

NO. A06-0425

State of Minnesota
In Court of Appeals

David and Charlotte Goeman and
Trade Lake Mutual Insurance Company,
Appellants,

v.

Allstate Insurance Company,
Respondent.

APPELLANTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE

1. When two insurance policies containing identical excess insurance clauses provide concurrent personal liability coverage, the policy that is “closer to the risk” is primary. If neither policy is “closer to the risk,” they are concurrent. All of the evidence in this case shows that the policies issued by Allstate and Trade Lake to David and Charlotte Goeman were equally close to the risk of a personal injury caused by a dog in Wisconsin. Did the trial court err by holding that the Trade Lake policy was primary?

List of most apposite authorities:

- *Illinois Farmers Ins. Co. v. Depositors Ins. Co.*, 480 N.W.2d 657 (Minn. Ct. App. 1992)
- *Integrity Mutual Ins. Co. v. State Automobile and Cas. Underwriters Ins. Co.*, 239 N.W. 2d 445 (Minn. 1976)
- *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Republic Underwriters Ins. Co.*, 429 N.W.2d 695 (Minn. Ct. App. 1988)

STATEMENT OF THE CASE

David Vita was bitten by the Goemans’ dog, Jake, at the Goemans’ Wisconsin cabin on June 20, 1998. A.A. 2. Bryan Vita commenced suit on David’s behalf against the Goemans in Hennepin County District Court in October, 2001. A.A. 93. A jury trial on October 29, 2002, resulted in a gross award of \$32,409.00. A.A. 2. Trade Lake paid this verdict as well as an additional \$2,807.34 of taxable costs. *Id.* The combined verdict and taxable costs totaled \$35,216.34. *Id.* Trade Lake also incurred \$19,055.73 in legal fees and costs, for a grand total of \$54,272.07 it paid to defend and indemnify the Goemans. *Id.*

The Goemans tendered the defense to Allstate and Trade Lake. A.A. 94-96.

Allstate refused the tender and refused to share the defense and indemnity obligation. *Id.*

Trade Lake then sought indemnity in the amount of \$27,136.04 from Allstate for the amounts it had paid for defense and to satisfy the Vita judgment. A.A. 2. The basis for the indemnity claim was that both Trade Lake and Allstate insured the Goemans for bodily injury to others occurring in Wisconsin, and therefore that each was contractually obligated to pay fifty percent of the defense expenses and judgment. *Id.*

The trial court ruled in Allstate's favor on summary judgment after determining that the excess clauses in the Trade Lake and Allstate policies were in conflict and that the Trade Lake policy was "closer to the risk." A.A. 1, 4.1, 4.3. Of the three factors examined in the closeness to the risk analysis, the trial court concluded that the first factor, whether one policy specifically describes the accident-causing instrumentality, was not helpful to either party. A.A. 4.2. The court reasoned that both policies offered broad personal liability coverage and neither one specifically mentioned the risk of injury from a pet. *Id.* The second factor, whether one policy's premium reflected greater contemplated exposure, was deemed unanswerable because the trial court could not ascertain how much Allstate charged for its coverage. *Id.* The trial court found that the third factor, contemplation of risk, favored Allstate because Allstate insured against occurrences nationwide while Trade Lake insured against losses or occurrences only in Wisconsin. A.A. 4.2-.3.

Because of this, and only this, feature, the trial court concluded that Trade Lake was solely responsible for the costs and indemnity associated with the Vita claim. A.A.

4.3. Judgment was entered against Trade Lake on February 2, 2006. A.A. 2.

STATEMENT OF FACTS

A. The Accident

David Vita was bitten by Jake, a five-year-old Black Labrador Retriever, at the Goemans' cabin in Frederic, Wisconsin. A.A. 92, 94. He alleged personal injuries as a result of the attack. *Id.* Jake spent most of his time at the Goemans' home in Richfield, Minnesota, and only spent weekends at the cabin. A.A. 94.

B. The Insurance Policies

Trade Lake policy DF - 34456 insured the Goemans for property damage to the premises located at 20659 Freedom Drive, Frederic, Wisconsin. A.A. 6. The policy included broad comprehensive personal liability coverage with a \$100,000 limit. *Id.* Its personal liability coverage was not limited to accidents that took place on the insured premises. A.A. 39. The policy's excess insurance clause is set out in the subsection "How Much We Pay For Loss Or Claim":

Coverage L – Insurance Under More Than One Policy

Coverage L is excess over other valid and collectible insurance that applies to the loss or claim. If the other valid and collectible insurance is also excess, we pay only our share of the loss. We pay only that part of the loss that the applicable limit under this policy bears to the total amount of insurance covering the loss.

A.A. 35. The Trade Lake policy also contained a Seasonal Endorsement that limited the coverage provided by the policy for property and liability claims “to losses or occurrences that occur within the boundaries of the State of Wisconsin.” A.A. 39.

