

67906-6

67906-6

No. 679066

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

FNI INSURANCE COMPANY OF AMERICA

Plaintiff/Respondent

v.

MARK DeCOURSEY and CAROL DeCOURSEY,

Defendants/Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Patrick Oishi, Case No. 10-2-37944-4 SEA)

APPELLANTS' BRIEF

Mark and Carol DeCoursey
Pro se

Carol & Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052
Telephone: 425.885.3130

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUL 10 PM 2:19

TABLE OF CONTENTS

TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	II
I. IDENTITY OF PETITIONERS.....	1
II. DECISIONS BELOW	1
III. ISSUES PRESENTED FOR REVIEW.....	1
7. ASSIGNMENTS OF ERROR	2
8. STATEMENT OF THE CASE.....	3
A. FACTUAL BACKGROUND.....	3
B. THE UNDERLYING CASE.....	4
9. ARGUMENT	9
C. THE SUMMARY JUDGMENT STANDARD	9
D. TRADE NAMES ARE ALIASES FOR REAL ENTITIES	10
E. INSURANCE PURCHASED UNDER A TRADE NAME INSURES THE UNDERLYING ENTITY	12
F. THE REAL INSURED ENTITY UNDER THE FIRST NATIONAL POLICY	15
G. FNI TELLS A CONFUSED STORY OF THE INSURED	15
H. THE FINDINGS BELOW WERE NOT ACCORDING TO THE FACTS	19
I. FIRST NATIONAL'S EVIDENCE IS FLAWED	19
J. THE COURT'S FINDINGS ON FNI'S EVIDENCE.....	26
K. DECOURSEYS' EVIDENCE CLEARLY ESTABLISHED ISSUES OF MATERIAL FACT THAT DISPUTED FNI'S SUMMARY JUDGMENT.....	27
L. FNI WAS NOT PREJUDICED BY LACK OF NOTICE	30
M. FNI FILED ITS ANSWER LATE WITHOUT PERMISSION.....	32

TABLE OF AUTHORITIES

American Family Mutual Insurance Company v. Teamcorp, Inc. 659 F.Supp.2d 1115 (2009)	12
Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793	36, 37
Bushey v. N. Assurance Co. of Am., 766 A.2d 598, 603 (2001)	13
Carlson v. Doekson Gross, Inc., 372 N.W.2d 902 (N.D. 1985)	13
CR 12(a)(4)	33
CR 12(c)	38
CR 15	42
CR 15(a)	34, 35, 39
CR 15(c)	39, 40
CR 15(d)	34, 35
CR 56	32
CR 56(c)	9, 36
CR 6(a)	35
CR 6(b)	33
CR 7(a)	33, 34
CR 8(b)	34
CR 8(d)	33, 38
Foman v. Davis, 371 U. S. 178 (1962) ..	35, 36, 37
General Cas. Co. v. Outdoor Concepts, 667 NW 2d 441 (2003)	12
Herron v. Tribune Publ'g Co., 108 Wn.2d 162 (1987)	39
Holmes v. Border Brokerage Company, Inc., 51 Wn.2d 746 (1958)	11
Hubred v. Control Data Corp., 442 N.W.2d 308 (1989)	13
Jansen v. Nu-West, Inc. 102 Wash.App. 432, 6 P.3d 98 (2000)	34
Lamon v. McDonnell Douglas Corporation, 91 Wn.2d 345 (1979)	30
Morris v. McNicol, 83 Wn.2d 491, 494-95 (1974)	30
North St. Ass'n v. Olympia, 96 Wn.2d 359, 367-69, 635 P.2d 721 (1981) ...	40
Patrevito v. Country Mut. Ins. Co., 118 Ill.App.3d 573, 74 Ill. Dec. 259, 455 N.E.2d 289, 290-91 (1983)	13
Providence Washington Ins. Co. v. Valley Forge Ins. Co., 42 Cal.App.4th 1194, 50 Cal.Rptr.2d 192, 194 (1996)	12
Purcell v. Allstate Ins. Co., 168 Ga.App. 863, 310 S.E.2d 530, 533 (1983) .	13
RCW 19.80.001	10
RCW 19.80.005	10, 14
RCW 19.80.010	10
RCW 23B.04.010	12
RCW 23B.14.050(1)	30
RCW 9.12.010	17

