

Case No. A12-0155

STATE OF MINNESOTA
IN COURT OF APPEALS

Farmers Insurance Exchange,

Plaintiff,

vs.

J A Letellier, Robert Letellier
and Jennifer Letellier,

Appellants,

Robert Hedberg as trustee and next-of-kin
of Shrimatie Ramoutar-Hedberg,
Robert Hedberg individually,
Brent Duane Holland, Drew Holland,
Mark Dominic Frank, Alivia Shae
Elizabeth Boddie, and Krista Boddie Letner,

Defendants,

and

J A Letellier, Robert Letellier
and Jennifer Letellier,
third party plaintiffs,

Appellants,

vs.

Illinois Farmers Insurance Company,
third party defendant,

Respondent.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Letellier appellants submit this Reply Brief in response to the arguments raised in the Brief of respondent Illinois Farmers Insurance Company.

ARGUMENT

I. THE LETELLIERS HAVE NEVER ASKED ANY COURT TO RULE THAT A IS AN INSURED UNDER THEIR POLICIES.

In view of statements in Illinois Farmers' brief, the Letelliers need to restate their basic position. They have never asked the court to declare that D M A is an insured person and is entitled to coverage under the Letelliers' auto policies. The Letelliers ask for coverage in favor of themselves under the auto policies that they bought and which promised to protect them from claims brought against them asserting that they may be liable for damages for bodily injury to others arising out of the use of any motor vehicle. This has nothing to do with D M A's status. He has his own policy. We understand that policy made a substantial payment to the underlying plaintiffs to buy a release of A . But that is between A and his own insurer. The Letelliers are asking for coverage for themselves under their own policies.

Contrary to Illinois Farmers' argument on page 8, the Letelliers have never claimed that all vehicles that left their home after the party that evening would be covered under the Letelliers' policies. The Letelliers' position is that they should

have the coverage under their own policies that they bought when they paid premium, i.e., liability coverage protecting them from allegations of bodily injury or property damage to others arising out of the use of a private passenger car. That is the coverage that they bought and that Illinois Farmers was willing to sell to them.

This is not a change in position. The Letelliers have never asked the court to declare that D M A was an insured under their policies. The underlying claimants asserted that the Letelliers were liable to the underlying plaintiffs for their injuries arising out of the use of a motor vehicle, i.e., the motor vehicle driven by A and owned by his sister. A is not an insured under the Letelliers' policies. He was never a resident of the Letelliers' household. The involved vehicle was not described in the Letelliers' policy. None of the Letelliers ever operated it with permission of the owner. But none of this makes any difference to the coverage analysis. The Letelliers had auto coverage in place to protect them against claims of liability arising out of the use of any motor vehicle. The allegations of liability in the underlying complaints fall within the broad scope of the insuring agreement as drafted by Illinois Farmers. Certainly, the Letelliers' policies cover them for their own use of their specifically described vehicles. But the policies go beyond that. They also cover the Letelliers

for their permissive use of other vehicles not specifically described. And the policies go beyond that, too. Illinois Farmers, in agreeing to insure the Letelliers, agreed to cover them for liability that may be asserted against them for bodily injury to others arising out of the use of any motor vehicle. That broad insuring language does not include any limiting language that such use of a motor vehicle must be the Letelliers' own use. The trial court concluded that the legislature must have intended to put that limitation in the amended statute. That is improper statutory analysis as argued in more detail in Section II below.

II. THE LEGISLATURE'S 2002 AMENDMENT TO THE NO-FAULT ACT OVERRULED THE WIDNESS CASE AND SIGNIFICANTLY BROADENED THE SCOPE OF LIABILITY COVERAGE.

Illinois Farmers all but ignores the most important case on these coverage issues, i.e., Progressive Specialty Insurance Company v. Widness, 635 N.W.2d 516 (Minn. 2001). It devotes a page and a half to a discussion of Widness (Section II of its Brief). Illinois Farmers takes the position that Widness is still good law even though the legislature amended Minn. Stat. § 65B.49, Subd. 3(2) the next year. In Illinois Farmers' view, liability insurance still follows the vehicle rather than the person. (Illinois Farmers' Brief at 11)

The Letelliers' position in their main brief is that the legislature's 2002 amendment effectively overruled Widness and broadened the scope of liability

coverage required by the No-Fault Act. The Widness court had restricted liability coverage. Specifically, Widness held that under Minn. Stat. § 65B.49, Subd. 3(2), an omnibus clause extended coverage for permissive use of somebody else's vehicles to the named insured only. The omnibus clause did not extend coverage to an unnamed resident relative for permissive use of the neighbor's car. The Widness court specifically invited the legislature to change that result by changing the wording of the statute.

