

A12 – 0453

STATE OF MINNESOTA
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 APPENDIX OF RESPONDENTS JONATHAN SCHUPP AND
NORTHERN PINE LODGE, INC.

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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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None

RESPONDENTS' [SCHUPP'S AND NPLI'S] STATEMENT OF THE LEGAL ISSUES

I. Where Exclusion G. was not delivered to Schupp and NPLI as part of Policy #85304136, did the trial court err in ruling that Schupp and NPLI are entitled to summary judgment declaring that Minn. Stat. § 60A.08 precludes United Fire from asserting Exclusion G. against Schupp and NPLI?

The trial court held: because Exclusion G. was not delivered to Schupp and NPLI as part of Policy #85304136, Minn. Stat. § 60A.08 precludes United Fire from asserting Exclusion G. against Schupp and NPLI.

List of most apposite cases:

SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 311 (Minn. 1995)

Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co., 383 N.W.2d 645, 652 (Minn. 1986)

List of most apposite constitutional and statutory provisions:

Minn. Stat. § 60A.08, subdivision 1

II. Where Schupp and NPLI incurred attorney fees as a direct result of United Fire's refusal to provide coverage by invoking Exclusion G., did the trial court err in ruling that Schupp and NPLI are entitled to recover those fees as damages under the *Morrison v. Swenson* doctrine?

The trial court held: where Schupp and NPLI incurred attorney fees as a direct result of United Fire's refusal to provide coverage by invoking Exclusion G., Schupp and NPLI are entitled to recover those fees as damages under the *Morrison v. Swenson* doctrine.

List of most apposite cases:

Morrison v. Swenson, 142 N.W.2d 640 (Minn. 1966)

List of most apposite constitutional and statutory provisions:

None.

**RESPONDENTS' [SCHUPP'S AND NPLI'S] STATEMENT OF THE CASE AND
THE FACTS**

RESPONDENTS' [SCHUPP'S AND NPLI'S] STATEMENT OF THE CASE

The Hennepin County District Court, Fourth Judicial District, the Honorable George F. McGunnigle presiding, granted Schupp's and NPLI's motion for summary judgment.

The trial court found that [1] Minn. Stat. § 60A.08, subd. 1, does not permit "incorporation by reference"; [2] Minn. Stat. § 60A.08 nullifies any terms or conditions of an insurance policy which are not "incorporated in or attached to" the policy; and [3] the renewal of an insurance policy is not exempt from the requirements of Minn. Stat. § 60A.08, subd. 1, when, as in this case, the policy was not renewed in the matter authorized by Minn. Stat. § 60A.08, subd. 3.

The trial court also found that Schupp and NPLI are entitled to attorney fees and costs as damages under the doctrine first set forth in *Morrison v. Swenson*, 142 N.W.2d 640 (Minn. 1966).

RESPONDENTS' [SCHUPP'S AND NPLI'S] STATEMENT OF THE FACTS

[1] Schupp and NPLI note that in its Statement of the Facts United Fire inexplicably ignores the concise statement of facts on which the trial court made its ruling, facts gleaned from statements of alleged undisputed facts submitted to the trial court by both sides. Instead of citing those facts on which the trial court based its decision, United Fire offers a rambling, slanted and inaccurate narrative. And at the end of United Fire's misstatement of the facts of the case,

United Fire further muddies the waters by asserting that “[T]he trial court, based upon the above facts, then ruled Plaintiffs were entitled to summary judgment and denied summary judgment to United Fire.” *United Fire’s Brief*, at 15.

In its “Order and Memorandum Granting Summary Judgment in Favor of Plaintiffs and Against Defendant United Fire & Casualty Company,” the trial court wrote:

In connection with Plaintiffs’ motion for summary judgment, Plaintiffs and Defendant United Fire & Casualty Company agree that the following facts are undisputed:

1. Plaintiff Jonathan Schupp (“Schupp”) is an individual who works and resides in Hubbard County. Northern Pine Lodge, Inc. (“NPLI”) is an Iowa corporation which has owned and operated a family resort, called Northern Pine Lodge, on Potato Lake in Hubbard County since 1980. Schupp owns all the shares of NPLI, and Schupp is the general manager of Northern Pine Lodge.

2. Defendant United Fire is a property and casualty insurer headquartered in Cedar Rapids, Iowa, and licensed to do business in Minnesota. United Fire provides insurance policies to business and individuals through a network of independent agents.

3. Defendant Ross Nesbit Agencies, Inc. (“Nesbit”) is a Minnesota corporation with headquarters in Hennepin County and with offices in several other Minnesota counties. At all relevant times, Nesbit was an independent

insurance agency which procured insurance for Minnesota businesses and individuals.

4. Defendant Itasca Region Insurance Agency, Inc. ("Itasca Region") is a Minnesota corporation headquartered in Hubbard County. At all relevant times, Itasca Region was an independent insurance agency which procured insurance for Minnesota businesses and individuals.

5. Schupp and NPLI established a relationship with Itasca Region in 1986, which continued through August 12, 2009. From 1986 to 1990, Schupp and NPLI bought all of their insurance from Itasca Region: health insurance for Schupp and members of his family; property insurance which, among other things, would provide for the repair or replacement of any building damaged by fire; and liability insurance, which would provide indemnity in the event of a claim of bodily injury or property damage caused by operations and activities of Schupp, members of Schupp's immediate family, NPLI, and/or NPLI employees.

6. Beginning in 1990, Schupp and NPLI obtained property and general liability insurance for the resort through another insurance agent, but continued to rely on Itasca Region to provide automobile coverage and health insurance.

7. In 2000, Schupp and NPLI again bought all of their insurance from Itasca Region: health insurance, property insurance, general liability and automobile liability for the resort and automobiles.