Recalde v. ITT Hartford, 492 SE 2d 435 - Va: Supreme Court 1997	13
Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886).....	14
Simmons v. Ins. Co. of N. Am., 17 P.3d 56, 62 (Alaska 2001)	13
Stansfield v. Douglas County 107 Wn. App. 20.....	39, 40
Trombley v. Allstate Ins. Co., 640 So. 2d 815 - La: Court of Appeals, 3rd Circuit 1994	13
United States v. Diebold, Inc., 369 588*588 U. S. 654, 655 (1962)	27
Veradale Vly. Citizens' Planning Comm. v. Board of Cy. Comm'rs, 22 Wn. App. 229, 238, 588 P.2d 750 (1978).....	40
Wilson v. Steinbach, 98 Wn.2d 434, 656 P. 2d 1030 (1982)	9, 30
Woodcrest Investments v. Skagit Cy., 39 Wn. App. 622	40

I. IDENTITY OF PETITIONERS

Mark DeCoursey, pro se, and Carol DeCoursey, pro se,
("DeCourseys") move for relief as set forth below.

II. DECISIONS BELOW

The Superior Court of King County in Seattle, Judge Oishi presiding,
entered orders:

1. Granting Summary Judgment in favor of the Plaintiff, First National Insurance Company of America ("FNI"), **CP891**,
2. Denying DeCourseys' motion for Summary Judgment, **CP889**,
3. Denying DeCourseys' motion to strike FNI's untimely answer to DeCourseys' counterclaims, **CP884**,
4. Denying DeCourseys' motion to reconsider motion to strike, **CP911**, and
5. Denying DeCourseys' motion to reconsider motions for summary judgment, **CP913**.

III. ISSUES PRESENTED FOR REVIEW

1. Does CR 6 (Time) apply to the pleadings?
2. Should a litigant be permitted to file an answer more than seven months late pleading without excuse or explanation for tardiness?
3. Should a litigant be permitted to withhold a responsive pleading until after scheduling and filing a summary judgment motion?
4. Does CR 8(d) have any real world application?

5. Were Appellants prejudiced by the Court's acceptance of Respondent's pleading?
6. Can an attorney be impeached as a declarant if the attorney signs a paradoxical or disputed declaration?

7. ASSIGNMENTS OF ERROR

The Superior Court committed the following errors:

1. Permitted Respondent to file an answer to counterclaims more than seven months late without a motion, in violation of CR 6.
2. Permitted Respondent to file an answer to counterclaims after crossed summary judgment motions had been filed.
3. Denied Appellants' motion to strike Respondent's untimely pleading and apply CR 8(d).
4. Delayed ruling on the motion to strike, prejudicing DeCourseys.
5. Failed to apply CR 8(d) to FNI's failure to timely answer DeCourseys' counterclaims.
6. Ignored Appellants' impeachment of the witnesses' declarations
7. Applied the Rules of Evidence unequally
8. Granted Respondent's motion for Summary Judgment despite genuine issues of material fact.
9. Denied reconsideration of the Motion to Strike Respondent's untimely pleading.

10. Denied reconsideration of the summary judgment orders.

8. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In 2001, Stefan Birgh started Automated Home Solutions, Inc. (CP483) to do electrical contracting. CP704. Birgh's corporation did business under its own name at 16300 Redmond Way, Redmond, Washington. CP738.

In 2003, Birgh sold the business to V&E Medical Imaging Services, Inc. ("V&E"), operated by Lester Ellis. CP759. V&E bought all the assets, the customers, the inventory, the store front, and the trade name, "Automated Home Solutions." CP758. In December 2003, V&E registered the trade name with the Department of Licensing, CP669, and thereafter did all company business under the trade name (CP 485), which included preprinted checks and business forms. CP547 through CP568.

After the sale, Birgh's corporation became defunct. It did no more business and had no assets to insure for fire, theft, terrorism, or other perils. CP758. It had no income stream and its account with the State Department of Revenue was closed on April 30, 2003. CP738. Birgh took employment as sales manager for V&E. CP681. In January 2004, Birgh's corporation was administratively dissolved. CP427. Because it sold its own name to V&E, hereinafter it will be known as the "defunct corporation."

On June 7, 2004, Respondent First National Insurance Company of

America (hereinafter, “FNI”),¹ sold insurance policy #1CG57501910 (hereinafter, the “Policy”) to V&E under the name “Automated Home Solutions, Inc.” CP84.

