and by-laws into evidence" and the insured "was not in position to object." Id. "[E]xcluding them was reversible error." Id.

2. Aaberg does not support the trial court's ruling.

It is difficult to understand how the Supreme Court's ruling in Aaberg supports the trial court's ruling here. The Minnesota Supreme Court does not allow an insured to have its determination of insurance coverage based on only part of an insurance policy, which is the trial court's ruling here. To prove entitlement to insurance coverage, NPL necessarily has to introduce CGL Coverage Form CG0001 (12-07). Without that coverage

form, there is no CGL coverage for NPL for the 2009-2010 policy period. NPL, per Aaberg, is not entitled to claim on a self-selected basis that exclusions to that coverage form are not part of its insurance coverage and are not to be considered by the court.

In addition, in Aaberg, the Minnesota Supreme Court was not dealing with a policy renewal situation. The policy in Aaberg was issued just two days before the insured's accident. There, the Supreme Court, as a penalty for noncompliance with the statutes, inserted statutory provisions for those of the contract to the extent the two conflicted.

Here, there is no provision in the CGL policy which conflicts with a Minnesota statute. There is no basis under Minnesota law to read out of United Fire's policy auto exclusion 2.g. At worst, if the Court were to conclude there was noncompliance with the statute, the Court should then look to the previous policies issued to NPL by United Fire to determine its applicable terms. Obviously, NPL does not want the Court to do that because the policy as issued always contained auto exclusion 2.g.

3. Domke v. Farmers & Mechanics Savings Bank does not support the trial court's holding in this case.

In construing Minn. Stat. § 60A.08, the trial court also relied on this Court's decision in Domke v. Farmers & Mechanics Sav. Bank, 363 N.W.2d 898, 901 (Minn. Ct. App. 1985) (Add. 9). This case concerns Minn. Stat. § 62A.06, subd. 3, which addresses statements in an application for accident and health insurance, and Minn. Stat. § 62B.06, subd. 2, which addresses required provisions in credit insurance. Neither statute is implicated here.

There, this Court held that an exclusion from coverage of preexisting conditions contained in a master policy of credit disability insurance held by the mortgagee bank, but which exclusion was not set forth either in a promotional brochure describing the insurance given to the insured debtor by the bank, or in a four-page certificate of insurance issued to the debtor by the insurer, could not be relied upon by the insurer to deny coverage to the debtor for employment disability resulting from his progressive hearing loss that originated before he applied for the insurance. 363 N.W.2d at 889-900. At no time was the insured made aware of any exclusion for preexisting conditions. Id. Nor was he ever provided a copy of the master policy. Id.

Domke is distinguishable on its facts alone. The insured in Domke applied for disability coverage, provided all information required for the application and was allowed by the insurer to believe that disability coverage existed until the insurer denied a claim based on an alleged misrepresentation in the application. Here, by contrast, Plaintiffs now seek a wholly different kind of liability coverage than that for which they applied and that has been issued since 2003. Plaintiffs applied for CGL coverage, but never applied for liability coverage for the resort's automobiles.

As the Supreme Court explained in Johnson v. Farmers & Merchants State Bank of Balaton, 320 N.W.2d 892, 897 (Minn. 1982), the intent of § 62B.06 "is to assure that the borrower will receive the benefit of insurance for which he has applied." The concern is that the insured receive what he applied for and paid for "which is what the statute sought to ensure." Id. at 898. The penalty imposed for violation is to make the insurer "an

insurer to the extent of the coverage for which application is made.” Id. Here, Plaintiffs seek auto coverage from United Fire for which they never applied nor paid a premium.

The insured in Domke was never provided with a copy of the policy and had no means to discover the exclusion upon which the insurer ultimately denied coverage. 363 N.W.2d at 899. The insured received nothing that referenced a preexisting conditions exclusion. Id. Here, Plaintiffs were provided with the CGL form (which always included auto exclusion 2.g.) and the form was specifically incorporated into the policy at all relevant times. Moreover, the policy was available for NPL’s review on the website.

