

NO. A05-2541

State of Minnesota
In Court of Appeals

Gregory A. Jablonske, et al.,

Appellants,

vs.

Metropolitan Property and Casualty
Insurance Company,

Respondent.

**BRIEF AND APPENDIX OF
APPELLANTS JOSEPH AND JEANNE SENKO**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 13

ARGUMENT 14

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THE POLICY DID NOT PROVIDE COVERAGE BASED ON THE “BUSINESS” AND “BUSINESS PREMISES” EXCLUSIONS. THEREFORE, THE DECISION OF THE TRIAL COURT MUST BE REVERSED..... 14

A. Standard of Review 14

B. The “Business” Exclusion Contained in the Policy is a Narrow Exclusion which does not Exclude Coverage for the Senkos’ Claims since Their Claims are not “Connected to Any Business, Profession or Occupation.” 15

1. The Plain Language of the “Business” Exclusion Indicates it does not Apply to the Facts of this Case so as to Preclude Insurance Coverage..... 15

2. In the Alternative, if this Court Finds the “Business” Exclusion to be Ambiguous, the Exclusion must be Strictly Construed Against Metropolitan and in Favor of Coverage..... 20

3. Even Under the “Business Pursuits” Analysis the “Business” Exclusion does not Apply Since There is No Connection Between the Liability Causing Conduct and Jablonske’s Business. 22

C. The “Business Premises” Exclusion does not Exclude Coverage under the Policy since the Vacant Land was not “Used in a Business or Rented for a Profit.” 27

II.	THE TRIAL COURT ERRED WHEN IT RELIED ON THE FARMING EXCLUSION TO DEFEAT COVERAGE WHEN JABLONSKA DID NOT USE THE VACANT LAND FOR FARMING OR RENT IT FOR A PROFIT ON JANUARY 14, 2002..	30
A.	<u>The Vacant Land is “Vacant Land” Within the Language of the Policy and Therefore the Policy Provides Coverage to Jablonske for the Senkos’ Claims</u>	30
B.	<u>The Farming Exclusion does not Apply since the Vacant Land was not “Used for Farming” at the Time of the January 14, 2002, Incident.</u>	34
	CONCLUSION	38
	ADDENDUM	40
	CERTIFICATE OF COMPLIANCE	41

TABLE OF AUTHORITIES

Statutes

Minn. Stat. § 555.114

Cases

Allied Mut. Ins. Cas. Co. v. Askerud,1, 25
254 Minn. 156, 94 N.W.2d 534 (1959)

American Family Ins. Co. v. Walser,15, 16, 22
628 N.W.2d 605 (Minn. 2001)

American Motorist Ins. Co. v. Steffens,1, 20, 31
429 So. 2d 335 (Fla. 4th Dist. App. 1983)

Bianchi v. Westfield Ins. Co.,35
191 Cal. App. 3d 287, 236 Cal. Rptr. 343 (Cal. App. 2d Dist. 1987)

Bob Useldinger & Sons, Inc. v. Hangsleben,16, 25, 26
505 N.W.2d 323 (Minn. 1993)

Brault v. Acceptance Indem. Ins. Co.,15
538 N.W.2d 144 (Minn. App. 1995)

Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc.,15
258 N.W.2d 570 (Minn. 1977)

Dawson v. Dawson,34
841 P.2d 749 (Utah App. 1992)

De Lisa v. Amica Mut. Ins. Co.,1, 30, 31
59 A.D.2d 380, 399 N.Y.S.2d 909 (N.Y. App. Div. 3d Dept. 1977)

DLH, Inc. v. Russ,14
566 N.W.2d 60 (Minn. 1997)

Dome Corp. v. The Cincinnati Ins. Co.,1, 20, 21
172 F.3d 1278 (10th Cir. 1999)

<i>Fabio v. Bellomo</i> ,	14
504 N.W.2d 758 (Minn. 1993)	
<i>Foret v. Louisiana Farm Bureau Casualty Ins. Co.</i> ,	34
582 So. 2d 989 (La. App. 1st Cir. 1991)	
<i>Fort Worth Lloyds v. Garza</i> ,	31
527 S.W.2d 195 (Tex. Civ. App. 1975)	
<i>Franklin v. Western Natl. Mut. Ins. Co.</i> ,	14
574 N.W.2d 405 (Minn. 1998)	
<i>Grossman v. American Family Mut. Ins. Co.</i> ,	26
461 N.W.2d 489, 493 (Minn. App. 1990), <i>review denied</i> (Minn. Dec. 20, 1990)	
<i>Harasyn v. St. Paul Guardian Ins. Co.</i> ,	29
75 S.W.3d 696 (Ark. 2002)	
<i>Illinois Farmers Ins. Co. v. Glass Service Co.</i> ,	15
683 N.W.2d 792 (Minn. 2004)	
<i>Kluball v. American Family Mut. Ins. Co.</i> ,	14
706 N.W.2d 912 (Minn. App. 2005)	
<i>Meister v. Western Natl. Mut. Ins. Co.</i> ,	14
479 N.W.2d 372 (Minn. 1992)	
<i>Milwaukee Mut. Ins. Co. v. City of Minneapolis</i> ,	23
307 Minn. 301, 239 N.W.2d 472 (1976)	
<i>O’Conner v. Safeco Ins. Co. of North America</i> ,	32
352 So. 2d 1224 (Fla. 1st Dist. App. 1977)	
<i>Ratka v. St. Joseph Mut. Ins. Co.</i>	35, 36
No. A03-1661 (Minn. App. May 18, 2000)	
<i>Senger v. Minn. Lawyers Mut. Ins. Co.</i> ,	26
415 N.W.2d 364 (Minn. App. 1987)	
<i>State by Cooper v. French</i> ,	14
460 N.W.2d 2 (Minn. 1990)	

State Farm Fire & Casualty Co. v. Comer,36
 No. 3:95CV041-B-A (N.D. Miss. Jan. 10, 1996)

Thommes v. Milwaukee Ins. Co.,20
 641 N.W.2d 877 (Minn. 2002)

Van Hollenbeck v. Ins. Co. of North America,21
 403 N.W.2d 166 (Mich. App. 1987)

Wanzek Const., Inc. v. Employers Ins. of Wausau, 15, 30
 679 N.W.2d 322 (Minn. 2004)

West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.,15, 25
 372 N.W.2d 438 (Minn. App. 1985)

Zimmerman v. Safeco Ins. Co. of America, 1, 24
 605 N.W.2d 727 (Minn. 2000)

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Frazier, *The “Business Pursuits” In Personal Liability Policies: What the Courts Have Done With It*, 572 Ins. L.J. 519 (1970)23

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STATEMENT OF ISSUES

- I. DID THE TRIAL COURT ERR IN DETERMINING THAT THE “BUSINESS” AND “BUSINESS PREMISES” EXCLUSIONS EXCLUDE INSURANCE COVERAGE FOR THE SENKOS’ CLAIMS WHEN THERE IS NO CONNECTION BETWEEN THE SENKOS’ CLAIMS AND JABLONSKE’S BUSINESS?

Applying a “business pursuits” exclusion analysis, the trial court held that that the planning and development activities on the Vacant Land, and Jablonske’s prior rental of the Vacant Land constituted a “business pursuit” within the meaning of the policy and the Policy did not provide insurance coverage for the Senkos’ claims.