In November 2006, V&E began working on Appellant DeCourseys’ house, both as a subcontractor for high voltage work and as a direct contractor for low voltage work. In March 2006, V&E filed suit against the prime contractor and DeCourseys. CP7 *et seq.* DeCourseys counter-claimed against V&E for damages to the home. CP12. On March 8, 2010, the remaining claims between V&E and DeCourseys were sent to Mandatory Arbitration by the Superior Court. CP362.

B. THE UNDERLYING CASE

Ellis, registered agent for V&E, was properly served with the notice of arbitration (CP243), and Ellis subsequently conducted a correspondence with the Superior Court concerning the case. Ellis wrote an undated letter to the court with a copy to DeCourseys (CP239), postmarked February 3, 2010.

¹ The documentation for this case shows that the Plaintiff uses multiple names in the course of business, including “FNI Insurance Company of America, Inc.,” “Safeco Insurance,” “American States Insurance Company,” “Northwest,” and “Safeco Corporation,” so that tracing the activity of the particular entity may be difficult. Plaintiff also apparently uses agents such as “Liberty Mutual” to perform services without explicit delegation, with similar potentially confusing effect. In this brief, all of the various affiliates and agents who acted on behalf of the Plaintiff are designated collectively “FNI” unless the name of a natural individual brings additional understanding.

CP241. In that letter, Ellis denied he was the registered agent of V&E. CP239. Subsequently, the Superior Court sent Ellis the “strike list” of available arbitrators. On March 22, 2011, Ellis called with the King County Arbitration Department Supervisor on the phone, apparently denying that he was the registered agent for V&E. The Supervisor wrote a second letter to Ellis identifying the lawsuit, the case number, and the judge, explaining his rights and duties under the arbitration rules and refusing to cancel or delay the arbitration. CP240. On April 6, 2011, the Superior Court sent the parties a Notice of Appointment of the arbitrator.

On April 16, 2010, Jon Sefton, an agent from Bordelon Insurance² contacted FNI’s claims office with the following facts (CP242 - CP243 ¶):

1. There was a claim against one of FNI’s clients (presumably the policy was identified).
2. The declarant identified the client as “AHS.”
3. The claimants were the DeCourseys.
4. DeCourseys had called and written a letter to Bordelon with the details of the claim

The FNI claims office issued claim number #594299924013. CP519.

² B&S Insurance Agency, which brokered the Policy (CP86), is somewhat inconsistent in the use of its own names. At various times and places, it is identified as “B&S Insurance Agency, Inc.,” “Bordelon Insurance” and “Bordelon, McClusky, and Sefton, Inc.”

On April 23, 2010, FNI intake adjuster Travis Tonn spoke with “the registered agent for AHS,” Ellis. Ellis was in fact the registered agent for V&E and for no other entity in evidence before the Court. CP478. From that conversation, Tonn admits gleaning more information (CP243 ¶4):

1. Ellis confirmed there might be an active lawsuit.
2. Ellis had received arbitration notices.

From the information about the arbitration notices, on April 23, 2010, FNI knew or should have known with certainty that its insurance client was a defendant in a lawsuit that involved the Policy and that the Insured’s interests (and its own) could and should be defended at the “arbitration” hearing. But even with that knowledge, FNI did nothing to defend its own interests.

On May 10, 2010, DeCourseys presented their claims and evidence to the arbitrator. Neither FNI nor V&E participated. On May 11, the arbitrator awarded DeCourseys \$91,219. CP79. Neither V&E nor FNI protested the award. On June 29, 2010, the award was entered in judgment in the King County Superior Court (the “Judgment”).

V&E had gone out of business in or about June 2009 and dissolved as a corporation on April 1, 2010 (CP702), so DeCourseys began collections actions against the insurer, FNI.

In October 2010, FNI sued DeCourseys in Superior Court. FNI claimed (inconsistently) that the Policy was sold to the defunct corporation (CP3

¶3.9), that the defunct corporation had sued DeCourseys (CP2 ¶3.3), that DeCourseys had counter-sued the defunct corporation when it was incapable of suing or being sued (CP4 ¶4.3), and that the Judgment was awarded against the defunct corporation (CP3 ¶3.7). Despite the true name of the plaintiff on the complaint from the earlier case (“V&E MEDICAL IMAGING SERVICES, INC., a Washington corporation, doing business as AUTOMATED HOME SOLUTIONS”, CP7), which FNI included in its *Complaint*, FNI alleged that the actual plaintiff was the defunct corporation operating “under” the name of an active corporation. CP2 ¶3.1.