The next year the legislature took up the court's invitation and amended the statute to read exactly as the Widness court said it should read if the legislature intended the statute to provide for a broader scope of liability coverage. It is impossible to draw any conclusion other than that the legislature overruled Widness and intended that the scope of liability coverage required under Minn. Stat. § 65B.49 is broader than what the Minnesota Supreme Court had thought.

Illinois Farmers assails the Letelliers for not including any legislative history on the 2002 amendment. The Letelliers assert that legislative history is unnecessary. The effect of the 2002 amendment is crystal clear. The Widness court held that if the legislature had intended the scope of liability coverage to be as broad as the Widness respondents argued, the legislature could have signified that meaning by phrasing the statute in terms of "any motor vehicle" instead of "a

motor vehicle.” Widness, 635 N.W.2d at 522.

The next year the legislature did exactly what the court said it should do in order to effect a broader meaning. Legislative history would add nothing to these facts. Legislative history is appropriate only where the intent of the legislature is not clearly expressed by the language of the bill eventually enacted. Burck v. Pederson, 704 N.W.2d 532, 534 (Minn.App. 2005) (If a statute “merely produces a troubling result . . .” that is no reason not to apply unambiguous language.); State v. Gresser, 657 N.W.2d 875 (Minn.App. 2003); In re Welfare of the Child of R.S., 793 N.W.2d 752 (Minn.App. 2011). In this case, there is no lack of clarity and no occasion to look at legislative history.

The trial court read an additional limiting phrase into Minn. Stat. § 65B.49, Subd. 3(2), i.e., liability coverage covers an insurer’s legal obligation to pay damages to others because of bodily injury arising out of **an insured person’s operation** of a motor vehicle. (Letelliers’ main Brief at 31, citing Transcript at 22, 24); (see, also, District Court Order, ADD at 10, “The term ‘any motor vehicle’ therefore applies to any motor vehicle that an insured individual is driving. . . .”) The limiting phrase is not present in the statute. This is a matter of the court improperly reading language into the statute that the legislature has chosen to omit. The court has no power to do so whether the omission is intentional or

inadvertent. The supreme court reaffirmed that rule after the Letelliers submitted their main brief. See Fanny Mae v. Heather Apartments Limited Partnership, ___ N.W.2d ___ (Minn. 2012). (“We ‘will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently.’” ___ N.W.2d at ___)

The district court violated this rule of statutory construction. The legislature gets to write the laws. The district court obviously thought that the Letelliers’ coverage position was a “troubling result” from the 2002 amendment. However, that is no reason to disregard the statute that the legislature wrote.

Illinois Farmers continues to repeat the phrase that liability coverage follows the vehicle rather than the person. (Illinois Farmers’ Brief at 11) This is a general statement that is frequently true, but also frequently incomplete and misleading. Liability generally follows the described vehicle, but that is not the end of the story. Liability coverage in Minnesota is not limited to specifically described vehicles. An omnibus clause extends liability coverage beyond the designated vehicles. The definition of “your insured vehicle” in the Illinois Farmers policy and all policies issued in Minnesota extend liability coverage beyond the designated vehicles. Newly acquired vehicle clauses or replacement vehicle clauses do the same. The specific issue is how far liability coverage

extends in Minnesota beyond the specifically described vehicles. The legislature's latest word on that issue is the 2002 amendment to § 65B.49, Subd. 3(2) which mandates that liability coverage extend to claims for bodily injury or property damage alleged against insured persons arising out of the ownership, maintenance or use of any motor vehicle, without limiting the section to an insured person's use of any motor vehicle.

Illinois Farmers' position seems to be that the 2002 amendment to the No-Fault Act accomplished nothing. This position is untenable. Simply stating that liability coverage follows the vehicle does not address the coverage issues. Liability coverage generally follows the vehicle, but not always, particularly where the legislature has amended the statute to specifically provide that liability coverage applies to an insured's liability arising out of the use of any motor vehicle, without any limitation as to whose use it must be.