Allied Mut. Ins. Cas. Co. v. Askerud, 254 Minn. 156, 94 N.W.2d 534 (1959)

Dome Corp. v. The Cincinnati Ins. Co., 172 F.3d 1278 (10th Cir. 1999)

Zimmerman v. Safeco Ins. Co. of America, 605 N.W.2d 727 (Minn. 2000)

- II. DID THE TRIAL COURT ERR IN DETERMINING THAT THE FARMING AND RENTAL EXCLUSIONS EXCLUDE INSURANCE COVERAGE FOR THE SENKOS’ CLAIMS WHEN THE VACANT LAND WAS NOT FARMED OR RENTED FOR A PROFIT AT THE TIME OF THE JANUARY 14, 2002, INCIDENT?

The trial court held that the Vacant Land was within the language of the Policy farmed based on aerial photographs and even though Jablonske stated he was not renting the land for farming after the 2001 season.

American Motorist Ins. Co. v. Steffens, 429 So. 2d 335 (Fla. 4th Dist. App. 1983)

De Lisa v. Amica Mut. Ins. Co., 59 A.D.2d 380 (N.Y. App. Div. 3d Dept. 1977)

STATEMENT OF THE CASE

Joseph Senko was severely injured when his snowmobile struck a recently constructed unmarked, snow-covered ditch while snowmobiling on a known snowmobile trail on vacant land ("Vacant Land") owned by Greg and Susan Jablonske. (A.93-94). Joseph and Jean Senko ("Senkos") commenced a law suit against the entities involved with the design and construction of the ditch and Gregory A. Jablonske ("Jablonske") as the owner of the land. (*Id.*). Specifically, the Senkos claimed Jablonske was negligent in allowing a dangerous, hidden condition to exist on the land and of failing to warn them of such condition. (A.95).

The Gregory and Susan Jablonske purchased insurance policy number PK02219381 ("Policy") from Metropolitan Property and Casualty Company ("Metropolitan"). (A.4). They tendered the Complaint to Metropolitan and Metropolitan accepted defense of Greg and Susan Jablonskes under a reservation of right. (A.7; Fleming Aff., Ex. 46). Metropolitan commenced a declaratory judgment action to establish that the Policy issued to Gregory and Susan Jablonske excluded coverage for the Senkos' claims. (A.7). Metropolitan relied on the "business," "business premises," "farming" and "rented for a profit" exclusions to defeat coverage. (*Id.*). Metropolitan moved the trial court for an Order granting summary judgment on August 8, 2005. (A.99).

Metropolitan's motion was heard on September 13, 2005, before the Honorable Rex C. Stacey, Dakota Court District Court Judge. (A.100). Judge

Stacey issued an Order, filed on October 28, 2005, granting Metropolitan's motion and held that Jablonske's planning and preparation in connection with his vacant land was a "business pursuit" and that the Policy did not provide coverage for the Senkos' claims. (A.9-10). The trial judge also held that the Vacant Land was not "vacant" within the language of the Policy since the land was farmed in the prior season. (A.11-12).

The Senkos appeal the decision of the trial court by Notice of Appeal served and filed on December 27, 2005. (A.112).

STATEMENT OF FACTS

A. Introduction and the Parties.

On January 14, 2002, Joseph Senko suffered serious injuries when the snowmobile he was operating struck a recently constructed unmarked, snow-covered ditch located on a vacant parcel of land owned by Gregory and Susan Jablonske. (A.93-94). The Senkos commenced an action against all entities involved in the construction and design of the ditch including Lyman Development Company ("Lyman"), Enebak Construction Company ("Enebak"), Nodland Construction Company, ("Nodland"), McCombs, Frank, Roos Associates, Inc. ("MFRA"), BDM Consulting Engineers, PLC ("BDM") for personal injury damages suffered by Joseph Senko. (A.89). Metropolitan insured Gregory and Susan Jablonske under the Policy. (A.4; A.11). Metropolitan commenced this declaratory judgment action to establish that the Policy it issued to Gregory and Susan Jablonske excluded coverage for Senkos' claims. (A.7). Since the Senkos

have an interest which would be affected by the declaration, they are proper parties to the declaratory judgment action. See Minn. Stat. § 555.11.

B. The Policy.

Gregory and Susan Jablonske purchased the Policy from Metropolitan, effective March 2, 2001, through March 2, 2002. (A.4; A.7). Greg and Susan Jablonske understood the Vacant Land was covered by the Policy. (G. Jablonske Aff., ¶ 3; Vander Linden Aff., Ex. G, p. 60). The Policy states “Pak II means broad personal protection.” (A.41). The personal liability coverage provided by the policy is as follows:

Legal Liability Protection. Under the liability section of this policy you’re covered when somebody makes a claim against you. We’ll cover your legal liability resulting from an occurrence in which there is actual accidental property damage, personal injury or death, anywhere in the world, subject to the limitations and exclusions in PAK II.

(A.43) (emphasis in original). The liability protection section further provides:

We cover your liability for an accident or incident that happens in your home that is listed in the Coverage Summary. You and your family are protected against claims up to the limit of liability per occurrence shown on the Coverage Summary.

...

We also cover the liability of you and your family (but not others) in connection with:

2. Vacant land owned by you or rented to you as long as it is not used for farming or ranching.

(A.46). The Policy excludes the following from coverage:

1. PAK II doesn't cover accidents happening on your business premises. And we do not cover any liability or claims *connected* with any business, profession or occupation.

(A.60) (emphasis added). "Business premises" is defined elsewhere in the policy as "any property used in a business or rented for a profit." (A.47). The Minnesota Personal Umbrella Liability Endorsement contains a similar exclusion:

"Types of Claims Not Covered By This Endorsement"

In addition to the claims not covered that are listed in your Policy, this endorsement does not cover the following types of claims:

1. We won't cover any liability *connected* with any business, profession or occupation of anyone insured by this endorsement. . . .

(A.84) (emphasis in original; emphasis added).

C. Jablonske's Primary Business: Greg J. Homes, Inc.

Gregory A. Jablonske ("Jablonske") is the owner of a business called Greg J. Homes, Inc. ("Greg J. Homes, Inc."). (Vander Linden Aff., Ex. B, p. 19). Greg J. Homes, Inc. constructs townhouses and single family homes. (See Flemming Aff., Ex. 4). Jablonske's primary business, profession or occupation is home builder. (G. Jablonske Aff., ¶ 4). Susan Jablonske, his wife, operates a business named Home Design which sells floor coverings, wall paper, drapes, and miscellaneous home products. (Vander Linden Aff., Ex. G, p. 8). In the past, Greg and Susan Jablonske have purchased real estate as investment properties. (G. Jablonske Aff., ¶ 6). Since the late 1970s or early 1980s through January 14,

2002, Jablonske has developed two parcels of land which are now known as the Riverwood and Summit Heights Additions. (Vander Linden Aff., Ex. B, pp. 20-22).

D. The Vacant Land.

In the early 1990s Greg and Susan Jablonske purchased the Vacant Land in Dakota County. The Vacant Land was sold to Greg and Susan Jablonske on a Contract for Deed. (Flemming Aff., Ex. 7). At that time the Vacant Land was zoned as Agricultural. (See Flemming Aff., Ex. 9). At the time the Jablonskes entered into the Contract for Deed they did not have any specific plans to develop the Vacant Land. (G. Jablonske Aff., ¶ 8). The Jablonskes completed the Contract for Deed payments and obtained title to the Vacant Land by a Trustees' Deed filed on September 27, 2001. (Vander Linden Aff., Ex. H).