8. In 2000, Itasca Region procured for Schupp and NPLI an automobile policy and a commercial general liability policy.

9. Schupp and NPLI first began purchasing liability insurance for the resort from Nesbit in 2003. However, Schupp and NPLI continued to annually purchase an automobile insurance policy from Itasca Region through August 12, 2009.

10. In July 2003, Schupp and NPLI bought from Nesbit a commercial insurance policy, Policy No. 85304136, issued by United Fire.

11. For the policy period of July 2, 2009 through July 2, 2010, Schupp and NPLI bought from Nesbit a commercial insurance policy, Policy No. 85304136, issued by United Fire.

12. On August 12, 2009, at the intersection of U.S. Highway 8 and County Road 26 (also known as Pleasant Valley Road) in Chisago County, Minnesota, Schupp was driving a 1989 Plymouth Voyager minivan owned by NPLI when the minivan was struck by a Honda motorcycle occupied by Michael James Terry and Lois Carolyn Terry. Both Michael James Terry and Lois Carolyn Terry died from injuries sustained in the collision of their motorcycle with Schupp's/NPLI's van, and wrongful death claims for the next of kin of both Michael James Terry and Lois Carolyn Terry have been brought against Schupp and NPLI.

13. United Fire agrees that Policy No. 85304136 was in force at the time of the August 12, 2009 accident.

In connection with United Fire's motion for summary judgment, Plaintiffs and United Fire agree that the following additional facts are undisputed:

14. NPLI is governed by a four-member board of directors. Kevin S. Carpenter, one of the attorneys representing Plaintiffs, is a member of the NPLI board of directors.

15. Schupp bought the Northern Pine Lodge in 1980.

16. Schupp is solely responsible for buying insurance for NPLI.

17. Schupp bought auto coverage through Itasca Region at various times between 1986 and 2010.

18. An auto policy that Schupp bought through Itasca Region was in force on August 12, 2009.

19. Schupp looked at Policy No. 85304136 when it was issued in 2003. Schupp also "paged through" the documents he received when the policy was renewed or reissued every year.

20. Policy No. 85304136 was renewed or reissued in 2009. One of the documents Plaintiff received with the reissuance or renewal package was a declarations page entitled Commercial General Liability Coverage Part.

21. Plaintiffs bought the vehicle involved in the August 12, 2009 accident in 1997.

22. The vehicle was titled in the name of NPLI.

23. Although the vehicle was titled in the name of NPLI, Schupp has used the vehicle mostly for personal use since the time of purchase.

24. The August 12, 2009 accident arises from the use or ownership of an auto.

United Fire's Addendum, Add. 2 through Add. 5.

In addition to the facts stated above, the trial court noted in its 10.10.11 Order and Memorandum that

It is undisputed that the policy in force on August 12, 2009 was not accompanied by the CGL Coverage Form when it was delivered to Plaintiffs. Rather, the policy was accompanied by a document entitled Commercial General Liability Coverage Part. This document lists the CGL Coverage Form as one of the forms "[a]pplicable to the state of Minnesota."

United Fire's Addendum, Add. 6-Add. 7.

This is actually the critical fact in the case. The 91 pages of the United Fire policy for 2009-2010 that was delivered to Schupp and NPLI by United Fire's agent, Nesbit, in July 2009 did NOT include a 19-page "Commercial General Liability [CGL] Coverage Form." The policy as delivered [*see Respondents' (Schupp's and NPLI's) Appendix, at R.A. 5*] included a section [the "Forms Supplemental Declarations" page; *R.A. 76*] which listed various forms that were SUPPOSED to be included with the policy, and one of those forms was the CGL Coverage Form.

The omitted CGL Coverage Form contained, among other things, the one and only exclusion that United Fire has cited as the basis for its denial of coverage for Schupp and NPLI for the 8.12.09 accident, Exclusion G. [in its brief United Fire refers to this exclusion as "2.g.," and some of the documents filed by

the parties with the trial court also referred to the exclusion as “2.g.,” but the trial court referred to it, correctly, as “Exclusion G”].

[2] After it first issued an insurance policy to Schupp and NPLI in 2003, United Fire thereafter with each subsequent policy DID NOT send out the entire policy to the insureds, but only sent declarations pages, including “FORMS SUPPLEMENTAL DECLARATIONS” pages, and only sent those forms that had been added or changed from the previous policy. So, for example, if the 2003-2004 policy contained forms A, B, C, D, E and F; and if for the 2004-2005 policy forms A, B and F were unchanged from the previous year’s policy but forms C, D, and E had been amended; then for the 2004-2005 policy United Fire would send out the declarations pages and forms C, D, and E. United Fire’s Lisa Caraway explained this in her 7.1.2011 affidavit. *United Fire Appendix, A. 78 through A. 82.*

In addition to the fact that United Fire’s method of issuing what it calls “renewal policies” does not comply with Minnesota law, there are a couple of significant problems with the approach. For the 2009-2010 policy, the declarations pages and forms that United Fire issued, which included only those forms that had been added or changed from the previous year’s policy, still consisted of 91 pages. To someone like Jon Schupp, 91 pages of insurance documents looked like a complete policy.