Illinois Farmers' analogy to bartenders and waitstaff of bars and the difficulties they may have in finding personal auto coverage if the Letelliers' position prevails is misguided. (See Illinois Farmers' Brief at 8-9) Commercial vendors have potential liability under § 340A.801 for illegal sales of alcohol. That is usually for sales to obviously intoxicated adults, but also to minors. That is a well-recognized risk of the business for which separate dram shop insurance is

available. A separate section of Chapter 340A requires commercial vendors to have such policies in place as a condition of licensing. The employees of the commercial vendors don't face any liability. They are not the licensees.

Furthermore, § 340A.90, Subd. 1, provides, "This paragraph does not apply to sales licensed under this chapter." That takes care of the issue. Illegal sales by commercial vendors are subject to potential liability under § 340A.801, not § 340A.90.

III. THE AUTOMOBILE COLLISION IS THE MOMENT WHEN ALL CAUSES OF ACTION ACCRUED AND INSURANCE COVERAGE WAS TRIGGERED.

Illinois Farmers takes the position (on page 9 of its brief) that it is misleading for the Letelliers to argue that the underlying plaintiffs claim that the Letelliers' liability arose out of A's use of his sister's car instead of minor consumption. That is the position that the Letelliers put forward. They further take the position that it is not misleading at all but a statement of the way it is. The fact that teenagers gathered at the Letellier home earlier in the evening to drink alcohol, thereby bringing Minn. Stat. § 340A.90 into play, does not preclude automobile-related liability from accruing from events later in the evening.

Minn. Stat. § 340A.90 creates potential liability on the part of adults who knowingly or recklessly permit minors to consume on premises that the adults

control. So Illinois Farmers takes the position that the Letelliers' potential liability arises out of minor consumption, not use of a motor vehicle. But until the moment of collision between the vehicles driven by A and Ramoutar-Hedberg, the Letelliers were liable for nothing. Teenagers may have consumed alcohol on the Letellier premises, but there were no damages and nothing for anyone to sue over until the automobile collision. In legal terms, no cause of action had accrued until the moment of the crash. Until that moment, the police could have cited some teenagers for underage consumption, but that would have been it. Until that moment of the collision, no one had any actual injuries that could support a civil lawsuit.

This court recognized this in Fillmore v. Iowa National Mutual Insurance Co., 344 N.W.2d 875 (Minn.App. 1984). In Fillmore, an incompetent son drove his parents' car when he was under the influence. He collided with a police squad car. Several people were killed. One of the plaintiffs asserted a theory of negligent entrustment against the parents for letting a person known to be incompetent drive their car. Iowa National, the parents' homeowners insurer, commenced a declaratory action to determine whether its homeowners policy had any duty to defend or indemnify.

This court agreed with Iowa National. The act of negligently entrusting the vehicle to the parents' son took place before the actual collision, but until the collision, there were no damages and therefore no claim. This was not a matter of separate causes insured under separate policies as in Waseca Mutual Insurance Company v. Noska, 331 N.W.2d 917 (Minn. 1983). This court held:

In this case, the entrustment, combined with the manner in which he used the automobile, caused the injuries to the claimants. Therefore, there are not two separate and independent acts that concurred to cause the damages as in the *Waseca Mutual* case; rather, there is negligence combined with the use of the automobile which caused the accident, the injuries, and the damages claimed. 344 N.W.2d at 880.

Accordingly, the automobile collision was the only event of legal significance in determining liabilities and coverages.

Getting at it from a slightly different angle, it is an elementary rule of insurance law that the date of an accident or an occurrence is the date of damage resulting from some negligent act and not the date of the negligent act. Singsaas v. Diederich, 307 Minn. 153, 238 N.W.2d 878, 881 (1976). The insured may have done negligent work when the policy was in effect, but if there is no resulting damages for several months thereafter, and after the insured cancelled the policy, then there is no occurrence within the policy period. Id. ("The trial court decision is consistent with the generally accepted rule that the time of the occurrence is not

the time the wrongful act was committed, but the time the complaining party was actually damaged.” 238 N.W.2d at 880.) Liability policies, including Illinois Farmers, cover accidents or occurrences that cause damages. Until both are present, there is nothing for a policy to do. There is no occasion to invoke the terms of the policy. There is nothing to trigger coverage. The same applies here. The underlying plaintiffs’ claims accrued when the vehicles collided. Before that, there were no facts of any consequence to trigger coverage.