FNI asked for all DeCourseys’ claims against FNI to be declared null and void by the court through declaratory judgment. CP5 ¶5.1.

DeCourseys answered the Complaint and counterclaimed for the Judgment against FNI’s client on January 12, 2011. CP195. FNI did not answer the counterclaim until months later, as told below. CP577.

In March 2011, FNI began planning for summary judgment. CP630. In July or August 2010, FNI scheduled a summary judgment hearing for September 9, 2011 and announced the hearing date to DeCourseys. On August 3, 2011, the court administration rescheduled the hearing for October 7 with FNI’s agreement. CP629. On September 9, 2011, FNI filed and served a motion for summary judgment for the relief requested in its *Complaint*. CP209.

By September 9, 2011, FNI still had not answered DeCourseys' counterclaim. On September 9, DeCourseys filed a cross-motion for summary judgment based on FNI implicit admissions to DeCourseys' counterclaims. CP446.

On September 16, 2011, FNI filed and served its answers to DeCourseys' counterclaims. CP578. The pleading was not accompanied by a motion showing cause for the untimely filing. On September 26, 2011, DeCourseys moved to strike FNI's untimely filing, citing the Rules. CP601.

On October 7, 2011, the Court heard oral argument on the summary judgment motions. The hearing centered primarily on the identity of the Insured and whether the Insured had properly notified FNI of DeCourseys' claims. DeCourseys drew attention to the April 16 phone call between Bordelon and FNI, but the Court refused to consider the evidence. RP31.

In a memorandum after the hearing (CP879), DeCourseys drew the Court's attention to the Travis Tonn declaration (CP242) showing that FNI was aware of the lawsuit and the arbitration hearing on April 23, 2010. CP879. On October 11, 2011, the Superior Court denied DeCourseys' motion to strike FNI's answer (CP884) and DeCourseys' motion for summary judgment. CP889. The Court granted FNI's motion for summary judgment, ruling that the insured entity was the defunct corporation and the defunct corporation did not notify FNI of the suit. The Court ruled that FNI

has no duty to pay a judgment awarded against the defunct corporation. CP892.

DeCourseys moved the Court to reconsider the ruling on the strike motion, citing the Rules. CP894. DeCourseys also asked the Court to reconsider the order granting FNI's summary judgment, CP901. The Court denied both motions. CP911- CP913.

FNI did not file a final judgment. DeCourseys filed a notice and motion for discretionary review of the three October 12 orders and the orders on reconsideration. The Div. I commissioner converted the request to an appeal by right. Thus this hearing.

9. ARGUMENT

C. THE SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment only when, considered in a light most favorable to the non-moving party, the evidence shows that there is no genuine issue as to any material fact.

A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Wilson v. Steinbach, 98 Wn.2d 434 (1982)

This case is fraught with issues of material fact. FNI did not meet the standard, and the court should not have granted its summary judgment motion.

D. TRADE NAMES ARE ALIASES FOR REAL ENTITIES

RCW 19.80.005 defines a “trade name” as a name that is used in business different from the “true and real name” of the individual or corporation.

In Washington, anyone using a trade name is required to register the name with the Department of Licensing (RCW 19.80.010) so that anyone may learn the true and real name of anyone conducting business in the State (RCW 19.80.001). The Department maintains a database of trade names and true names publicly accessible through the Internet, desk clerks, and other means. For an Internet example, see CP700.

An insurance company doing business in Washington has a duty to know its clients, else fall victim to insurance fraud. Upon application by Ellis for insurance on the assets of “Automated Home Solutions,” a responsible insurance company would determine the true and real name of the entity purchasing the insurance.

To avoid any confusion, the use of trade names is carefully regulated:

A person, whether individual or corporate, may not use any name, not even his or its own, which is the distinctive feature of a trade name already in use by another, if such use by the one person tends to confuse, in the public mind, the business of such person with that of the other.

Holmes v. Border Brokerage Company, Inc., 51 Wn.2d 746 (1958).