Finally, Domke involved Minn. Stat. § 62B.06. It and Minn. Stat. § 60A.08 are not similar. Minn. Stat. § 62B.06, subd. 2 is a detailed list of certain policy terms that must be provided to the insured in a policy of credit life insurance, credit accident and health insurance when issued. There is no equivalent statute for CGL coverage. Domke does not support the trial court’s ruling here.

H. The Trial Court’s Construction of Minn. Stat. § 60A.08 Is Not Supportable.

1. Minn. Stat. § 60A.08 cannot provide insurance coverage that never existed.

Here, Plaintiffs’ stated intent when the United Fire CGL policy came up for renewal was to purchase liability coverage as provided in its expiring contract unless NPL requested otherwise. (Schupp Depo., pp. 82, 91; A. 213, 221). NPL was well aware it had never requested auto coverage from Ross Nesbit or United Fire. Plaintiffs cannot claim in retrospect that they have sustained a loss because their 2009-2010 CGL policy

contained no auto coverage. Minn. Stat. § 60A.08 cannot be utilized to provide insurance coverage that never existed and for which a premium was never paid.

There is no indication that the Legislature ever intended the trial court's construction of Minn. Stat. § 60A.08 that it applied here. The trial court reads the statute to require an insurer to deliver to the insured a paper copy of every policy form every year a policy is renewed. Failure to do so, in the trial court's view, then binds the insurer to coverage for whatever liability might be incurred by the insured, regardless of the limitations contained in that policy of insurance. The Legislature could not have intended such an absurd result under the facts here. Minn. Stat. § 645.17(1) ("The legislature does not intend a result that is absurd, impossible of execution, or unreasonable.").

Rather, the Legislature clearly provided that parties to an insurance contract can incorporate terms from previous policy years into renewal policies. Minn. Stat. § 60A.08, subd. 1, 3. This is in accord with the longstanding principle that even where a renewal policy is a new contract, the renewal coverage like that in the expiring insurance contract is intended to continue on the same terms as the previous contract, unless stated otherwise.

2. The law should be applied here as in other policy renewal situations.

United Fire also takes issue with the trial court's reading of Minn. Stat. § 60A.08, subd. 3. (Add. 10). Subdivision 3 states that "[a]ny insurance policy terminating by its provisions at a specified expiration date or limited as to term by any statute and not otherwise renewable may be renewed or extended at the option of the insurer, at the

premium rate then required therefor, for a specific additional period or periods by a certificate and without requiring the issuance of a new policy.” (Emphasis added). The trial court states that, given this statutory section, the only basis on which it can be renewed outside of subdivision 1 is by certificate. But the word “may” is permissive. Minn. Stat. § 645.44, subd. 15.

Here, NPL was informed the policy would be renewed “subject to our premiums, rules and forms then in effect.” (A. 83, 144). NPL was also informed that if United Fire decided not to renew this policy, it would do so by giving NPL and its agent “written notice of our intent not to renew at least 60 days before the expiration date of this policy.” (A. 23). There is no basis to conclude that United Fire is not entitled, because of subdivision 3, to an application of the law as stated previously and as applied by the Minnesota courts in other renewal situations.

Louisiana, which has a statute – La. R. S. 22:635(A) – pertaining to policy renewals quite similar to § 60A.08, subd. 3, has held that statute does not require an insurer to reissue the entire policy each and every time it was renewed. “It was sufficient that the renewal certificates designated the provisions which were added or deleted from coverage.” Crocker v. Roach, 766 So.2d 672, 677 (La. Ct. App. 2000), *writ denied*.

Here, on renewal, NPL did much more than that. The insured was provided a complete list of all policy forms that constituted its policy of insurance and any provisions added, deleted or modified were specifically presented to the insured for its review. And contrary to the trial court’s statement (Add. 11), the policy in force, with regard to CGL

coverage, had not been modified substantially from the prior year. (Compared Add. 28-29 with A. 23-85). In fact, there was no material change to the commercial general liability coverage from policy period 2008 to 2009.