But in this case, in addition to 91 pages looking like a complete policy to Jon Schupp, United Fire’s agent, Nesbit’s Thomas J. Rykken, represented that

the 91 pages sent to Schupp and NPLI WAS the complete United Fire policy. United Fire's agent, Rykken, sent a cover letter to Schupp forwarding the United Fire policy for 2009-2010 stating: "Your insurance policy is enclosed." See *Schupp/NPLI Ex. 1; A. 65*. At his deposition on June 20, 2011, Rykken was questioned about this statement [*page 26, beginning at line 5*]:

- Q. It says in the first paragraph, second sentence, quote, "Your insurance policy is enclosed," close quote. Right? That's what it says?
- A. That's what it says.
- Q. It doesn't say, quote, "Part of your insurance policy is enclosed," close quote. Correct?
- A. That's correct.
- Q. It doesn't say, "This is only part of your policy. Other parts of it are available on their Web site." Right?
- A. That's correct.
- Q. It doesn't say, for example, that Mr. Schupp should take some sections out of a prior year's policy and add them to the enclosed policy. True?
- A. It doesn't say that.
- Q. So when Jon Schupp received this letter from you dated July 27, 2009, this Rykken Number 1, it was your expectation that he could have thrown away the United Fire policy that he had that expired on July 2, 2009. Right? Once he gets this one, he doesn't need that one?
- A. He can – yeah, he can do what he wants with his policies.
- Q. But it's your understanding when you send this policy, it's a brand-new policy, the old policy is history?
- A. This is the policy that covered him from July of 2009 to July of 2010.
- Q. And, Mr. Rykken, was it your understanding that the policy that you sent with this letter that's been marked Rykken Number 1 was the complete policy from United Fire for Jon Schupp and Northern Pine Lodge?
- A. It was my belief that this was the complete policy.

United Fire Appendix, at A. 186-A. 187.

[3] United Fire suggests that the policy it first issued to Schupp and NPLI in 2003 contained Exclusion G. and that subsequent annual policies, because they were “renewals” of the original policy, also contained Exclusion G. And United Fire asserts that “[T]he auto portion of that exclusion has not changed since the Commercial General Liability (CGL) coverage was first issued to NPL by United Fire in 2003.” *United Fire’s Brief*, at 2. The suggestion United Fire makes is that the policy issued in 2003 was a single seven-year policy [running through 2010] rather than seven one-year policies.

United Fire’s agent, Nesbit’s Rykken, was asked about this in his 6.20.11 deposition:

Q. Right. There’s two possible concepts and I want to make sure we’re understanding each other here.

One concept is that Jon Schupp buys a policy that starts July 2, 2008, and on July 2, 2009 he just continues that same policy for a second year. The policy that started July 2, 2008 initially was a one-year policy, but it became a two-year policy.

There’s a different concept where Jon buys one policy on July 2, 2008, and then the policy that he buys on July 2, 2009 is a second policy, not one policy for two years, but two one-year policies. Are you saying that it’s your belief that Jon bought one two-year policy that started in July 2008 or did he buy two one-year policies each that started in July of a different year?

A. The company underwrites each on the information they have at that time.

Q. So am I right that you’re saying that he bought two one-year policies?

A. The policy is a one-year policy.

6.20.11 Rykken deposition at 30, United Fire A. 189.

Because United Fire sold Schupp and NPLI a series of one-year policies, the fact that an earlier version of United Fire's policy may have contained Exclusion G does nothing to cure United Fire's failure to include the exclusion as part of the 2009-2010 policy.

[4] United Fire asserts that "NPL Renewed Its CGL Coverage With United Fire Annually Through July 2, 2010, Which Renewals Contained the Same Auto Exclusion 2.g." *United Fire Brief, at 9*. Again, as has been noted, the 2009-2010 policy did NOT contain Exclusion "2.g."

[5] United Fire claims that "The CGL Policy Issued for Policy Period July 2, 2009 to July 2, 2010 Contained Auto Exclusion 2.g." *United Fire Brief at 11*.

This United Fire claim is based upon an assertion that Exclusion G. was incorporated by reference because it would have been in the Commercial General Liability [CGL] Coverage Form and the CGL Coverage Form was *listed* in the "Forms Supplemental Declarations" as one of the Forms which was part of the policy. But the trial court considered this claim and rejected it, finding that this type of incorporation by reference does not comply with Minnesota law.

[6] As has been noted, based upon the facts which the trial court succinctly stated in its 10.10.11 "Order and Memorandum Granting Summary Judgment in Favor of Plaintiffs and Against Defendant United Fire & Casualty Company" [Add. 1], the trial court found that [1] Minn. Stat. § 60A.08, subd. 1, does not permit "incorporation by reference"; [2] Minn. Stat. § 60A.08 nullifies any terms or conditions of an insurance policy which are not "incorporated in or attached to"

the policy; and [3] the renewal of an insurance policy is not exempt from the requirements of Minn. Stat. § 60A.08, subd. 1, when, as in this case, the policy was not renewed in the matter authorized by Minn. Stat. § 60A.08, subd. 3.

The trial court also found that Schupp and NPLI are entitled to attorney fees and costs as damages under the doctrine first set forth in *Morrison v. Swenson*, 142 N.W.2d 640 (Minn. 1966).

RESPONDENTS' [SCHUPP'S AND NPLI'S] ARGUMENT

Scope of Review/Standard of Review

Respondents Schupp and NPLI concur with the Standard of Review stated at page 17 of Appellant United Fire's Brief.

RESPONDENTS' [SCHUPP'S AND NPLI'S] ARGUMENT

I. Where Exclusion G was not delivered to Schupp and NPLI as part of Policy #85304136, the trial court did not err in ruling that Schupp and NPLI are entitled to summary judgment declaring that Minn. Stat. § 60A.08 precludes United Fire from asserting Exclusion G against Schupp and NPLI.

Minn. Stat. § 60A.08, titled "Contracts of Insurance," in Subdivision 1, titled "Policy to contain entire contract," 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.

In this case the United Fire policy issued to Schupp and NPLI for 2009-2010 did not contain the exclusion that United Fire cited as the sole basis for its denial of coverage to Schupp and NPLI for the 8.12.2009 accident, Exclusion G. The trial court ruled that because United Fire did not provide Exclusion G. to Schupp and NPLI as part of the 2009-2010 policy, United Fire could not assert Exclusion G. to deny coverage.