The prior owners of the Vacant Land rented it to the Bauer family. From the time of their purchase of the Vacant Land until the late fall of 2001, Greg and Susan Jablonske rented the Vacant Land to the Bauer family. (Bauer Aff., ¶¶ 2-3). The Bauers planted and harvested crops on the Vacant Land through the 2001 growing season. (Vander Linden Aff., Ex. A, p. 85-86 & Ex. G, p. 15). At the close of the 2001 harvest, Jablonske told Bauer that he would not be renting the Vacant Land the following year. (Vander Linden Aff., Ex. A, p. 85 & Ex. B, p. 9; see Bauer Aff., ¶ 4). The Vacant Land was not rented to anyone else or used for planting and harvesting crops after the end of the 2001 farming season. (*Id.*). All that remained on the Vacant Land on January 14, 2002, were the remnants of the previous year's crops. (Flemming Aff., Ex. 10). No person resided on the

Vacant Land from the time of its purchase by the Jablonskes through January 14, 2002. (See Vander Linden Aff., Ex. B, pp. 6-7).

Up through 2001, Gary Bauer paid Greg and Susan Jablonske rent of \$2,000 per season. (Vander Linden Aff., Ex. B, p. 6). The Jablonskes claimed this payment as income on their personal income tax returns. (*Id.*). They also listed real estate taxes for the Vacant Land and Contract for Deed interest as expenses on their personal income tax returns (in prior years). (Vander Linden Aff., Ex. B, pp. 7-9). The Jablonskes did not claim any rental income in 2002 in connection with the Vacant Land, since it was not rented. (See Flemming Aff., Ex. 69). Jablonske never filed a Farm Return (1040 Schedule F (Profit or Loss from Farming)) in connection with the Vacant Land. (*Id.*). The \$2,000 rental payment was used to help pay for the Contract for Deed interest and the real estate taxes on the Vacant Land. (Vander Linden Aff., Ex. B, pp. 7-8).

On December 28, 2000, Jablonske, as an individual, retained Probe Engineering to prepare a concept plan for the Vacant Land. (Flemming Aff., Ex. 15). On October 22, 2001, Jablonske, as an individual, submitted an application and paid \$2,420.00 fee from his personal checking account to initiate the process of rezoning the Vacant Land from agricultural use to multi-dwelling use. (Flemming Aff., Ex. 22; G. Jablonske Aff., ¶ 27). The Hastings City Council approved Jablonske's zoning request on February 19, 2002 (thirty-six days after the snowmobile incident), and approved the final plat for Jablonske's proposed South Oaks development on June 9, 2002. (Flemming Aff., Exs. 21, 31). As of

May 21, 2002, the Jablonskes had not secured building permits for their proposed development. (Flemming Aff., Ex. 63). The Jablonskes entered a Development Agreement with the City of Hastings on July 1, 2002. (Flemming Aff., Ex. 21 (Development Agreement)). The Development Agreement was between the City of Hastings and Greg and Susan Jablonske as *individuals*. (*Id.*). The Jablonskes were not able to and did not begin improvement of the Vacant Land prior to the zoning changes, approval of the final plat, execution of the Development Agreement with the City of Hastings or until they received the necessary building permits. (Vander Linden Aff., Ex. C, p. 84; Jablonske Aff., ¶¶ 12-14). Construction by Greg J. Homes, Inc. on the Vacant Land did not commence until the summer of 2002. (Jablonske Aff., ¶ 9).

D. Lyman Development Company's Century South Development.

Lyman owned a parcel of land directly south of the Vacant Land. (Vander Linden Aff., Ex. D, p. 29). Lyman developed this parcel into a residential housing development known as Century South. (See *id.*, Ex. D at p. 13). During the development of Century South, the City of Hastings required Lyman to address the storm water that drained into and out of the development. (*Id.*, Ex. D at pp. 43-44). Since the natural flow of water on Century South was to the north, onto the Jablonskes' Vacant Land, an accommodation needed to be made for this water. (*Id.*, Ex. D at p. 44). MFRA, Lyman's Engineering Firm, designed a swale with a flared end section, which would be located on the Vacant Land, to accommodate the discharge of Century South's storm sewer. (*Id.* at p. 42-43).

The swale design provided for a structure with a ten foot wide flat bottom and with sides with a four-to-one slope. (Vander Linden Aff., Ex. E, pp. 24-25). The swale was to be three feet deep. (*Id.*, Ex. E at p. 25).

Lyman approached Jablonske requesting his permission to construct the swale, flared end section and storm sewer pipe on his Vacant Land. (Vander Linden Aff., Ex. D, pp. 45-46). Jablonske understood the swale, sewer pipe and flared end section were requirements of the City of Hastings to complete the Century South development. (Vander Linden Aff., Ex. A, p. 95). Jablonske objected to the discharge of water onto his Vacant Land and he voiced his objections to the City of Hastings. (*Id.*, Ex. A, at p. 94). Ultimately, Jablonske consented to the construction of the swale, flared end section and sewer pipe on his Vacant Land. (Vander Linden Aff., Ex. I). Greg and Susan Jablonske and Lyman entered into the License Agreement and Right of Entry Permit which granted Lyman and its contractors the right to enter the Vacant Land and to construct the storm water outlet structure and swale. (*Id.*).

Rather than construct a swale and flared end section as required by the plans, Nodland, a subcontractor, constructed a ditch with vertical sides—not the four-to-one slope—and a storm sewer outlet without the flared end section. (Vander Linden Aff., Ex. F, pp. 24-25). The ditch was filled with boulders. (See Flemming Aff., Ex. 11). The ditch and storm sewer outlet was constructed in December of 2001 by Nodland. (Vander Linden Aff., Ex. F, p. 21; T.16). As a

result of the construction of the storm sewer outlet, water drained out of the Century South development and onto the Vacant Land. (T.16-17).

E. The City of Hastings' Water and Sewer Project to Century South.

Just prior to the construction of the storm sewer outlet, the City of Hastings completed a water and sewer project to connect Lyman's Century South development to the City's water and sewer. (Flemming Aff., Ex. 39). In order to connect Century South to the City's water and sewer system it was necessary to cross the Vacant Land with the City's water and sewer pipes. (See Fleming Aff., Ex. 41). The City of Hastings obtained both a Temporary Construction Easement and a Permanent Easement from the Jablonskes for such construction and placement of the water and sewer lines. (Flemming Aff., Exs. 40 & 41; Jablonske Aff., ¶ 21; Vander Linden Aff., Ex. A, p. 67). The Easements were signed by both Greg and Susan Jablonske in their individual capacities, and indicated Greg and Susan Jablonske were to be compensated for the Easements as individuals. (Flemming Aff., Exs. 40 & 41). The water main and sewer line were buried under the ground. (See Vander Linden Aff., Ex F, p. 26).

The City of Hastings connected the water and sewer to the Century South project by crossing the Vacant Land. (Vander Linden Aff., Ex F, p. 22-24; see Fleming Aff., Ex. 39). As part of the project to provide water and sewer to the Century South development, the City of Hastings installed curb boxes on the Vacant Land. (Vander Linden Aff., Ex F, p. 22-24). Curb boxes are a connection

to the water main which could be connected to a future project. (*Id.*, Ex. F. at p. 28). Some of the curb boxes located in the Vacant Land were disconnected from the water main. (*Id.*, Ex. F. at p. 28). They were not connected to any development structure or improvement on January 14, 2002, as no such structure or improvement existed until the summer of 2002. (*See id.*, Ex. F. at p. 28).