A trade name may be abandoned or given up by the original appropriator, and, when it is so abandoned or given up, any other person has the right to seize upon it immediately, and make use of it, and thus acquire a right to it superior not only to the right of the

original user, but of all the world."

Ibid.

In this case, the court was given undisputed evidence that the original owner sold the name "Automated Home Solutions" to V&E (CP483-5.), who registered the name in 2003 (CP498) and acquired the superior right to use the name and exclude the use by all others.

Most trade name disputes concern the competition between entities for use the same name. In this case, the original owner and the purchaser of the name are not confused. Only FNI is confused. FNI asserts the right to be confused by a name that confuses no one else. FNI asserts that a contract for insurance lawfully purchased under a trade name must be reassigned by the courts to the original owner to satisfy FNI's confusion over a trade name, regardless of registration of the trade name with the state agency by its rightful owner to prevent public confusions.

But what of the fact that the name on the face page of the insurance is "Automated Home Solutions, Inc.," as FNI has argued? (CP887) Though the trade name was registered without the "Inc.," the statute specifies that there shall be no distinction on the presence or absence of the "Inc." suffix. (argued at CP651). RCW 23B.04.010:

(5) A name shall not be considered distinguishable upon the records of the secretary of state by virtue of (a) A variation in any of the following designations for the same name: "Corporation," "incorporated," "company," "limited," "partnership," "limited

partnership," "limited liability company," or "limited liability partnership," or the abbreviations "corp.," "inc.," "co.," "ltd.," "LP," "L.P.," "LLP," "L.L.P.," "LLC," or "L.L.C.";

E. INSURANCE PURCHASED UNDER A TRADE NAME INSURES THE UNDERLYING ENTITY

The courts in several jurisdictions have dealt with insurance sold to a trade name (or dba), and universally agree that the owner of the Policy is the underlying entity, the trade name being a mere synonym for the true and real name.

Cases cited to the trial court include:

- **American Family Mutual Insurance Company v. Teamcorp, Inc. 659 F.Supp.2d 1115 (2009)** – Agreeing with other jurisdictions that listing the insurance under the trade name may result in an ambiguity, but that all such ambiguities should be construed in favor of the insured.
- **Providence Washington Ins. Co. v. Valley Forge Ins. Co., 42 Cal.App.4th 1194, 50 Cal.Rptr.2d 192, 194 (1996)** - The court held that a policy issued with a "dba" as the named insured actually covered the user of the "dba" because the "dba" was not a separate legal or insurable entity; discussing numerous cases from other jurisdictions.
- **General Cas. Co. v. Outdoor Concepts, 667 NW 2d 441 - Minn: Court of Appeals (2003)** – “A significant majority of authorities support the view that when an insurance policy lists a sole proprietorship's trade name as the "named insured," the policy extends coverage to the sole proprietor as well as the business.”
- **Purcell v. Allstate Ins. Co., 168 Ga.App. 863, 310 S.E.2d 530, 533 (1983)** – The Court of Appeals in Georgia held that Purcell was the named insured under a commercial automobile policy listing the named insured as "Purcell Radiator Serv." and that Purcell's wife could recover as a relative of the named insured. The court based its decision primarily on the inability of Purcell Radiator Service, a sole proprietorship with no separate legal identity, to own the vehicle listed in the policy. *Id.* at 532. The court concluded that

Purcell, as the owner of the vehicle, was the 'entity' to whom the uninsured motorist coverage was extended by Allstate's policy and was the true 'named insured' in that regard.