A. As the insurer, United Fire has the burden of proving that an exclusion applies to avoid coverage.

In an action to determine insurance coverage, the insured has the initial burden of proof to establish a *prima facie* case of coverage. *SCSC Corp. v.*

Allied Mut. Ins. Co., 536 N.W.2d 305, 311 (Minn. 1995). In this case, United Fire has never claimed that its policy #85304136 was NOT in force on 8/12/2009, or did NOT provide liability insurance coverage to Schupp and NPLI at that time; United Fire has admitted that the policy was in force and provided liability insurance coverage with \$2 million aggregate limits.

Once a *prima facie* case of insurance coverage exists, the insurer has the burden of proving that a policy exclusion applies. *Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986). United Fire's sole basis for denying coverage to Schupp and NPLI for claims arising from the 8/12/2009 accident is Exclusion G. But Exclusion G. was not included in policy #85304136 as delivered by Nesbit to Schupp and NPLI in July 2009.

Much of United Fire's argument is faulty because it ignores this principle, that the insurer has the burden of proving that an exclusion applies. United Fire argues "[T]here 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..." *United Fire Brief*, at 20. United Fire characterizes the situation as reading into a policy "coverage never procured," or enlarging insurance policy coverage by waiver or estoppel, [see *United Fire Brief*, at 23] rather than what it actually is, refusing to apply an exclusion which the insurer failed to deliver as required by Minnesota law.

United Fire argues that in this case United Fire was never asked to write automobile coverage for Schupp and NPLI, and United Fire claims that it “was provided no information about auto liability exposure upon which it could have underwritten automobile coverage.” *United Fire Brief, at 25.*

Actually, Schupp asked Nesbit to obtain liability insurance coverage for Schupp’s and NPLI’s *business*, and part of that *business* involved the use of automobiles. In his cover letter sending the 2009-2010 policy, Rykken wrote to Schupp: “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” [*emphasis added*]. *7.27.2009 letter from Rykken to Jon Schrupp [sic]; Schupp/NPLI Exhibit 1, United Fire Appendix, A.65.* And Rykken has admitted in deposition that he knew that Schupp’s *business* included the use of motor vehicles. *See 6.20.11 Rykken deposition, p. 108, l. 12 through l. 25. United Fire Appendix, A. 192.*

Also, United Fire admits that in the declarations page of the 2009-2010 policy it told Schupp and NPLI that they had liability insurance with limits of \$1 million/\$2 million; so Schupp had reason to believe that the United Fire policy that provided coverage for his “business” included coverage for automobiles that were sometimes used for his “business.” And although United Fire claims that it is unfair to require United Fire to provide coverage for automobiles under its commercial general liability policy, United Fire admits that it DOES write

coverage for automobiles—it just “typically” provides that coverage under a separate policy. *See United Fire Brief, at 25.*

Instead of accepting its burden of proving that Exclusion G. applies, United Fire improperly tries to duck that burden by arguing that the trial court rewrote the insurance contract by refusing to incorporate Exclusion G., leading to an “absurd result.” *See United Brief, at 33.* In truth, United Fire’s policy is affected only by United Fire’s own failure to provide an exclusion as required by law, a failure which prevents United Fire from asserting that exclusion.

United Fire claims “[T]here is no basis under Minnesota law to read out of United Fire’s policy auto exclusion 2.g.” [*United Fire Brief, at 37*]. But this is not a matter of “reading *out*” the exclusion—rather, this is a matter of United Fire failing to meet its burden of proving that the exclusion must be “read *in*.”

United Fire argues “Plaintiffs seek auto coverage from United Fire for which they never applied nor paid a premium.” *United Fire Brief, at 39.* Again, Plaintiffs do not expand coverage when United Fire fails to meet its burden; because United Fire fails to meet its burden of proving that Exclusion G. applies, United Fire fails to reduce coverage through application of the exclusion.

Similarly, United Fire mistakenly argues that “[T]o 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.” *United Fire Brief, at 36-37.* But the fact that United Fire provided liability coverage to Schupp and NPLI has never been the

issue. United Fire sold the policy, collected the premium, and provided Schupp and NPLI with a declarations page [R.A. 75] confirming that United Fire provided Schupp and NPLI with liability insurance coverage with limits of \$1 million/\$2 million. United Fire's suggestion that Schupp and NPLI should be deprived of coverage because of United Fire's agent's failure to provide the CGL Coverage Form would wrongfully punish the victim for the crime.

B. A "Renewal Policy" versus a "New Policy": Minnesota law allows for renewal of an insurance policy by certificate, but that cannot be done if the policy is changed in any respect—renewal may only extend the policy as is without additions or modifications. If the policy is changed in any respect, by modified or additional language, it is a new policy and all of the policy language has to be provided to the insured as part of the policy.

As explained in Respondents' [Schupp's and NPLI's] Statement of the Facts, after it first issued an insurance policy to Schupp and NPLI in 2003, United Fire thereafter with each subsequent policy DID NOT send out the entire policy to the insureds, but only sent declarations pages, including "FORMS SUPPLEMENTAL DECLARATIONS" pages, and only sent those forms that had been added or changed from the previous policy. For the Commercial General Liability portion [one of three sections of the policy—the other two were Commercial Property and Commercial Inland Marine] of the 2009-2010 United Fire policy issued to Schupp and NPLI, the "FORMS SUPPLEMENTAL DECLARATIONS" page [*Schupp/NPLI Exhibit 2, Page 72 of 91; R.A. 76*] lists 31 forms; and asterisks indicate that at least 12 [the page was three-holed punched, possibly erasing two asterisks] of the forms were either added or amended from

the previous year's policy. So the 2009-2010 United Fire was substantially changed from the 2008-2009 United Fire policy.