Nearly nine months after Joseph Senko was injured, the Jablonskes received payment of \$18,800 from the City of Hastings for the Easements in the form of a check dated October 5, 2002. (Flemming Aff., Ex. 44; G. Jablonske Aff., ¶ 22). The check from the City of Hastings was erroneously made payable to Greg J. Homes, Inc. when it should have been made payable to Greg and Susan Jablonske as individuals. (G. Jablonske Aff., ¶ 23; Vander Linden Aff., Ex. B, p. 35 (correction page)). To correct this error, Greg and Susan Jablonske loaned the entire proceeds of the check to Greg J. Homes, Inc. (G. Jablonske Aff., ¶¶ 24-26 and attachments). The funds were deposited in a business account and recorded as a loan from Greg and Susan Jablonske to Greg J. Homes, Inc. (*Id.*).

F. Procedural Posture of the Action.

Metropolitan moved the trial court for an Order granting summary judgment on August 8, 2005. (A.99). Metropolitan's motion was heard on September 13, 2005, before the Honorable Rex C. Stacey, Dakota Court District Court Judge. (A.100). At the hearing the Court and Mr. O'Connor had the following dialogue when discussing the farming exclusion:

THE COURT: Doesn't Metropolitan agree with that proposition—it's not a farming issue, it's a business issue?

Mr. O'CONNOR: Yeah, I I'm not sure that—I still would argue that because he is taking the position that there is continuity here, who's to say it still wasn't farm land. But you are right, he says that it ended. So I don't think we would win at trial on that issue.

(T.20). Judge Stacey issued an Order, filed on October 28, 2005, granting Metropolitan's motion and entering judgment accordingly. (A.100). The Senkos appeal from this judgment. (A.112).

SUMMARY OF ARGUMENT

The Policy purchased by the Jablonskes provides insurance coverage for the Senkos' claims. The "business" and "business premises" exclusions do not exclude coverage for the Senkos' claims since based on their plain language, the Senkos' claims are not connected to Gregory Jablonske's business. In the alternative, as drafted, the "business" exclusion is ambiguous. Should this court use the "business premises" analysis, the exclusions still do not exclude coverage since there is no connection between the liability causing conduct and Gregory Jablonske's business, Greg J. Homes, Inc. For similar reasons, the business premises exclusion does not apply since the Vacant Land was not used in Jablonske's primary business, Greg J. Homes, Inc.

As to the farming exclusion, it is not applicable to the facts of this case. Case law provides multiple definitions of "vacant land"—unused, empty, uninhabited—and as such the term is ambiguous and must be construed in favor of coverage and against Metropolitan. Additionally, while the Vacant Land had been farmed in the past, it was not farmed at the time of the incident. Even when the Vacant Land was rented it was not rented for a profit. Therefore the farming exclusion is not applicable. In light of the trial court's misinterpretation of the Policy this Court must reverse the decision of the trial court and construe the policy in favor of coverage.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DETERMINED THE POLICY DID NOT PROVIDE COVERAGE BASED ON THE "BUSINESS" AND "BUSINESS PREMISES" EXCLUSIONS. THEREFORE, THE DECISION OF THE TRIAL COURT MUST BE REVERSED.

A. Standard of Review.

On an appeal from summary judgment, this Court must determine (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *Kluball v. American Family Mut. Ins. Co.*, 706 N.W.2d 912, 915-16 (Minn. App. 2005). Interpretation of an insurance policy, and its application to the facts of the case, are questions of law. *Franklin v. Western Natl. Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998), citing *Meister v. Western Natl. Mut. Ins. Co.*, 479 N.W.2d 372, 376 (Minn. 1992). There is no genuine issue of material fact if "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The existence of a genuine issue of material fact must be established by substantial evidence. *Id.* at 69-70. On appeal, the Court must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

It must be noted from the outset that insurance policy coverage clauses must be interpreted broadly to afford the greatest possible protection to the insured, while exclusionary clauses must be interpreted narrowly against the

insurer. *West Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co.*, 372 N.W.2d 438, 441 (Minn. App. 1985). Minnesota has demonstrated a strong policy of extending insurance coverage in favor of the insured rather than allowing coverage to be restricted by confusing or ambiguous language. *Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 147 (Minn. App. 1995). When interpreting insurance policies, exclusionary language is construed in accordance with the expectations of the insured party, and is strictly construed against the insurer. *American Family Ins. Co. v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001); *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 327 (Minn. 1993).

B. The “Business” Exclusion Contained in the Policy is a Narrow Exclusion which does not Exclude Coverage for the Senkos’ Claims since Their Claims are not “Connected to Any Business, Profession or Occupation.”

1. The Plain Language of the “Business” Exclusion Indicates it does not Apply to the Facts of this Case so as to Preclude Insurance Coverage.

The interpretation of insurance policies is governed by general principles of contract law. *Illinois Farmers Ins. Co. v. Glass Service Co.*, 683 N.W.2d 792, 799 (Minn. 2004). Clear and unambiguous policy language must be given its usual and accepted meaning. *Wanzek Const., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322, 324-25 (Minn. 2004). The policy language must be construed to mean what a reasonable person would have understood it to mean. *Canadian Universal Ins. Co., Ltd. v. Fire Watch, Inc.*, 258 N.W.2d 570, 573 (Minn. 1977). In

addition, courts must construe exclusionary language against the insurer and in favor of coverage. See *Walser*, 628 N.W.2d at 613.

The Policy provides broad personal protection to its insureds. (A.41). As such, Metropolitan can only escape coverage under the Policy if an exclusion without question applies to the facts of this case. The trial court held that Jablonske's planning and preparation for the South Oaks development constituted a "business pursuit." (A.108-109). However, a plain reading of the "business" exclusion clearly establishes this exclusion does not apply to the facts of this case since the Senkos' claims are not connected to Jablonske's "business, profession or occupation." As such, the decision of the trial court must be reversed.

The Policy provides coverage for personal injury, liability and property damage. (See A.46). The Policy excludes coverage for "accidents happening on your business premises." (A.60). The Policy also excludes coverage for "any liability or claims connected with any business, profession or occupation." (*Id.*). The Policy's Minnesota Personal Umbrella Liability Endorsement contains a similar exclusion which excludes coverage for "liability connected with any business, profession or occupation of anyone insured by this endorsement." (A.84).

The terms "connected," "business," "profession" and "occupation" are not defined by the policy. "Connected" is defined as "joined or linked together." *Webster's Third New International Dictionary* 480 (Philip Babcock Gove ed.,

Merriam-Webster, 1986). “Business” is defined as “a usual commercial or mercantile activity customarily engaged in as a means of livelihood.” *Id.* at 302. “Profession” is defined as “the principal business of one’s life.” *Id.* at 1811. “Occupation” is defined as “a principal calling, vocation or employment.” *Id.* at 1560.

The trial court failed to address the plain language of the “business” exclusion. (See A.8). However, an examination of the plain language of the policy reveals the Senkos’ claims against Jablonske are not connected to his business, profession or occupation. The Senkos’ have made the following claims against Jablonske in their Complaint in the underlying personal injury action:

Defendant Gregory A. Jablonske, as *the owner of the field* was negligent in allowing a dangerous, hidden condition to exist upon his hand, in failing to warn known users of such land of the dangerous hidden condition that existed on his land.