Allstate’s “Deluxe Homeowners Policy” 0 11 853738 03/30 insured the Goemans for property damage to the premises located at 7000 Lakeshore Drive, Richfield, Minnesota 55423. A.A. 46. Like Trade Lake, the Allstate policy included broad comprehensive personal liability coverage with a \$100,000 limit. *Id.* Like Trade Lake, personal liability coverage was not limited to accidents that took place on the insured premises. A.A. 74-86. Unlike Trade Lake, the Allstate policy afforded personal liability coverage for occurrences in all fifty states. *Id.* The Allstate excess clause is set out in the “Conditions” chapter of Section II of the policy:

Other Insurance – Coverage X – Family Liability Protection

This insurance is excess over any other valid and collectible insurance except insurance that is written specifically as excess over the limits of liability that apply to this policy.

A.A. 81.

SUMMARY OF ARGUMENT

The trial court correctly held that the excess insurance clauses of the Allstate and Trade Lake policies conflicted. It erred in its determination of whether one of the policies was primary or, alternatively, whether they were concurrent. Specifically, the trial court erred in its application of the third prong of the “closeness to the risk” analysis by

incorporating a new factor – geographic scope of coverage – into the analysis of which policy contemplates the risk with greater specificity.

No reported Minnesota case incorporates a geographic limitation factor into its excess coverage analysis, nor are there any sound reasons for creating one. Because both policies insured against “occurrences” in Wisconsin, they are concurrent. The trial court erred in holding that the geographic limitation on the Trade Lake policy’s property coverage was a sufficient basis to find that the policy’s personal liability coverage was “closer to the risk.”

ARGUMENT

I. Standard of Review

On appeal from summary judgment, the reviewing court must determine whether genuine issues of material fact remain for trial and whether the district court erred in applying the law. The interpretation of an insurance policy raises a question of law which is reviewed de novo by the appellate court. *Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 711 (Minn.1991).

II. Resolving Conflicts in Excess Insurance Clauses in Minnesota Requires Determining Which Policy Is Closer to the Risk

The Minnesota Supreme Court identified the problem of conflicting excess insurance policies when two insurance policies provide concurrent coverage in *Integrity Mutual Ins. Co. v. State Automobile and Cas. Underwriters Ins. Co.*, 239 N.W. 2d 445

(Minn. 1976). It noted that “[i]nsurance companies commonly include in their policies other insurance clauses which tend to limit their liability on the risk if the insured has similar insurance available from another company.” *Id.* at 446. Among these clauses are excess clauses, which limit liability to the amount by which the loss exceeds “the limit of liability of all other insurers.” *Id.*

“When it is clear that two or more companies are among themselves liable to the insured for his loss but the apportionment among the companies cannot be made without violating the other insurance clause of at least one company, then the courts must look outside the policies for rules of apportionment.” *Id.* After a review of how conflicting excess insurance clauses are interpreted in other states, the *Integrity Mutual* court established a test for applying conflicting excess clauses in Minnesota. *Id.* at 446-47. Relying on *Federal Ins. Co. v. Prestemon*, 278 Minn. 218, 231, 153 N.W.2d 429, 437 (1967), the Court held that, in Minnesota, policy coverages are to be allocated in light of the total policy insuring intent, as determined by the primary function of the policy and the primary risks that the policy premiums cover. *Id.* It then declared that:

The nub of [this] doctrine is that coverages of a given risk shall be 'stacked' for payment in the order of their closeness to the risk. That is, the insurer whose coverage was effected for the primary purpose of insuring that risk will be liable first for payment, and the insurer whose coverage of the risk was the most incidental to the basic purpose of its insuring intent will be liable last. *If two coverages contemplate the risk equally, then the two companies providing those coverages will prorate the liability between themselves on the basis of their respective limits of liability.*

Id. at 446, 447 (emphasis added).

Later decisions have formalized a three-part test is used for determination of closeness to the risk:

- (1) Which policy specifically described the accident-causing instrumentality?
- (2) Which premium is reflective of greater contemplated exposure?
- (3) Does one policy contemplate the risk and use of the accident-causing instrumentality with greater specificity than the other policy—that is, coverage of the risk primary in one policy and incidental to the other?

Illinois Farmers Ins. Co. v. Depositors Ins. Co., 480 N.W.2d 657, 660-61 (Minn. Ct. App. 1992).

An example of a case where the “closer to the risk” analysis resolved the issue of which policy is primary is *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Republic Underwriters Ins. Co.*, 429 N.W.2d 695, 697 (Minn. Ct. App. 1988). In *National*, the court resolved a coverage dispute between a day-care provider liability insurer and a homeowner insurer. *Id.* at 696. The day care liability policy specifically contemplated injury resulting from the careless actions of young children in a day care setting, while the homeowner policy did not. *Id.* at 697. The day-care insurer was, therefore, the primary insurer because its policy was closer to the risk. *Id.*

III. The Trial Court Erred in Holding that the Trade Lake Policy Was Closer to the Risk and Thus Obligated to Pay 100% of the Judgment

A. Specific Description of Accident-Causing Instrumentality

The trial court concluded that “both policies provided broad personal liability coverage for a wide range of occurrences” and that neither policy more specifically describes the accident-causing instrumentality, i.e. the Goemans’ dog Jake. A.A. 4.2. Trade Lake agrees.

