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State of Minnesota
In Court of Appeals

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

v.

Allstate Insurance Company,
Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE

This case involves two homeowner's insurance policies with similar excess clauses. Under Minnesota law, the policy that is "closer to the risk" is primary. Did the trial court err in finding that a homeowner's policy with coverage specific to the location where the tort occurred was "closest to the risk" and therefore primary?

STATEMENT OF THE CASE

Plaintiffs Goeman were sued following a dog bite that occurred at their cabin in Frederic, Wisconsin. A.A.2. The Goemans were insured at their cabin under a farm policy issued by Trade Lake Mutual. *Id.* David Vita, a guest at plaintiffs' Wisconsin residence, was bitten by Jake, the Goemans' dog. *Id.* David Vita and his father, Brian, filed suit, in which they alleged that the Goemans "were the owners of a certain dog named Jake, which was being kept at their farm located at 20659 Lakewood Drive, City of Frederick, County of Polk, State of Wisconsin." A.A.92.

Allstate, which insured the Goemans' Minnesota residence, refused tender of defense of claims arising out of the dog bite incident because the Allstate policy contained an "excess insurance" provision and because the Trade Lake policy was "closest to the risk" and therefore primary. A.A.2

Both insurers moved for summary judgment. Judge Kevin Burke of the Hennepin County District Court ruled in Allstate's favor after concluding that the Trade Lake policy was "closer to the risk" because the policy applied only to occurrences within Wisconsin and

was “specifically for the Goemans’ Wisconsin property” where the tort occurred . A.A.4.2, 4.3.

STATEMENT OF FACTS

As the trial court pointed out in its Memorandum, the tort in this case occurred at the Goemans’ Wisconsin cabin. A.A.4.3. Trade Lake insured the cabin where the tort occurred.

A.A.2. Allstate insured the Goemans’ Minnesota residence. *Id.*

Both of the policies at issue contain similar but not identical “excess” clauses.

Allstate’s provision states as follows:

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.4.

Trade Lake’s provision states as follows:

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 the insurance covering the loss. A.A.4.1.

The Trade Lake policy also contained a Seasonal Residence Endorsement – Non-Wisconsin Resident which states that:

Coverage under the Property Coverage section or the Liability Coverage section of this policy applies only to losses or occurrences that occur within the boundaries of the State of Wisconsin. A.A.39.

The \$54,272.07 in total costs claimed to have been paid by Trade Lake are well within the \$100,000 liability limits of its policy with the Goemans. A.A.4.3.

ARGUMENT

I. Standard of Review

When reviewing an appeal from a grant of summary judgment, the reviewing court determines whether there are any genuine issues of material fact and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). With undisputed facts, the reviewing court “need only review the trial court’s application of the law in interpreting the language of the two insurance contracts.” *Interstate Fire & Casualty Co. v. Auto Owners Ins. Co.*, 443 N.W.2d 82, 85 (Minn. 1988). Questions of law are reviewed de novo. *Garrick v. Northland Ins. Co.*, 469 N.W.2d 709, 711 (Minn. 1991).

II. If “Other Insurance” Clauses Conflict, an Analysis of Which is Closer to the Risk Must be Undertaken

Both of the policies at issue had “other insurance” clauses under which each policy claimed to have excess coverage. When two policies claim to be excess, it is clear under Minnesota law they are deemed to conflict. *Farmers Ins. v Depositors Ins. Co.*, 480 N.W.2d 657, 660 (Minn.App. 1992). When faced with this type of conflicting coverage, the court must determine which policy is closest to the risk. *Id.* As stated in *Integrity Mutual Ins. Co. v. State Automobile and Cas. Underwriters Ins. Co.*, 239 N.W. 2d 445, 446 (Minn. 1976):

The nub of the Minnesota 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.

The closeness-to-the-risk analysis has three primary factors. As set forth in *Ill. Farmers Ins. v. Depositors Ins. Co.*, 480 N.W.2d 657, 660-661 (Minn. App. 1992) and *Auto Owners Ins. v. Northstar Mut. Ins.*, 281 N.W.2d 700, 704 (Minn. 1979), the factors to be applied are:

- (1) Which policy specifically described the accident-causing instrumentality?
- (2) Which premium is reflective of the 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, is coverage of the risk primary in one policy and incidental to the other?

III. The Trial Court Correctly Analyzed the Coverage Issue under Applicable Law when it Determined that the Trade Lake Policy was Closer to the Risk

As stated in the trial Court's Memorandum, it applied the three-prong test set forth above when it determined which policy was closest to the risk. A.A.4 – 4.2. Since Appellants only takes issue with the trial court's analysis of the third factor, Respondent will not discuss the first two factors.