(A.95) (emphasis added). Thus, the plain language of the Complaint indicates that the Senkos’ claims against Jablonske arise out of Jablonske’s negligence as an individual owner of land. The Senkos did not claim Greg J. Homes, Inc., Jablonske’s primary business, was negligent, and Senko did not name Greg J. Homes, Inc. as a Defendant in his personal injury action. Rather, liability for the Senkos’ claims arises from Jablonske’s negligence, as *the owner of the Vacant Land*, and from Jablonske’s failure, as *an individual*, to warn of the dangerous, hidden condition that existed on the Vacant Land. Additionally, Joseph Senko

was in no way associated with Greg J. Homes, Inc. As such, there is no “joining or linking together” of the claims of the Senkos and Greg J. Homes, Inc., in fact, there is *no connection*.

Similarly, there was no connection between Jablonske’s liability or the Senkos’ claims and Greg J. Homes, Inc. Greg J. Homes, Inc. is in the business of building houses. However, on January 14, 2002, Greg J. Homes, Inc. *was not* constructing homes on the Vacant Land, and *could not* begin construction of anything until after the Vacant Land was re-zoned, the final plat was approved, the Development Agreement was executed and the necessary building permits were obtained. None of these requirements were completed on January 14, 2002. The ditch, which was the cause of Joseph Senko’s injuries, was not constructed, designed, maintained or paid for by Greg J. Homes, Inc. or on its behalf.

Even if Jablonske’s business was broadly described as land development, there is still no connection between the Senkos’ claims, Jablonske’s liability and the land development. Jablonske’s actions, such as retention of an engineering firm and submission of proposals to the Hastings City Council, have no connection to the Senkos’ claims. The Policy requires a connection of the claim to the business to find the exclusion applicable to the facts of this case. The Senkos would have claims against Jablonske whether or not he retained an engineering firm or submitted proposals to the Hastings City Council. The Senkos’ claims arise from Jablonske’s negligence as the owner of the Vacant

Land, not from phone calls, payment of application fees and newspaper characterizations of Jablonske's business.

For similar reasons the Senkos' claims are not connected to Jablonske's rental of the Vacant Land prior to January 14, 2002. The Vacant Land was not rented on January 14, 2002. In any event, the Senkos' claims are not connected to Jablonske's rental of the land to the Bauers and they are not connected to the Bauers' farming of the land up through the 2001 harvest season. The Senkos' claims and Jablonske's liability is solely connected to Jablonske's acts and omissions as the owner of the Vacant Land.

The trial court, ignoring the substantial difference between a "business" exclusion and a "business pursuits" exclusion, applied cases construing the business pursuits language and found that planning and preparation for the proposed South Oaks development to be a "business pursuit." An examination of the plain language of the "business" exclusion indicates that it does not exclude insurance coverage for the Senkos' claims or Jablonske's liability under the Policy. The Senkos' claims and Jablonske's liability are not connected to any business, trade or occupation. Instead, the claims and liability are directly connected to Jablonske's actions as an individual. The Senkos would be able to pursue their claims against Jablonske and he could be found liable whether or not he owned a business or engaged in a trade or occupation. The trial court erred when it failed to consider the plain language of the "business" exclusion and as such, the trial court's grant of summary judgment must be reversed.

2. In the Alternative, if this Court Finds the “Business” Exclusion to be Ambiguous, the Exclusion must be Strictly Construed Against Metropolitan and in Favor of Coverage.

Since virtually all insurance policies are presented as preprinted forms, which a potential insured must usually accept or reject as a whole, ambiguities in a policy are resolved in favor of coverage and against the insurer. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 880 (Minn. 2002) (citations omitted). Whether an activity is a “business, profession or occupation” or a parcel of land is a “business premise” is a factual question to be decided by the trier of fact. See, e.g., *American Motorist Ins. Co. v. Steffens*, 429 So. 2d 335, 336 (Fla. 4th Dist. App. 1983).

Minnesota Courts have not construed a similar “business” exclusion, however other courts construing this exclusion have found this exclusionary language to be ambiguous. In *Dome Corp. v. The Cincinnati Ins. Co.*, the Tenth Circuit Court of Appeals, applying Michigan law, construed a similar exclusion and found it to be ambiguous. 172 F.3d 1278, 1280 (10th Cir. 1999). In *Dome Corp.* the insured sought indemnification with respect to a homeowner’s policy that excluded from coverage liability for personal injury “in connection with any business, occupation, trade or profession.” That policy defined “business” as “any full or part time trade, profession or occupation.” *Id.* The issue before the court was whether the insured’s oil and gas well endeavor was a “business” as defined

in the policy exclusion. *Id.* Commenting on the use of “business” exclusions versus “business pursuits” exclusions the court noted:

Instead of using a ‘business pursuits’ exclusion, which has been broadly construed under Michigan law to exclude a wide array of profit motivated activities...Auto-Owners chose to use *narrower language excluding injuries in connection with any ‘business, occupation, trade or profession ...* After choosing to narrowly define ‘business,’ Auto-Owners may not now complain about the ambiguity which arises when its narrow definition is read in conjunction with the expansive term ‘any.’

Id. at 1281-82 (emphasis added). The Tenth Circuit Court of Appeals found this exclusion to be ambiguous and construed the policy in favor of coverage. *Id.*

The court in *Dome Corp.* cited *Van Hollenbeck v. Ins. Co. of North America* in support of its decision. 172 F.3d at 1280. In *Van Hollenbeck*, the court of appeals reversed the trial court finding the policy language ambiguous. 403 N.W.2d 166, 170 (Mich. App. 1987). The Michigan Court of Appeals refused to “read the word ‘pursuits’ into the instant ‘business’ exclusion,” noting the insurer should not benefit from the ambiguity contained in a clause it drafted, when the insurer had the power to exclude “business pursuits” but chose not to do so. *Id.* at 170.

Dome Corp. and *Van Hollenbeck* are both instructive in this case. Metropolitan’s use of the terms “any” and “business” in the business exclusion is ambiguous and must be strictly construed against Metropolitan. “Any” is an expansive term. See *Dome Corp.*, 172 F.3d at 1281-82. Metropolitan chose to leave the terms “business”, “profession” and “occupation” undefined. However,

the plain meaning of each term read together with “any” creates ambiguity. Had Metropolitan desired to exclude coverage for people engaged in multiple professions, occupations and businesses, it had the option to define these terms expansively—“professions, occupations and business”—however, it chose not to do so. Exclusions are construed narrowly and when ambiguous shall be strictly construed against the drafter. *Walser*, 628 N.W.2d at 613. Here, based on the ambiguous language of the Policy, this Court must construe the business exclusion against Metropolitan and in favor of coverage and reverse the decision of the trial court.

3. Even Under the “Business Pursuits” Analysis the “Business” Exclusion does not Apply Since There is No Connection Between the Liability Causing Conduct and Jablonske’s Business.

Insurance policy construction focuses on the language of the policy. As such it is the language of the policy which extends or excludes coverage. The exclusion contained in the Policy excludes coverage for “liability or claims in connection with a business.” These exclusions are narrower than “business pursuits” exclusions. There are no Minnesota cases construing similar “business” exclusion language, however there are Minnesota cases that discuss the broader, “business pursuits” exclusion.

The trial court erred, in basing, in part, its decision on Minnesota cases construing policies with “business pursuits” exclusions. As stated herein “business” and “business pursuits” are not synonymous. “Business pursuits” is a

much broader term than the “business” term used in the Policy in question. Further, the exclusionary language of the policies analyzed in the Minnesota cases is much different that the language of the Policy exclusion now before this Court.