B. Whether One Policy’s Premium Reflects Greater Contemplated Exposure?

The trial court ruled that:

Trade Lake charged a premium of \$514 per year for \$100,000 of comprehensive personal liability coverage for the Goemans’ Fredric, Wisconsin property. It is unclear to the Court the amount that Allstate charged for a yearly a [sic] premium for coverage for the Goemans’ Richfield, Minnesota property. However, they have stipulated that they provided the same \$100,000 in coverage that Trade Lake does. Again, the Court cannot answer the question as to primary and secondary liability using this prong of the “closeness to the risk” analysis.

A.A. 4.2. Trade Lake agrees.

C. Whether the Trade Lake Policy More Clearly Contemplated the Risk

The trial court erred in its analysis of which policy more clearly contemplated the risk. It concluded that because Trade Lake restricted its personal liability coverage to occurrences in Wisconsin, it “more accurately cover[ed] the location where this tort occurred.” A.A. 4.2-3.

This conclusion was error. In fact, neither policy “more accurately” defines the location where this tort occurred. Rather, both policies provide concurrent, in fact, identical, bodily injury coverage for “occurrences” in Wisconsin. True, a geographical restriction with respect to personal liability coverage is uncommon. In this, the Trade Lake policy is unusual. On the other hand, the Allstate policy contemplates, and insured and insurer expect, coverage for “occurrences” in all fifty states, inclusive of Wisconsin.

The trial court was apparently influenced by the fact that this “occurrence” took place in the Goemans’ Wisconsin cabin. But this is of no consequence in “closeness to the risk” analysis. There is no language in either policy linking coverage for an injury caused by a pet animal to any particular place, let alone to an insured dwelling. Thus, the place of an occurrence is of no consequence, whether it be a dog bite in Chippewa Falls, or an errant golf ball in Door County. The fact that the occurrence took place at the Goemans’ cabin is serendipity and nothing more. So long as the occurrence is in Wisconsin, treatment under the Trade Lake and Allstate policies is identical. In deciding that the Trade Lake policy’s limitation of coverage to Wisconsin meant that the Trade Lake policy contemplated the risk of a dog bite with greater specificity, the trial court ignored the fact that there is no published Minnesota case holding that geographic coverage limitations create greater specificity.¹

¹There may be some types of risks that are dwelling specific. For example, it seems reasonable that the policy covering the primary residence that has a swimming pool is invoked first for a pool accident, and the policy on the cabin that has no pool is reached

National is an example of a case where one type of coverage was held closer to the risk than another. Its holding was not, however, based on geographic proximity. In contrast to the day care exposures specifically contemplated by one of the two policies in *National*, both the Trade Lake and Allstate policies had the same insuring intent with respect to the Goemans' personal liability exposure. Both provided comprehensive personal liability coverage as part of a homeowner's insurance policy. Neither policy specifically addresses the risk of an injury caused by a pet. Both policies approached that risk as they did all others. The risk of a dog bite was but one of thousands of personal liability exposures of a homeowner. Whether the accident occurred in Wisconsin or not was a threshold issue to Trade Lake's coverage, but cannot be viewed as a factor making that policy primary over a policy with a wider coverage area.

In ruling that geographical scope of coverage is a permissible factor to consider in determining whether one policy contemplates a risk with greater specificity than another, the trial court turned a governing principle of the insurance industry on its head. Trade Lake restricted the Goemans' coverage to Wisconsin to *reduce* its potential risk by eliminating occurrences and losses occurring outside of Wisconsin. It did not do so in order that, within Wisconsin, its personal liability coverage would be primary over Allstate's almost-identical policy.

second, if at all. That is because the pool is a clear, site specific hazard that is almost certainly considered in the assessment of risk and premium.

CONCLUSION

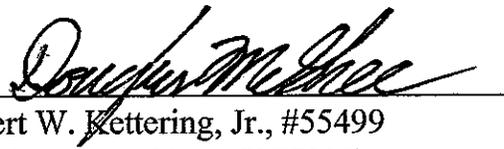
The trial court's decision adopts a factor – geographic scope of coverage – into the contemplation of excess coverage in personal liability risk analysis that has never before been used in a published Minnesota decision. It should not be adopted today. Both the Trade Lake and Allstate policies contemplate equally the risk of a dog bite injury at the Goemans' Wisconsin cabin. The trial court's decision should be reversed and judgment for \$27,136.04 entered against Allstate and in favor of Trade Lake.

Dated:

3-31-6

Respectfully submitted,

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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).