Appellants claim -- without citing any authority -- that the trial court erred when it concluded that the Trade Lake policy is primary because it contemplated the risk with greater specificity than the Allstate policy. Appellants are mistaken. The trial court correctly applied the legal standards referenced above to the pertinent facts to arrive at its conclusion that the Trade Lake policy is primary.

The trial court pointed out several features of the Trade Lake policy that support its conclusion. First, coverage under the Trade Lake policy is limited to losses or occurrences in

Wisconsin, where the tort occurred. A.A. 4.2. Even Appellants concede that such a geographical restriction is uncommon. App. Brief, p.9. Appellants argue that “the trial court ignored the fact that there is no published Minnesota case holding that geographic coverage limitation create greater specificity”. *Id.* This argument not only ignores the trial court’s discussion of other facts that led it to its conclusion that the Trade Lake policy was primary but creates a straw man. It is very likely that such a geographical limitation has never been litigated because an insurer with such provisions in its policy accepts the primacy of its coverage in circumstances such as those present in this case.

The second factor cited by the trial court was that the Trade Lake policy “was specifically for the Goemans’ Wisconsin property. Trade Lake’s policy specifically describes the locale of the Goemans’ cabin as being the location from where the insurance is based.” A.A. 4.2. The trial court’s analysis of this factor is precisely in line with the standard stated by the Court in *Integrity Mutual Ins. Co. v. State Automobile and Cas. Underwriters Ins. Co.*, 239 N.W. 2d 445, 446 (Minn. 1976) that “...the insurer whose coverage was effected for the primary purpose of insuring that risk will be liable first for payment...”. “That risk” in this case is the risk of dog bite occurring at the Wisconsin cabin insured by Trade Lake.

The Court also stated that when analyzing apportionment among insurers the “better approach is to allocate respective policy coverages in light of the total policy insuring intent, as determined by the primary policy risks upon which each policy’s premiums were based and as determined by the primary function of each policy.” *Id.* (emphasis added).

Given this legal standard and its policy language, Trade Lake is hardly in a position to complain when the injury for which it paid damages, costs and fees was exactly the type of liability for which it contracted with the Goemans – liability arising out of the Goemans’ activities at their cabin in Wisconsin.

The final factor cited by the court in support of its conclusion that the Trade Lake policy is primary is that the tort occurred at the location insured by Trade Lake. A.A.4.2, 4.3. Appellants state that “there is no language in either policy linking coverage for an injury by a pet animal to any particular place...”. App. Brief, p.9. This statement is incorrect. It is clear that coverage under the Trade Lake policy is linked to an occurrence in Wisconsin, which is precisely what occurred in this case. Even plaintiff David Goeman agreed that the Trade Lake policy should cover the loss. On April 13, 2001, prior to commencement of *Vita vs. Goeman* and more than five years prior to the date of his affidavit attached as A.A.94-95, David Goeman told an Allstate claim representative that he obtained coverage through Trade Lake for his Wisconsin property because Allstate would not insure it and that he thought Trade Lake should be paying for the dog bite incident. R.A.2.

Although, as shown above, the geographical scope of coverage was but one of several factors cited by the court in reaching its conclusion, Appellants’ statement on page 10 of its brief that “the trial court turned a governing principle of the insurance industry on its head” is incorrect. Arguing, as Appellants do, that Trade Lake restricted coverage to Wisconsin to reduce potential risk (App. Brief, p.10) doesn’t answer the question of which policy is

primary. Since it is clear that the insuring intent and primary function of the Trade Lake policy was to insure the Goemans for liability arising out of their activities in Wisconsin that policy is primary. The Allstate policy insured a home in Minnesota. The fact the Goemans secured liability coverage specific to their Wisconsin activities and residence reinforces the primacy of the Trade Lake coverage.

CONCLUSION

“The insurer who has issued the more specific policy is primarily liable, and the other insurer’s coverage is considered secondary, or excess coverage.” *National Union Fire Ins. Co. of Pittsburgh, PA v. Republic Underwriters Ins. Co.*, 429 N.W.2d 695, 697 (Minn. Ct. App. 1988), *Id.* at 697, citing *Nordby v. Atlantic Mutual Insurance Co.*, 329 N.W.2d 820, 823-24 (Minn. 1983). That is the essence of this case. The trial court correctly applied the three-prong “closeness to the risk” analysis to the facts and policy language and arrived at the correct conclusion that the Trade Lake policy is primary. There never has been and is not now any concurrent liability between Trade Lake and Allstate, and therefore no obligation for Allstate to reimburse Trade Lake for any of its expenses, fees or costs. It is respectfully requested that the trial court’s decision be affirmed.

Dated: 4/27/06

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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).