Minn. Stat. § 60A.08, titled "CONTRACTS OF INSURANCE," in Subdivision 3, titled "Renewal; new policy," states:

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.

This section allows an insurer to renew or extend a policy through issuing a certificate and posting the policy on its Web site or informing the policyholder annually in writing that a copy of the policy is available on request. The statute does not allow an insurer to both renew and amend a policy at the same time, which is what United Fire claims it did annually in this case. See 7.1.2011 *Caraway Aff.*, ¶ 8 ["each insured is provided with a declarations page and copies of any forms that change or modify the policy"] and ¶ 9 ["forms that are included with the renewal declarations are identified with asterisks"]. *United Fire Appendix, A. 79.*

United Fire notes in its Brief that "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." *United Fire Brief, at 12.* The fact

that the policy was available online would only be relevant under Minn. Stat. § 60A.08, subd. 3, if United Fire had renewed the policy, without change, by issuance of a certificate. But United Fire never renewed the policy without changing at least some part of it, and United Fire never renewed by issuing a certificate; so Minn. Stat. § 60A.08, subd. 3, does *not* apply.

Moreover, United Fire's agent, Rykken, was not on board for such a program. United Fire's agent, Rykken, sent a cover letter to Schupp forwarding the United Fire policy for 2009-2010, stating: "Your insurance policy is enclosed." See *Schupp/NPLI Ex. 1; United Fire Appendix, A. 65*. At his deposition on June 20, 2011, Rykken was questioned about this statement [page 26, beginning at line 5]:

Q. It says in the first paragraph, second sentence, quote, "Your insurance policy is enclosed," close quote. Right? That's what it says?

A. That's what it says.

Q. It doesn't say, quote, "Part of your insurance policy is enclosed," close quote. Correct?

A. That's correct.

Q. It doesn't say, "This is only part of your policy. Other parts of it are available on their Web site." Right?

A. That's correct.

Q. It doesn't say, for example, that Mr. Schupp should take some sections out of a prior year's policy and add them to the enclosed policy. True?

A. It doesn't say that.

Q. So when Jon Schupp received this letter from you dated July 27, 2009, this Rykken Number 1, it was your expectation that he could have thrown away the United Fire policy that he had that expired on July 2, 2009.

Right? Once he gets this one, he doesn't need that one?

A. He can – yeah, he can do what he wants with his policies.

Q. But it's your understanding when you send this policy, it's a brand-new policy, the old policy is history?

A. This is the policy that covered him from July of 2009 to July of 2010.

Q. And, Mr. Rykken, was it your understanding that the policy that you sent with this letter that's been marked Rykken Number 1 was the complete policy from United Fire for Jon Schupp and Northern Pine Lodge?

A. It was my belief that this was the complete policy.

United Fire Appendix, 186-187.

Given Rykken's 7/27/09 letter to Schupp, indicating – and intended to state – that the policy that was enclosed with that letter was a complete copy of the United Fire insurance policy, there would have been no reason for Schupp to concern himself with trying to view the policy online.

When United Fire's agent, Rykken, gave Schupp the 2009-2010 policy with his [Rykkens] 7/27/09 letter, § 60A.08, subd. 1, required that the complete policy be provided. As noted herein, Subdivision 1 of Minn. Stat. § 60A.08, titled "Policy to contain entire contract," requires that an insurance policy must "contain the entire contract," which means the insurer must incorporate in, or attach to the policy, "[A] statement in full of the conditions of insurance." United Fire was required to issue a policy that contained the entire contract for 2009-2010.

C. Except in the case of a renewal with no changes to policy terms [which did not occur in this case] Minnesota law prohibits an insurer from incorporating insurance policy terms by reference.

Much of United Fire's Argument is premised upon the false assumption that Exclusion G. was appropriately incorporated by reference in the 2009-2010 policy issued to Schupp and NPLI. The trial court rejected United Fire's assertion

that Minn. Stat. § 60A.08, subd. 1, permits incorporation by reference; the trial court rejected this argument “based on the language of the statute, the purpose of the statute, and the case law construing the statute.” *United Fire Addendum, Add. 7.*

The trial court noted that if the statute permitted incorporation by reference, it would provide that all of the policy conditions must be “incorporated *by* or attached to” the policy; but the statute actually provides that all of the policy conditions must be “incorporated *in* or attached to” the policy. *United Fire Addendum, Add. 7.* The trial court observed that “[T]he legislature’s choice of prepositions is telling.” *Id.*

The trial court then wrote that

[T]he purpose of the statute further belies United Fire’s contention that subdivision one permits incorporation by reference. The apparent purpose of the policy is to ensure that a policyholder has in-hand access to all of the terms and conditions of his or her insurance policy. Permitting incorporation by reference would undermine that policy because the terms and conditions incorporated by reference would not be in the hands of the policyholder.

United Fire Addendum, Add. 7-Add. 8.

Respondents do not believe that the case law cited by the trial court as construing the language in Minn. Stat. § 60A.08, subd. 1, *Aaberg v. Minnesota Commercial Men’s Ass’n*, 173 N.W. 708 (Minn. 1919), is as directly on point as other decisions [see discussion of *Aaberg*, herein below, at section I.F.]. For example, in *Thomas Casey, Sr., P.A., Matter of*, 540 N.W.2d 854 (Minn. App.

1995) the Court of Appeals noted that Minn. Stat. § 60A.08, subd. 1 (1990) requires that “[A] ‘policy’ of insurance must contain the entire insurance contract, including a ‘statement in full of the conditions of insurance.’” 540 N.W.2d at 857 [reversed on other grounds, 543 N.W.2d 96 (Minn. 1996)]. Cited to the trial court, the *Thomas Casey* decision was understandably ignored by United Fire in its appellate brief because the *Thomas Casey* decision confirms the trial court’s interpretation of Minn. Stat. § 60A.08, subd. 1.