Illinois Farmers argues that there is no evidence that the legislature, in amending 65B.49, Subd. 3(2), intended to cover claims arising under the social host statute, § 340A.90. Regardless of what the legislature considered before enacting the amendment, the effect of the amended statute is to create coverage for at least some claims arising out of motor vehicle accidents where there is a potential for liability arising under § 340A.90. The Letelliers are not arguing for blanket coverage under auto policies for any and all claims that could possibly arise under Chapter 340A. There could be no such rule. Section 340A.90 covers a broad range of conduct. Serving alcohol to minors does not necessarily result in automobile-related damages. There have been cases of minors served alcohol who

fall into a body of water on the way home. That has nothing to do with automobiles.¹

But the Letelliers are seeking coverage under their automobile policy for themselves under the facts of this case. Another Wright County District Court judge found that their behavior on the night of April 12-13, 2009 was neither knowing nor reckless. The Letellier parents did not provide any alcohol for anyone. They were asleep and had no idea that a party was going on in their home. They received summary judgment on that basis. The summary judgment order came after several years of litigation, numerous depositions and other discovery. That discovery disclosed that their conduct was not of a sort that any court has ever held to be uninsurable for public policy reasons. Their conduct was not intentional, knowing or reckless. It was not even negligent. They were at home asleep and not aware that teenagers were in the house. In short, they did nothing that was illegal or which in any way tended to produce the underlying plaintiffs' damages, but reaching that point cost a substantial amount of money.

¹ The two divisions of Farmers Insurance Group, Farmers Insurance Exchange and Illinois Farmers, took inconsistent positions on coverage, as was pointed out in the hearing before the district court. (See Transcript at 12) Farmers Insurance Exchange, the homeowners carrier, argued that there was no coverage because of an automobile exclusion. The auto insurer, Illinois Farmers, takes the position that the automobile collision has nothing to do with the motor vehicle accident, and the liability arises out of service of alcohol to minors.

Illinois Farmers points out that the statute is phrased in terms of “knowing or reckless” behavior. (Illinois Farmers’ Brief at 12) There may be cases where ill-advised adults knowingly procure alcohol for teenagers, knowingly serve the teenagers, watch them get drunk, and then watch them drive away. Whether there would be any coverage at all under any policy for such behavior is a matter for a future case. There might be a good defense to coverage under the rule of State Farm Fire & Casualty Company v. Schwich, 749 N.W.2d 108 (Minn.App. 2008). (Intentional procurement of methamphetamine resulting in death is a willful and malicious act from which intent to injure will be inferred precluding coverage.) Perhaps some court would make the same ruling in a case of intentionally providing teenagers with liquor. But that is a different case than what is before the court today. The Letelliers were sued because they were at home asleep and failed to notice that teenagers were drinking downstairs. The court should not adopt a rule of law that there is no coverage for such behavior because the statute requires “knowing or reckless” behavior for a finding of liability. Litigating a case to the point of determining that behavior was not reckless or knowing can be expensive. Insureds buy liability policies to protect them from that risk. Policies no longer explicitly extend coverage to groundless, false or fraudulent claims, but the courts still interpret policies in that manner. In United Services Automobile Association

v. Howe, 208 F.Supp. 683 (D. Minn. 1962), Judge Devitt noted that “there is no more vital interest that a person may possess in a chattel than that of being subject to a lawsuit.” 208 F.Supp. at 685. The Letelliers bought auto policies for protection of that vital interest. They should get that protection.

The Letelliers should have the benefit of the broad insuring agreement that Illinois Farmers issued to them as required by the No-Fault Act.

IV. THE FACT THAT THE FARMERS HOMEOWNERS INSURER PROVIDED A DEFENSE DOES NOT ADDRESS THE ISSUE OF FEES UNDER MORRISON V. SWENSON.

Illinois Farmers points out that Farmers Insurance Exchange, the Letelliers’ homeowners carrier, provided a complete defense in the underlying matter. That is correct. The Letelliers acknowledged as much in their main brief. The Letelliers are thankful for that defense which resulted in summary judgment in their favor without their having to sit through a trial and the risks incident thereto.