- **Other jurisdictions** have agreed that policies that list a trade name as the "named insured" extend coverage to the individuals operating those businesses. *See, e.g., Simmons v. Ins. Co. of N. Am.*, 17 P.3d 56, 62 (Alaska 2001) (when a business owner acquires insurance in his trade name, coverage extends to the owner as well as the business); *Bushey v. N. Assurance Co. of Am.*, 362 Md. 626, 766 A.2d 598, 603 (2001) (policy identifying insured as "William Bushey t/a Bushey's Automotive Repair" covers the individual); 445*445 *Chmielewski v. Aetna Cas. & Sur. Co.*, 218 Conn. 646, 591 A.2d 101, 113 (1991) ("We also agree that one who operates a business under a trade name is nonetheless an individual insured under a policy issued in that trade name."); *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 905 (N.D. 1985) ("A sole proprietorship which is conducted under a trade name is not a separate legal entity"); *Patrevito v. Country Mut. Ins. Co.*, 118 Ill.App.3d 573, 74 Ill. Dec. 259, 455 N.E.2d 289, 290-91 (1983) (driver was "named insured" within automobile policy provisions issued to his noncorporate business).
- ***Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn.1989)** - As an alternative holding, the district court concluded that because the declaration page of the commercial automobile policy states that the named insured is an "Individual" but then lists the named insured as "Outdoor Concepts Joe Ebertz DBA," the language in appellant's policy is ambiguous and must be resolved against the insurer.
- ***Recalde v. ITT Hartford*, 492 SE 2d 435 - Va: Supreme Court 1997** – Concluded that a sole proprietorship is not a legal entity separate and distinct from the individual owner doing business in that name.
- ***Trombley v. Allstate Ins. Co.*, 640 So. 2d 815 - La: Court of Appeals, 3rd Circuit 1994** – “The plaintiff has cited no authority for the proposition that an individual doing business under a trade name is a separate legal entity from the individual. Further, our research indicates that just the opposite is true; a trade name has no separate existence apart from the individual doing business under that trade name. In reaching this conclusion, we first note that the Code of Civil Procedure treats the trade name and the individual operating thereunder as one entity.”

- **Several insurance treatises** support the proposition that when issuing a policy to an individual operating a business under a trade name, the named insured is the individual. Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 110:5 at 110-12, 110-13 (3d ed.1997) (a policy purchased by an insured father in his trade name would be interpreted as issued in his given name, and references to the named insured would be deemed to refer to him individually); Irvin E. Schermer, *Automobile Liability Insurance* § 40.02[2] at 40-13, 40-14 (3d ed.1995); Alan I. Widiss, *Uninsured and Underinsured Motorist Coverage* § 4.4(C) at 62 (2d ed.1985) (when automobile insurance is issued in an insured's trade name, coverage claims by that individual's relatives have usually been sustained).

FNI has argued in response that the underlying entities in many of these cases are human beings rather than corporations. CP887. But FNI has provided no cases from any jurisdiction to substantiate the argument that the same would not apply to corporations. On the contrary, the distinction between the legal rights of corporations and natural persons becomes thinner with the decades, and in the economic sphere is already nonexistent.

- **Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886)** - "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."

In Washington under RCW 19.80.005, corporations have the right to do business under a trade name.

Whether the underlying entity is a natural person or a corporation, the principle is the same: Business transacted under the trade name reverts to the underlying entity, including the purchase of insurance.

F. THE REAL INSURED ENTITY UNDER THE FIRST NATIONAL POLICY

DeCourseys also produced for the Court the actual check by which the Policy was purchased. CP716. FNI did not dispute that this was the actual purchasing instrument, only that because the name on the check was “Automated Home Solutions,” it must have been issued by the defunct corporation. RP38:

MR. LOVE: Well, what we -- the only thing the DeCourseys have put forward is some checks that say on them Automated Home Solutions. That's it.

The check was dated “6-7-04,” paid to the same agency that issued the Policy on the same day the Policy was purchased. CP88. Under the registry of trade names and terms of sale on 2003, the only entity with the legal right to use that name “Automated Home Solutions” on the check was V&E, but FNI does not allege the check was fraudulently issued.

FNI does not dispute that the check (CP716) was the instrument that purchased the Policy.

Moreover, the check is signed by Ellis, corporate officer (CP498) and registered agent of V&E (CP478), the person who arranged for the purchase of the assets of the defunct corporation. CP485. FNI does not dispute any of those documents.

G. FNI TELLS A CONFUSED STORY OF THE INSURED

FNI’s identification of the insured is confused and contradictory. In its

Complaint, FNI recognized the existence of two different corporations, “V&E” and “AHS,” and averred that the Policy was sold to the defunct AHS:

1.1 First National. ... First National is the insurer under a liability insurance policy issued to Automated Home Solutions, Inc. [CP1]

1.2 V & E. V&E Medical Imaging, Inc. is a Washington dissolved corporation. ... [CP1]

1.3 AHS. Automated Home Solutions, Inc is a dissolved Washington corporation. [CP1]

Also in the *Complaint*, FNI identified AHS beyond ambiguity as Birgh’s defunct corporation:

3.13 Dissolution. According to the Washington Secretary of State’s records, AHS was dissolved as a corporation on January 20, 2004. [CP4]

FNI averred an improbable confusion of identities, alleging that the defunct corporation sued DeCourseys under the name of the live corporation.