In *Domke v. Farmers & Mechanics Sav. Bank*, 363 N.W.2d 898 (Minn. App. 1985), the Minnesota Court of Appeals held that an insurer could not enforce an exclusion in a “master policy” because the exclusion was not set forth in a four-page certificate of insurance issued to the insured; and the Court of Appeals so held even though the certificate of insurance specifically stated that the “master policy,” rather than the certificate, governed the terms of coverage.

The ruling in *Domke* was based upon Minn. Stat. § 62B.06, subd. 2 (1982), which stated that

Each individual * * * group certificate of * * * credit, accident and health insurance shall * * * set forth * * * a description of the amount, terms and coverage including any exceptions, limitations and restrictions * * *. 383 N.W.2d at 901.

Minn. Stat. § 62B.06 is part of Minnesota Statutes, Chapter 62B, which pertains to “All life insurance, accident and health insurance, and involuntary unemployment insurance in connection with loan or other credit transactions ...”

See Minn. Stat. § 62B.01.

United Fire argues that the trial court incorrectly interpreted *Domke* [*United Fire Brief, at 38*]. Again, United Fire's mistake is that it refuses to accept that it has the burden of proving that an exclusion applies to reduce coverage. United Fire characterizes this case as different from *Domke* because, United Fire improperly claims, "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." *United Fire Brief, at 38*. Again, when viewed in the proper context, that of denying an exclusion when an insurer has failed to prove that it applies, *Domke* is actually spot on, and it tells us that the statute means what it says.

The statute in this case is very similar to the one cited in *Domke*, Minn. Stat. § 62B.06, subd. 2. Minn. Stat. § 60A.08, titled "Contracts of Insurance," applies to all insurance contracts, including contracts for liability insurance, and states in Subdivision 1:

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 a warranty or a part of the contract, except in so far as they are so incorporated or attached.

In *Domke*, the Minnesota Court of Appeals did not refer to its decision as based upon "estoppel," but clearly the Court ruled that the insurer was estopped from asserting an exclusion because the insurer had failed to comply with a statutory requirement that the exclusion be provided to the insured. Notably, the *Domke* court did not require the insured to meet the various elements required for promissory estoppel or some other form of equitable estoppel. Similarly, in

the case of Schupp and NPLI, the various elements of promissory or other equitable estoppel were not required for the trial court to rule that United Fire is estopped from asserting Exclusion G.; estoppel flows from United Fire's failure to provide Exclusion G. to Schupp and NPLI as required by Minn. Stat. § 60A.08, subd. 1 (1990).

D. An insurer's failure to establish the applicability of an exclusion is not the same as an expansion of coverage through equitable estoppel.

As noted herein above, because United Fire refuses to accept its burden of proving that Exclusion G. applies to reduce coverage, United Fire repeatedly mischaracterizes this case as one where the trial court expanded coverage. In *Shannon v. Great American Ins. Co.*, 276 N.W.2d 77 (Minn. 1979), the Minnesota Supreme Court wrote that "[T]he doctrine of estoppel may not be used to enlarge the coverage of an insurance policy." In *Shannon* the insurance policy clearly had limits of \$15,000 and the plaintiffs argued that oral representations of the insurer's agent estopped the insurer from asserting that the policy limits were less than \$17,965.

The *Shannon* court cited *Madgett v. Monroe County Mut. Tornado Ins. Co.*, 176 N.W.2d 314 (Wis. 1970), a Wisconsin Supreme Court case where plaintiff bought a farm that had been insured for wind damage, but the insurance policy was not assigned or rewritten with the plaintiff as the new insured. Notably, the Wisconsin Supreme Court wrote that while "Estoppel may prevent an insurer

from enforcing certain policy provisions against its insured,” “estoppel cannot be used to enlarge the coverage of an insurance policy.” 176 N.W.2d at 315.

If Schupp and NPLI were asserting that the United Fire policy provided coverage with limits of \$3 million, or if the United Fire policy had been written for someone else, then the *Shannon* mandate might apply. But Schupp and NPLI are contending, initially, that United Fire’s CGL policy # 85304136 was in force at the time of the 8/12/2009 accident and provided liability insurance coverage of \$2 million; *and United Fire has not disputed this contention*. This is not a case where the trial court improperly expanded coverage; rather, this is a case where because of United Fire’s own conduct in failing to provide Exclusion G. as part of the 2009-2010 policy, United Fire was not allowed to reduce coverage through application of the exclusion.

E. United Fire’s cites to cases from other jurisdictions are not helpful to United Fire’s argument.

United Fire cites New York as having “a statute similar to Minn. Stat. § 60A.08, subd. 1, and cites *Hirshfeld v. Maryland Cas. Co.*, 671 N.Y.S. 2d 100, 101 (N.Y. Sup. Ct. App. Div. 1998) as holding that an insurer complied with the statute. *United Fire Brief*, at 28. Actually, the *Hirshfeld* court did NOT cite the New York statute. And in the second case cited by United Fire, *Shaw v. Aetna Life & Cas. Co.*, 413 N.Y.S.2d 832, 833 (N.Y. Sup. Ct. 1979) [*United Fire Brief*, at 29], the New York court actually wrote that in New York, *unlike* Minnesota, “incorporation by reference of certain provisions of the original policy was

proper.” 413 N.Y.S.2d at 833 [citing 29 N.Y.Jur., Insurance, § 624 and 30 N.Y.Jur., Insurance, § 709].