It should be noted that the Legislature in 2005 added to Minn. Stat. § 60A.08, subd. 3 the following section:

The insurer must also post the current policy form on its web site, or must inform the policyholder annually in writing that a copy of the current policy form is available on request.

United Fire did provide NPL website access to its policy at any time. (Add. 41). NPL at all times had access to its entire insurance policy on renewal.

The trial court's ruling nullifying auto exclusion 2.g. must be reversed.

II. THE GRANT OF ATTORNEY'S FEES AND COSTS AWARDED TO PLAINTIFFS MUST BE REVERSED.

Generally, a district court's order granting or denying costs and attorney's fees is reviewed on an abuse of discretion standard. Becker v. Alloy Hardfacing & Eng. Co., 401 N.W.2d 655, 661 (Minn. 1987). The trial court abuses its discretion when the trial court misapplies the law or settles a dispute in a way that is against logic and the facts of record. Foster v. Foster, 802 N.W.2d 755, 757 (Minn. Ct. App. 2011). Here, the trial court abused its discretion by its grant of attorney's fees.

The trial court ruled Plaintiffs were entitled to attorney's fees incurred as a result of United Fire's refusal to defend Plaintiffs' August 2009 auto accident due to its invocation of auto exclusion 2.g. (Add. 17, 20). The trial court then awarded Plaintiffs its attorney's fees incurred because of Plaintiffs' exposure in the underlying auto accident

action in excess of Allstate's \$100,000 auto policy limit and for "prosecution of this action against United Fire and Nesbit." (Add. 23). United Fire requests those rulings be reversed.

A. Because the Trial Court Was Wrong in Reading Out of United Fire's Policy Auto Exclusion 2.g., Its Award of Attorney's Fees and Costs Must Be Reversed.

Here, the trial court's ruling granting Plaintiffs their attorney's fees rests solely on its erroneous decision to read out of United Fire's policy auto exclusion 2.g. Since the trial court was wrong in reading out of United Fire's policy auto exclusion 2.g., the trial court must also be reversed with regard to its grant of attorney's fees, costs and disbursements to Plaintiffs. Based on auto exclusion 2.g., United Fire clearly had no duty to defend or indemnify Plaintiffs; therefore, the trial court erroneously found that United Fire breached its duty by denying coverage to NPL. Minnesota law is clear that if an insurer is under no duty to defend, the insured is not entitled to attorney's fees and litigation costs. St. Paul Fire & Marine Ins. Co. v. Seagate Tech, Inc., 570 N.W.2d 503, 507 (Minn. Ct. App. 1997).

As previously stated, the language of the policy is unambiguous and there was never "arguable coverage" for the August 2009 auto accident. Plaintiffs are not entitled to fees for the underlying action or for this declaratory action. See Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co., 515 N.W.2d 576, 581 (Minn. 1994); see Wakefield Pork, Inc. v. Ram Mut. Ins. Co., 731 N.W.2d 154, 162 (Minn. Ct. App. 2007) (denying fees for underlying action because insurer had no duty to defend).

B. The Trial Court Never Declared Plaintiffs Were Entitled to Coverage.

Moreover, here, the trial court never declared that United Fire Policy No. 85304136 provides coverage for claims arising from the August 12, 2009 auto accident. (Add. 12, 15). In fact, the trial court specifically declined Plaintiffs' request to do so in its October 27, 2007 Order. (Id.) The trial court just declared that "the coverage under the policy in force on August 12, 2009 is not subject to Exclusion G." (Add. 15). The trial court never ruled that coverage exists for the vehicle involved in the accident, thereby triggering a duty to defend and/or indemnify. Indeed, it would have been inappropriate for the trial court to do so, given the well-established rule that the court may not impose coverage for a risk not specifically undertaken and for which no premium has been paid. Shannon v. Great American Ins. Co., 276 N.W.2d 77, 78 (Minn. 1979). The vehicle itself was never covered under the policy, even if the exclusion does not apply. (See A. 79; Schupp Depo., p. 91; A. 221; Rykken Depo., pp. 104-05; A. 190-91). Therefore, on that alternative ground, the trial court should be reversed.