It is important to note from the outset that the Minnesota Supreme Court has recognized the job of the court is to construe business pursuits exclusions with reference to the facts specific to the particular case, and as such may glean only a general guidance from cases with different fact situations. See *Milwaukee Mut. Ins. v. City of Minneapolis*, 307 Minn. 301, 308, 239 N.W.2d 472, 476 (1976). Discussing “business pursuits” exclusions the Minnesota Supreme Court cited approvingly the following:

There seems almost unanimous accord in the decision that the location at which an act is performed is not decisive on the question of whether the act constitutes part of an excluded business pursuit. Rather, it is the nature of the particular act involved and its relationship, or lack of relationship to the business that controls. Personal acts, such as pranks, do not become part of a business pursuit so as to be outside of the coverage, merely because performed during business hours and on business property. In order for an action to be considered part of a business pursuit it must be an act that contributed to or furthered the interest of the business, and one that is peculiar to it. *It must be an act that the insured would not normally perform but for the business, and must be solely referable to the conduct of the business.*

Id. 307 Minn. at 308-09, 239 N.W.2d at 476 (emphasis in original), quoting Frazier, *The “Business Pursuits” In Personal Liability Policies: What the Courts Have Done With It*, 572 Ins. L. J. 519, 533-34 (1970). Minnesota cases demonstrate a similar fact dependant analysis of business pursuit cases. The

focus in the analysis of the applicability of “business pursuits” exclusion is the liability causing conduct. *Zimmerman v. Safeco Ins. Co. of America*, 605 N.W.2d 727, 731 (Minn. 2000).

Here, the liability causing conduct is Jablonske’s negligence, as an owner of land, for allowing a dangerous, hidden condition to exist on his land and his failure to warn of that condition. The trial court spent the majority of its analysis discussing Jablonske’s preparation and planning in connection with the Vacant Land, however, this discussion is nothing more than a smoke screen for the real issue—the liability causing conduct. The installation of curb boxes did not cause Jablonske’s liability. Similarly, consulting with an engineering firm or attending city council meetings did not cause Jablonske’s liability. Even granting Lyman an easement to construct the storm sewer outlet is not the liability causing conduct. Rather, Jablonske’s liability is derived from his individual decision to allow a dangerous, hidden condition to exist upon his land and his failure to warn of that condition. Jablonske could be held liable for his negligence as an individual whether or not he owned a business or engaged in preparation and planning for a future development.

Even if this Court found a connection between the Senkos’ claims against Jablonske and Jablonske’s planning and preparation activities, the exclusion still does not apply since land development was not an activity regularly engaged in by Jablonske. An activity may only be properly characterized as a business

pursuit when it is an activity regularly engaged in *and* the activity generates profit or financial gain. *Allied Mut. Ins. Cas. Co. v. Askerud*, 254 Minn. 156, 163, 94 N.W.2d 534, 539-40 (1959).

Here, Jablonske's primary business was that of home builder. Jablonske has testified that Greg J. Homes, Inc. is his *primary* occupation and he spends most of his time with this business. Jablonske has only developed two parcels of land from the late 1970 - early 1980s through the time of the incident. Thus, over an approximate 22 year period of time Jablonske has only developed 2 parcels of land. Two developments in 22 years does not demonstrate the continuity required by the plain meaning of the word business. It is the continuity of his career, not the continuity of the project that is controlling here. This activity does not demonstrate the continuity necessary to be considered a business pursuit. Long standing rules of insurance policy construction do not allow for such a broad definition of business. See *West Bend Mut. Ins. Co.*, 372 N.W.2d at 441.

The three cases the trial court cited in support of its determination of the applicability of the "business pursuits" exclusion address different issue and can be easily distinguished from the present case. *Bob Useldinger & Sons, Inc.*, arises in the context of a sale of seed potatoes from a seed farm. 505 N.W.2d at 325. Here, the Court determined the applicability of a policy exclusion that excluded "business pursuits of any insured except ... (ii) farming." *Id.* The Court held investing in a farm was not the same as farming based on the plain language of farming. As such, the "business pursuit" exclusion excluded

coverage under the policy. In *Grossman v. American Family Mut. Ins. Co.*, the court found a “business pursuits” exclusion applied to defeat coverage for claims related to the limited partners’ operation of a general partnership that operated a 312-unit apartment complex. 461 N.W.2d 489 (Minn. App. 1987). In *Senger v. Minn. Lawyers Mut. Ins. Co.*, this Court held the insurer had no duty to defend when the insured admitted the claim arose out of a business owned by the insured. 415 N.W.2d 364, (Minn. App. 1987).

Unlike the facts of *Bob Useldinger & Sons, Inc.* and *Grossman*, in which the liability arose out of the business activities—i.e. sale of seed potatoes and operation of a limited partnership, here Jablonske’s liability is connected to his individual actions. Additionally, the facts of *Senger* differ dramatically from the facts of this case, as here there is no admission by Jablonske that Senkos’ claims are connected to his business. Most importantly, as stated above, all three cases contain different exclusions and none contain similar text to the “business” exclusion contained in the Policy.

Even this Court would apply the analysis of the Minnesota cases construing a dissimilar business pursuit exclusion the “business” exclusion does not apply as there is *no connection* between Greg J. Homes and the liability causing conduct. In fact, Jablonske could be held negligent even in the absence of owning a business or of the planning and preparation of the land. The cases cited by the trial court do not support the determination that coverage is excluded

under the Policy. As such, the trial court misapplied the law and the decision of the trial court must be reversed.

C. The “Business Premises” Exclusion does not Exclude Coverage under the Policy since the Vacant Land was not “Used in a Business or Rented for a Profit.”

The Policy’s “business premises” exclusion seeks to exclude coverage for property “used in a business or rented for profit.” To avoid coverage under the policy, Metropolitan must prove the Vacant Land was used within Jablonske’s business on January 14, 2002. The trial court did not specifically address the applicability of the narrow “business premises” exclusion. Instead, the court summarily decided the planning and preparation work on the Vacant Land was a business pursuit. The Vacant Land was not used in a business and as such the “business premises” exclusion does not apply. Therefore, the decision of the trial court must be reversed.

Use is not defined in the Policy, however “use” is defined by the *Webster’s Third New International Dictionary* as the “act or practice of using something.” 2523 (emphasis added). “Business” is defined as “a usual commercial or mercantile activity customarily engaged in as a means of livelihood.” *Id.* at 302.

Greg J. Homes, Inc. is Jablonske’s primary business. The Vacant Land was not used by Greg J Homes, Inc. at the time of the incident. There was not and could not be any excavation, construction or improvement to the Vacant Land until the City of Hastings approved Jablonske’ request to rezone, approved a final plat, executed a development agreement with the Jablonske, the final plat

was approved, approved and executed a development agreement with the Jablonskes *and* issued building permits. None of these events occurred prior to January 14, 2002. No homes were constructed by Greg J. Homes or any other company on the Vacant Land on January 14, 2002. Greg J. Homes, Inc. did not “use” the property at the time of the incident.

Jablonske’s primary business is not property development. In the alternative, assuming Jablonske’s business was that of a property developer, the Vacant Land was still not used in a business since the Vacant Land was not being developed at the time of the January 14, 2002, incident. Any requests made by Jablonske to rezone the Vacant Land or create a preliminary plat did not involve use of the Vacant Land. The definition of “use” requires action. However, all requests related to the Vacant Land occurred without any action taken on the Vacant Land. Metropolitan points to the existence of curb boxes as conclusive proof the Vacant Land was used in Jablonske’s business. However, the installation of curb boxes was done as a part of the City of Hastings’ project *and not* at the direction of Jablonske. While the curb boxes could provide for a *future* use of the Vacant Land, at the time of the incident the curb boxes were not connected to a house and therefore, the Vacant Land was not used within the language of the Policy.