The Montana case cited by United Fire, *State v. Allendale Mut. Ins. Co.*, 154 P.3d 1233 (Mont. 2007) [*United Fire Brief*, at 29], did not involve the interpretation of a statute similar to Minn. Stat. § 60A.08, subd. 1. The Utah court, in the case cited by United Fire, *National Farmers Union Property and Cas. Co. v. Moore*, 882 P.2d 1168 (Utah App. 1994) [*United Fire Brief*, at 29], not only did not interpret a statute similar to Minn. Stat. § 60A.08, subd. 1; the Utah court wrote that in Utah, unlike in Minnesota, insurance companies are not “required to send a new copy of the original policy to an insured, along with modifications contained in the renewal notices, each time the policy is renewed.” 882 P.2d at 1169.

In the Louisiana appellate case cited by United Fire, *Kanter v. Louisiana Farm Bureau Mut. Ins. Co.*, 587 So.2d 9 (La. App. 3 Cir. 1991) [*United Fire Brief*, at 29], the court wrote that [unlike in Minnesota] in Louisiana “[T]he incorporation of a policy or written evidence of insurance with another by specific reference is a recognized practice in the insurance industry and is acceptable under LSA-R.S. 22:628.” 587 So.2d at 12. Neither the Illinois appellate case cited by United Fire, *Economy Fire & Cas. Co. v. Pearce*, 399 N.E.2d 151 (Ill. App. 5 Dist. 1979), nor the Georgia appellate case cited by United Fire, *Southern Trust Ins. Co. v. Georgia Farm Bureau Mut. Ins. Co.*, 391 S.E.2d 793 (Ga. App. 1990) [*United Fire*

Brief, at 29] involved the interpretation of a statute similar to Minn. Stat. § 60A.08, subd. 1.

F. Respondents [Schupp and NPLI] disagree with United Fire's interpretation of the *Aaberg* decisions and assert that those decisions have either no application or else limited application to the issue here.

The trial court cited the first of the three *Aaberg* decisions:

Specifically, in *Aaberg v. Minnesota Commercial Men's Assn.*, 173 N.W. 708 (Minn. 1919) [*Aaberg I*], the plaintiff applied for accident insurance, and the defendant issued a certificate to plaintiff which provided that the "application and by-laws constitute the contract" between the parties. Despite this reference to the by-laws, the court held, based on the language in subdivision 1 [footnote: When *Aaberg* was decided, the language in subdivision 1 was set forth in Minn. Gen. Stat. § 3292.], that the by-laws would not constitute the terms of the policy unless they were "included with the certificate." *Id.* at 711. The court thus rejected the notion that the language in subdivision 1 permits incorporation by reference.

United Fire Addendum, Add. 8.

Actually, in *Aaberg I* the Supreme Court wrote:

...The 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 whatever. These documents constitute the only contract and only policy contemplated by the parties. They do not conform to the statute, but section 3530 provides that a policy issued in violation of the statute shall be held valid, and that, where any provisions therein contravene the provisions of the statute, the provisions of the statute shall govern. It follows from this section that the contract of insurance was valid and must be given effect, but that the

provisions of the statute must be substituted for those of the contract insofar as the two conflict.

173 N.W.at 711.

This case would only be similar to *Aaberg I* if United Fire's agent had ONLY delivered a declarations page and a list of forms to Schupp and NPLI. Like the insured in *Aaberg*, Schupp and NPLI would have had a document that clearly told them their policy terms were somewhere else. But even in *Aaberg I*, the Court wrote that statutory provisions must be enforced as much as possible, to the point of substituting statutory provisions for conflicting contractual ones.

G. The trial court correctly found that Minn. Stat. § 60A.08 nullifies any terms or conditions that are not "incorporated in or attached" to the policy.

The trial court stated three reasons for its conclusion that § 60A.08 nullifies any terms or conditions that are not "incorporated in or attached" to the policy. First, the trial court found that "the language of the statute compels" this conclusion. *United Fire Addendum, Add. 8*. Second, the trial court noted that "nullification is essential to give force to the statute." *United Fire Addendum, Add. 9*. And third, the trial court, citing *Domke v. Farmers & Mechanics Sav. Bank*, 363 N.W.2d 898 (Minn. App. 1985), wrote that "case law construing a similar statute supports the conclusion that nullification is the proper remedy for noncompliance." *Id.*

United Fire fails to come to terms with the trial court's analysis because, as has been noted repeatedly herein, United Fire refuses to accept that it has the burden of proving the applicability of a policy exclusion.

II. Where Schupp and NPLI incurred attorney fees as a direct result of United Fire's refusal to provide coverage by invoking Exclusion G, the trial court did not err in ruling that Schupp and NPLI are entitled to recover those fees as damages under the *Morrison v. Swenson* doctrine.

A. United Fire wrongly states that the trial court read Exclusion G. out of United Fire's policy rather than that United Fire failed its burden of proving that Exclusion G. must be read into United Fire's policy.

United Fire cannot meet its burden of proving that Exclusion G. applies to avoid coverage because United Fire admits that its agent didn't provide Exclusion G. as part of the 2009-2010 policy [see 7.1.11 Affidavit of United Fire's Caraway, at ¶¶ 8-9, United Fire Appendix, A. 79] and because Minnesota law does not allow United Fire to incorporate Exclusion G. into the 2009-2010 policy "by reference." Because United Fire stubbornly refuses to accept its burden, United Fire repeatedly and wrongly characterizes this case as one where the trial court improperly excluded the exclusion; in truth, the trial court correctly ruled that United Fire failed to meet its burden.

B. United Fire quibbles that the trial court never declared that Schupp and NPLI are entitled to coverage when that is exactly what the trial court ruled.