However, that does not address the question of attorney’s fees that the Letelliers incurred in this action to determine whether Illinois Farmers was obligated to defend.

The Letelliers are not seeking a second defense to the underlying complaints. They got that defense, and it was successful. What they are seeking are expenses of bringing this declaratory action to determine coverage under the

policy of Illinois Farmers on the theory that it wrongfully refused to defend them. Today, with the benefit of 20/20 hindsight, it appears that this declaratory action was unnecessary since the Letelliers' involvement in the underlying matters concluded without any risk of liability.

But no one knew at the beginning of the legal proceedings how the underlying matters would turn out. The underlying plaintiffs sued the Letelliers. The complaints just asked for an amount in excess of \$50,000, but it was obvious that the damages – death and serious bodily injuries – could have been quite a bit in excess of \$50,000. Farmers Insurance Exchange agreed to defend, but also reserved its right to deny indemnity and to withdraw from defense. Illinois Farmers denied any obligation whatsoever. Farmers Insurance Exchange eventually got a court order declaring that it provided no coverage. A month or two later, a different judge of Wright County granted summary judgment in favor of the Letelliers. However, matters could have turned out differently. Farmers Insurance Exchange could have been entitled to withdraw from the defense long before the underlying matters were resolved. At that point, the Letelliers would have been left to their own devices since Illinois Farmers had denied any obligation to them whatsoever.

The Letelliers had to bring the declaratory action against Illinois Farmers as a third-party complaint to the homeowners' declaratory action in order to protect themselves. It was reasonable for them to do so under the circumstances then prevailing. Since Illinois Farmers wrongfully denied defense, it should reimburse the Letelliers for their expenses of bringing this declaratory action under Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640 (1966). Illinois Farmers does not address these arguments at all. Commenting that the Letelliers are not entitled to a double defense does not address the issues.

Illinois Farmers does not discuss the case of Redeemer Covenant Church of Brooklyn Park v. Church Mutual Insurance Company, 567 N.W.2d 71 (Minn.App. 1997) cited and discussed by the Letelliers in their main brief. In Redeemer, the insured church received a full defense from various insurers. That did not prevent this court from making rulings about who should share the cost of defense, the proportions thereof, and determining that Atlantic Mutual was responsible to reimburse the church for the costs of the declaratory judgment action. Redeemer, 567 N.W.2d at 82-83.

The Letelliers ask for a similar ruling. The Letelliers ask the court to determine that Illinois Farmers wrongfully denied its duty of defense and that

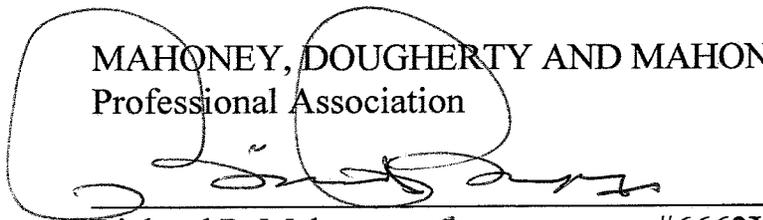
therefore it should be liable to them for their expenses, including attorney's fees, in bringing this declaratory action to make that determination.

CONCLUSION

For all the above reasons, this court should reverse and remand for further proceedings in the district court, including a determination of attorney's fees incurred in this declaratory action.

Dated: April 6, 2012.

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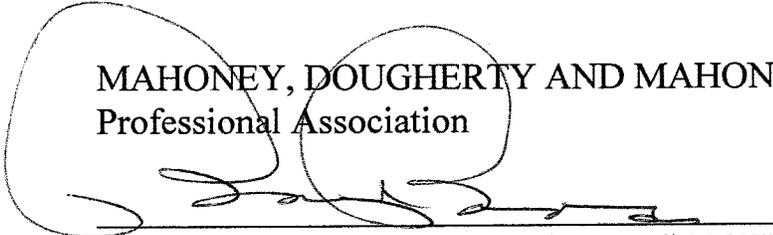
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CERTIFICATE OF WORD COUNT

I certify that the foregoing brief contains 3,757 words, as calculated by WordPerfect 13.

Dated: April 6, 2012.

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