Courts construing policy language must keep in mind the reasonable expectations of the parties. Greg and Susan Jablonske understood the Vacant Land was covered by the Policy. Here, the commonly understood definition of

“business premises” is the place where business is conducted. In this case, such place would be Jablonske’s offices for Greg J. Homes, Inc., or Susan Jablonske’s offices for Home Design, not the Vacant Land owned by Greg and Susan Jablonske as individuals. See *Harasyn v. St. Paul Guardian Ins. Co.*, 75 S.W.3d 696, 700-01 (Ark. 2002) (applying a similar “business premises” exclusion and finding an injury to a store owner that occurred at her store occurred on the “business premises”).

The Vacant Land was not “land used in a business or rented for a profit” and therefore the “business premises” exclusion does not exclude coverage as a matter of law. First of all, no homes were built on the Vacant Land by Greg J. Homes, Inc. at the time of the incident. Secondly, the Vacant Land was not rented in 2002 and thus could not be rented for a profit. In addition, Jablonske was not developing the Vacant Land at the time of the incident since the approval of the final plat, the entering into a development agreement and obtaining building permits had not yet occurred. In any event, the commonly accepted definition of “business premises” would be the offices of Greg J. Homes, Inc. or Home Design, and not the Vacant Land owned by the Jablonskes as individuals. Accordingly, this Court must reverse the trial court’s grant of summary judgment.

II. THE TRIAL COURT ERRED WHEN IT RELIED ON THE FARMING EXCLUSION TO DEFEAT COVERAGE WHEN JABLONSKA DID NOT USE THE VACANT LAND FOR FARMING OR RENT IT FOR A PROFIT ON JANUARY 14, 2002.

A. The Vacant Land is “Vacant Land” Within the Language of the Policy and Therefore the Policy Provides Coverage to Jablonske for the Senkos’ Claims.

The Policy extends coverage to vacant land owned by the insured as long as it is not used for farming or ranching. (A.46). The Policy does not define the term “vacant.” (See A.11; A.88). Therefore, in order for the Metropolitan to avoid coverage under the Policy, Metropolitan must demonstrate that the Vacant Land was “used for farming” or “rented for a profit” on January 14, 2002.

Minnesota courts have not construed the terms “vacant land” within the context of an insurance policy. Since “vacant” is not defined by the policy language, it should be given its plain and ordinary meaning. See *Wanzek Const., Inc.*, 679 N.W.2d at 324-25 (undefined policy terms are given their plain and ordinary meaning). The plain and ordinary meaning of “vacant” can be found within a dictionary. “Vacant” is defined as “being without content or occupant.” *Webster’s Third New International Dictionary* at 2527. “Use” is the act or practice of using something. *Id.* at 2523.

Other jurisdictions addressing whether land was vacant within the language of an insurance policy have reached a variety of results. In *De Lisa v. Amica Mut. Ins. Co.*, the court concluded that the term “vacant land” meant “lands that are both unoccupied and unused.” 59 A.D.2d 380, 382 (N.Y. App. Div.

3d Dept. 1977). The court in *De Lisa* held a cave which contained the improvements of an iron gate, a platform and a ladder inside the cave was “vacant land” within the meaning of a policy. *Id.* The court emphasized that “[u]se of the land implies the employment of the same in a manner that will materially benefit the owner.” *Id.* In *De Lisa*, the benefit of the use of the land was to others, *not* the owner of the land. *Id.* (emphasis added). In *American Motorist Ins. Co. v. Steffens*, the court found that land unoccupied by any permanent affixed structure or inanimate object was vacant within the language of the homeowners policy. The court also elaborated on the presence of inanimate objects on the land and stated:

One would hardly consider a parcel of land as anything other than vacant merely because it contained a drainage ditch filled with water, anymore than one would consider a parcel of land on which there were only native trees and underbrush as anything other than being vacant.

429 So. 2d at 337. In *Fort Worth Lloyds v. Garza*, the court defined vacant land as unoccupied land. 527 S.W.2d 195, 198-99 (Tex. Civ. App. 1975).

It is undisputed that no person resided on the Vacant Land on January 14, 2002, thus the Vacant Land was “unoccupied” within the plain and ordinary meaning of the word “vacant.” In addition, the Vacant Land was not “put to use” on January 14, 2002. On this date, the Vacant Land was not farmed, there was no machinery on the Vacant Land, there was no excavation, no construction of homes on the Vacant Land, nor were there any roads on the Vacant Land.

The storm sewer outlet and ditch and curb boxes did not materially benefit the Vacant Land or the Jablonskes on January 14, 2002. First of all, neither the storm sewer outlet and ditch nor the water main and sewer were constructed for the benefit of the Vacant Land. The storm sewer outlet and ditch were constructed for the sole benefit of drainage for the Century South development and was a requirement of the City of Hastings. The storm sewer outlet and ditch did not materially benefit the Vacant Land or its owners. In fact, the discharge of water from the storm sewer outlet onto the Vacant Land was a detriment to the Vacant Land in that it would lead to increased erosion. Unlike *O'Conner v. Safeco Ins. Co. of North America*, in which the purpose of the clay road was access to developed lots and the existence of the road improved the value of the lots, here the storm sewer outlet ditch did not improve the Vacant Land or its increase its value. 352 So. 2d 1224, 1245 (Fla. 1st Dist. App. 1977).

For similar reasons, the City of Hastings' water and sewer project did not convey a material benefit to the Vacant Land or the Jablonskes. First of all, the purpose of the City of Hastings' project was to bring water and sewer to the Century South development. This project was not completed at the direction of Jablonske. In fact, Jablonske resisted the project and only grudgingly allowed the installation of the water and sewer project.

Secondly, the installation of curb boxes does not convey a material benefit to the Vacant Land of Jablonske. These boxes were installed at the direction of, for the convenience of, and the benefit of the City of Hastings, not the

Jablonskes. Curb boxes, which can be hooked to a house or other structure to provide a connection to the water main, were not connected to any house of development on January 13, 2002. In fact some of the curb boxes had even been disconnected from the water main. Any benefit they provided by their existence is negligible, and they would not convey any material benefit until they were connected a water main and providing water for a home. At the time they were installed and at the time of the incident, future connection was just a possibility as the final plat had not been approved by the City of Hastings, there was not a Development Agreement between the Jablonskes and the City of Hastings and the Jablonskes had not obtained the necessary building permits. On January 14, 2002, the curb boxes did not provide any material benefit to the Vacant Land or the Jablonskes.

Lastly, Jablonske's discussions about the Vacant Land do not change its status from vacant land. Jablonske's alleged dealings with the City of Hastings, engineers, construction companies and creating publicity for the future development does not affect the status of the Vacant Land as vacant under the Policy. Whether the Vacant Land is vacant is not determined by Jablonske's alleged discussions with other persons about future plans for the Vacant Land. Instead, the focus of the analysis is on the Vacant Land and whether it is occupied or used within the language of the policy on January 14, 2002. The Vacant Land was not occupied or used within the language of the Policy on January 14, 2002.