United Fire argues that the vehicle involved in the 8.12.2009 accident "was never covered under the policy, even if the exclusion [Exclusion G.] does not apply." *United Fire Brief, at 44.* As has been noted, United Fire argues that it was never asked to write automobile coverage for Schupp and NPLI, and United Fire claims that it "was provided no information about auto liability exposure upon which it could have underwritten automobile coverage. *United Fire Brief, at 25.*

And, as has been noted, Schupp actually *did* ask Nesbit to obtain liability insurance coverage for Schupp's and NPLI's *business*, and part of that *business* involved the use of automobiles. And in his cover letter sending the 2009-2010 policy, Rykken wrote to Schupp: "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" [*emphasis added*]. *7.27.2009 letter from Rykken to Jon Schrupp [sic]; United Fire Appendix, A. 65*. And Rykken has admitted in deposition that he knew that Schupp's *business* included the use of motor vehicles. See *6.20.11 Rykken deposition, p. 108, l. 12 through l. 25. United Fire Appendix, A. 192*.

Also, United Fire admits that in the declarations page of the 2009-2010 policy it told Schupp and NPLI that they had liability insurance with limits of \$1 million/\$2 million; so Schupp had reason to believe that the United Fire policy that provided coverage for his "business" included coverage for automobiles that were sometimes used for his "business." And although United Fire claims that it is unfair to require United Fire to provide coverage for automobiles under its commercial general liability policy, United Fire admits that it DOES write coverage for automobiles—it just "typically" provides that coverage under a separate policy. See *United Fire Brief, at 25*.

C. United Fire mistakenly argues that the trial court extended *Morrison v. Swenson* by its ruling in this case.

United Fire argues that because Schupp and NPLI “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.” *United Fire Brief*, at 45. First, Schupp and NPLI specifically DID plead a claim for attorney fees. See [Schupp’s and NPLI’s] Complaint for Declaratory Relief and Damages, *ad damnum* clause, ¶ [2], *United Fire Appendix*, A.62.

Second, this issue was litigated by consent. A district court may imply consent to litigate an issue not raised in the pleadings when a party does not object to evidence relating to the new issue or offers evidence relating to that issue. *Folk v. Home Mut. Ins. Co.*, 336 N.W.2d 265, 267 (Minn. 1983); *Shandorf v. Shandorf*, 401 N.W.2d 439, 442 (Minn. App. 1987).

Third, United Fire did not raise this argument before the trial court. See [12.5.2011] *United Fire’s Memorandum in Opposition to Plaintiffs’ Motion for Attorney Fees*, R.A. 96; and see [12.12.2011] *United Fire’s Supplemental Memorandum in Opposition to Plaintiffs’ Motion for Attorney Fees*, R.A. 102. The appellate court will not consider an argument not raised or decided in district court. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

The trial court in this case found that

...the fees sought as damages by Plaintiffs were incurred as a direct result of United Fire’s refusal to provide coverage by invoking exclusion 2.g. The fees include those incurred in (i)

participating in the defense of the Underlying Action and (ii) prosecuting this declaratory judgment action.

As to fees incurred in the Underlying Action, Plaintiffs argue that because of United Fire's refusal to defend, Plaintiffs faced a significant exposure in excess of Allstate's \$100,000 per person policy and as a result incurred attorney fees in that action over and above those paid by Allstate. The Court agrees. The *Morrison* line of cases provides for an award of fees necessarily incurred in the defense of an underlying action, as well as those incurred in prosecuting a declaratory judgment action to obtain wrongfully denied coverage. ... See [2.13.2012] Order and Memorandum Granting Attorney Fees as Damages, Granting Costs and Disbursements, and Ordering Entry of Amended Judgment, *United Fire Addendum, Add. 17, at Add. 20-Add. 21*.

Aside from its argument, not raised at the trial court, that *Morrison* does not apply because Schupp and NPLI did not specifically plead a breach of contract claim, United Fire does not criticize the trial court's application of *Morrison*.

D. The trial court acted well within its discretion in awarding attorney fees for prosecuting the claim against Nesbit

In arguing that the trial court abused its discretion in awarding Schupp and NPLI attorney fees incurred in prosecuting their claims against Nesbit, United Fire completely ignores the key bases for this award: the trial court specifically found [1] that "had United Fire not improperly denied coverage, Plaintiffs' claims against Nesbit would not have been necessary" [See 2.13.2012 Order and Memorandum, etc., *United Fire Addendum, Add. 23*]; and [2] "[T]he claims against United Fire and Nesbit, the insurance agent, were "inextricably intertwined" [*Id.*, citing *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 83 (Minn. App. 1997)].

When viewed in the proper context, the trial court's award of attorney fees was well within that court's discretion.

RESPONDENTS' [SCHUPP'S AND NPLI'S] CONCLUSION

Where United Fire admits that its policy #85304136 was in force providing liability insurance coverage to Schupp and NPLI at the time of the 8/12/2009 accident and the sole basis for United Fire's denial of coverage is an exclusion that was not delivered to Schupp and NPLI, Schupp and NPLI are entitled to summary judgment declaring that United Fire policy #85304136 provides coverage for claims arising from the 8/12/2009 accident.

Where Schupp and NPLI incurred attorney fees as a direct result of United Fire's refusal to provide coverage by invoking Exclusion G., the trial court did not err in ruling that Schupp and NPLI are entitled to recover those fees as damages under the *Morrison v. Swenson* doctrine.

This matter should be affirmed but remanded to the trial court for a determination of additional attorney fees owed by United Fire as damages under the CGL insurance policy issued to Schupp and NPLI, incurred after the trial court's order granting summary judgment.

Respectfully submitted,

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Dated: May 11, 2012

A handwritten signature in black ink, appearing to read "Timothy R. Schupp", is written over a horizontal line.

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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 9,673 words. This brief was prepared using Microsoft Office Word 2007 and 2010.

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