C. The Trial Court Has Improperly Extended the Supreme Court's Decision in Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640 (1966).

Additionally, the Minnesota Supreme Court has repeatedly declined to extend the Morrison rule (attorney's fees are recoverable when an insurer breaches its duty to defend) where there has been no breach of a contractual duty to defend. E.g., In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 423 (Minn. 2003) (declining to extend Morrison, 74 Minn. 127, 142 N.W.2d 640 (1966), to breach of the implied covenant of good faith and fair dealing); Garrick v. Northland Ins. Co., 469 N.W.2d 709,

714 (Minn. 1991) (declining to extend Morrison to a claim for uninsured motorist coverage). Here, Plaintiff did not sue United Fire for breach of contract. (See Complaint ¶¶ 47-50; A. 55-56). Instead, Plaintiff proceeded on an “estoppel” theory. Because Plaintiff did not even plead a claim for breach of contract, Morrison, and its exception to the general rule that each party bears its own attorney’s fees, does not apply. The trial court’s reading of Morrison is contrary to the Minnesota Supreme Court’s consistent refusal to extend Morrison outside of its narrow context. (Add. 20).

D. The Trial Court Abused Its Discretion in Awarding Plaintiffs Attorney’s Fees Incurred in Prosecuting Their Claims Against Ross Nesbit.

Even if Plaintiffs can recover attorney’s fees incurred in the declaratory judgment action against United Fire, Plaintiffs were not entitled to their fees for prosecuting claims against Ross Nesbit. (Add. 23). Plaintiffs were not entitled to fees for tasks that were not necessary to Plaintiffs’ claim against United Fire. For example, Plaintiffs have been awarded fees against United Fire for responding to Defendant Ross Nesbit’s motion for summary judgment. United Fire’s objections to specific time entries were fully described for the trial court. (A. 229). The trial court committed error in its award.

Plaintiffs sued United Fire under a theory it labeled as “estoppel.” (A. 55). Plaintiffs also chose to pursue alternative theories of liability for negligence, breach of contract and breach of fiduciary duty against Ross Nesbit. (A. 58, 60-61). These theories of liability are not “inextricably intertwined,” but rather are separate and distinct. See Industrial Door Co., Inc. v. Builders Group, 2010 WL 2900312 (Minn. Ct. App. 2010) (A. 265). There, this Court held that attorney’s fees could be awarded against an insurer

who breached a duty to defend, but refused to award attorney's fees for claims against other defendants who were sued on different theories of liability. Id. at *7. (A. 270). Here, Plaintiffs' theories against Ross Nesbit are separate and distinct from the estoppel theory Plaintiffs chose to pursue against United Fire. For that reason also, the trial court's award of attorney's fees in the amount of \$122,317 should be reversed. (Add. 27).

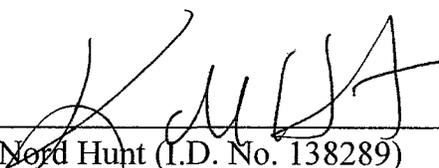
CONCLUSION

Appellant United Fire respectfully requests the trial court judgment, and as amended, as to United Fire be reversed and this action against United Fire be ordered dismissed as a matter of law.

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Dated: April 13, 2012

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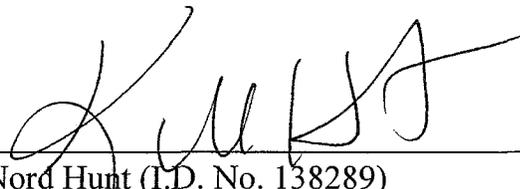
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,090 words. This brief was prepared using Word Perfect 10.

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