Based on the above analysis, the Vacant Land is “vacant land” within the plain language of the Policy since it was unoccupied and not used on January 14, 2002. In the alternative, based on the conflicting interpretations of the phrase “vacant land,” if this Court would find the phrase to be ambiguous, it must construe the Policy in favor of coverage and against the insurer who had the opportunity to, but chose not to clearly define “vacant land.” In any event, the Policy provides coverage to the Jablonskes for the Senkos’ claims and this Court must reverse the trial court’s grant of summary judgment to Metropolitan.

B. The Farming Exclusion does not Apply since the Vacant Land was not “Used for Farming” at the Time of the January 14, 2002, Incident.

Since the Vacant Land is vacant within the language of the Policy, Metropolitan can only avoid coverage if the Vacant Land was “used for farming” on January 14, 2002. The Vacant Land was not farmed after the 2001 season and therefore was not “used for farming” within the language of the Policy at the time of the incident.

Cases deciding whether land is vacant within the meaning of an insurance policy look to the facts at the time of liability causing incident, not facts occurring prior to or after that time. See *Dawson v. Dawson*, 841 P.2d 749, 751 (Utah App. 1992) (person injured while riding ATV on land; whether land was vacant was determined at the time the person was injured); *Foret v. Louisiana Farm Bureau Cas. Ins. Co.*, 582 So. 2d 989, 990 (La. App. 1st Cir. 1991) (person injured while attempting to affix mobile home to land; whether land was vacant determined at

the time the persons were attempting to affix the home); *Bianchi v. Westfield Ins. Co.*, 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343, 346 (Cal. App. 2d Dist. 1987) (land flooded when dam burst; whether land was vacant was determined at the time of break). Here, the determination of whether the Vacant Land was vacant at the time of the incident must focus on January 14, 2002, the date of the incident.

Ratka v. St. Joseph Mut. Ins. Co., No. A03-1661 (Minn. App. May 18, 2004), a Minnesota Court of Appeals decision, also supports the conclusion that this Court must look at the use of the land at the time of the incident not the time prior to that. In *Ratka*, respondents had farmed land between 1996 and 1999. *Slip op.* at 1. In 2000 they made a claim under a homeowners policy in connection with the fire in their barn. *Id.* The policy excluded loss to structures used for business. *Id.* Respondent testified he had ceased farming when he obtained a position as a mechanic. *Id.* This Court affirmed the holding of the trial court that the barn was not used for the business purpose of farming since he had stopped farming at the time of the incident and even though they had stored hay in the barn for when they would resume farming at a later date. *Ratka, slip op.* at 3.

The Affidavits of Greg Jablonske and Gary Bauer, a review of the Jablonskes' 2002 tax returns and photographs of the parcel taken near January 14, 2002, clearly indicate that the property was not being "used for farming" within the language of the Policy on January 14, 2002. Jablonske stated that the

growing season of 2001 was the last time any crops were planted on the Vacant Land. In addition, Jablonske did not claim any rental income on the farm in 2002, unlike prior years when the Vacant Land was farmed. Even a casual look at photographs taken near January 14, 2002, illustrate the fact the Vacant Land was not used for farming. The photographs show the remnants of harvested corn protruding through a blanket of snow, but do not show any activity on the Vacant Land. The Vacant Land was not used for farming within the meaning of the Policy on January 14, 2002.

For similar reasons, the farming and renting for a profit exclusions do not apply. Jablonske had rented the land to a person who raised crops on the land through the 2001 season. However, at the end of that season, Jablonske told the renter that he would not be renting the land the following year. This Court in *Ratka* looked at the status of the land at the time of the claim. For the same reason this Court should look at the status of the Jablonske land at the time of Joseph Senko's injuries—not farmed or rented for a profit.

The above conclusion is also consistent with the underlying purposes of a farming exclusion. The purpose of a farming exclusion is to allow insurers to delete coverage that is connected to the increased risks associated with farming such as dangers associated with machinery, animals and fertilizers and chemicals. Unlike the facts of *State Farm Fire & Cas. Co. v. Comer*, No. 3:95CV041-B-A, *slip op.* 1 (N.D. Miss. Jan. 10, 1996) in which the escape of cattle pastured on the land resulted in a collision between a cow and a motor

vehicle, the facts of the current case do not reveal any connection between the liability causing conduct and the alleged farm use of the Vacant Land. Here, the fact that the crops were raised on the Vacant Land in years prior to 2002, has no connection to the Senkos' claims against Jablonske as a landowner. Planting crops on the land in years past has no connection to Jablonske's liability.

In addition, the Policy does not require its insureds to notify the company when the use of the land changes from farmed to not farmed. Therefore, there is nothing more required than a change of the use of the property from farmed to not farmed to trigger coverage under the Policy. Metropolitan, as the drafter of the Policy, had every opportunity to add a notice requirement, but it chose to do so. It would be inappropriate at this juncture to add a notice requirement now and would defeat the reasonable expectations of the Jablonskes.

Metropolitan has the burden to prove the Vacant Land was "used for farming" on January 14, 2002. Metropolitan has offered no evidence that establishes that the parcel was "used for farming" within the language of the policy on January 14, 2002. In addition, Metropolitan's attempt to read a notice requirement into the Policy with regards to a changes in the use of the Vacant Land conflicts with established policy construction rules and therefore must fail. As such, the Policy provides insurance coverage under for Senkos' claims against Jablonske and the decision of the trial court must be reversed.

CONCLUSION

The “business,” “business premises,” and “farming” exclusions do not exclude coverage under the Policy for the Senkos’ claims against Jablonske. The “business” exclusion requires the claim to be connected with the insured’s business. The Senko’s claims are not connected to Jablonske’s business, occupation or profession of home builder as no homes were built on the Vacant Land and it was not rented at the time of the incident. The Vacant Land was not Jablonske’s “business premises,” as there were no homes built on the Vacant Land and it was not rented on January 14, 2002. Lastly, the Vacant Land was vacant within the meaning of the Policy and was not farmed at the time of the incident. Should the Court find these exclusions to be ambiguous, such exclusions must be construed in favor of coverage and against the insured. In any event, there are multiple material facts in dispute including the extent of the involvement of Greg J. Homes with the Vacant Land owned by the Jablonskes as individuals. As such, Appellants Joseph and Jeanne Senko respectfully request the reversal of the trial court’s grant of Metropolitan’s Motion for Summary Judgment.

Respectfully Submitted,

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Dated: 2/8/06

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ADDENDUM

Minn. Stat. § 555.11

555.11 Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

STATE OF MINNESOTA
IN COURT OF APPEALS

Gregory A. Jablonske, et al.,

CERTIFICATION OF BRIEF LENGTH

Appellants,

vs.

Metropolitan Property and Casualty
Insurance Company,

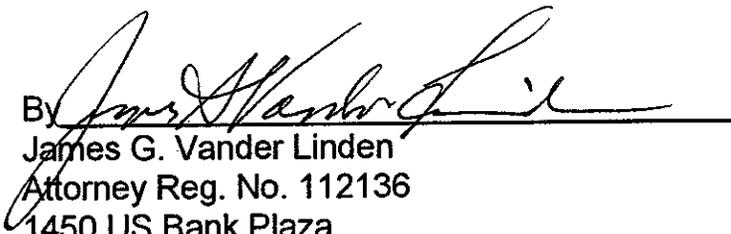
Appellate Court Case No. A05-2541

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is 9,853 words. This brief was prepared using Microsoft Word 2002.

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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) (with amendments effective July 1, 2007).