3.1 AHS Suit. On March 29, 2006 AHS (under the name “V & E Medical Imaging Services, Inc. dba Automated Home Solutions”) sued the DeCourseys and Home improvement Help in the King County District Court, East Division, Issaquah Courthouse under Case No. 63-9587. ... AHS’s claims are more fully set forth in its complaint attached as Exhibit 1. [CP2, referring to CP7]

3.11 No Tender. AHS did not tender to FNI the DeCoursey litigation prior to entry of the judgment. [CP3]

FNI included the complaint from the underlying case as an exhibit (CP7), the caption of which utterly refutes the statement in FNI’s complaint.

V&E MEDICAL IMAGING SERVICES, INC., a Washington corporation, doing business as AUTOMATED HOME SOLUTIONS, Plaintiff ... [CP7]

In its motion for summary judgment, FNI echoed the allegation almost

verbatim.

On March 29, 2006 AHS (under the name “V&E Medical Imaging Services, Inc. dba Automated Home Solution”) sued the DeCourseys and HIH in the King County District Court, East Division, Issaquah Courthouse under the Case No. 63-9587. [CP210]

Suing under a false name is barratry, a crime under RCW 9.12.010. FNI offered no evidence that the underlying suit was filed in barratry. But without evidence, the Court accepted FNI’s allegation that Birgh’s defunct corporation sued DeCourseys under a false name.

In its written *Reply* in support of the Motion, CP864, FNI argued:

There is no genuine issue of fact that Automated Home Solutions, Inc., a corporation separate from V & E Medical Imaging Services, Inc., is the entity insured under the FNI Policy.

In oral argument, however, FNI contradicted the *Complaint*, the Motion, and the Reply on the identity of the insured.

Your Honor, as you probably know from the pleadings, V&E Medical Imaging apparently sued the DeCourseys in 2006. ... V&E never tendered the lawsuit, that is the DeCourseys’ counter-claim, to FNI at all. [RP6 lines 6-11]

Ironically, the Judgment reverted to the version of facts in the pleading:

No material questions of fact exist that the insured, Automated Home Solutions, Inc. did not properly tender the claim or “suit” to FNI Insurance Company of America according to the terms and requirements of the commercial liability policy. [CP892 lines 9-1]

In the *Complaint*, FNI stated:

3.5 Withdrawal of AHS Counsel. Counsel for AHS withdrew effective June 30, 2009, as reflected in the Notice of Intent to Withdraw attached as Exhibit 3. ... [CP3 referring to CP76]

3.6 Stipulation to Arbitrate. ... AHS agreed to arbitrate their claims in October 2008 ... [CP3 ¶]

In oral argument, however, FNI contradicted its own *Complaint*:

Then, in 2009 V&E's counsel withdrew from the litigation and after allegedly agreeing to arbitrate the claims as between V&E and the DeCourseys. [RP5 lines 12-14]

In the *Complaint*, FNI stated:

3.6 Stipulation to Arbitrate. According to the DeCourseys, AHS agreed to arbitrate their claims in October 2008 ... [CP3 lines 5-7]

3.7 Arbitration. ... The arbitrator entered an award in favor of the DeCourseys totaling \$91,219 consisting of \$50,000 in damages, \$40,663.60 and costs of \$555.40. The arbitration award is attached as Exhibit 4. [CP3 line 10-14]

In oral argument, however, FNI contradicted its own *Complaint*:

So, then, in May 2010, the DeCourseys obtained essentially what was a default judgment against V&E in the arbitration. They obtained a judgment for \$50,000, you know, on the – [RP5 lines 14-17]

But in this also, the Judgment reverted to the version of facts in the pleading:

FNI Insurance Company of America has no duty under its commercial liability insurance policy issued to Automated Home Solutions, Inc. to defend and no duty to pay the judgment awarded against Automated Home Solutions in the underlying lawsuit *V&E Medical Imaging Services, Inc., v. DeCoursey, et al.*, case no. 06-2-24906-2 SEA. [CP892 line 23 *et. seq.*]

In oral argument, the Court initiated a discussion of the identity of the insured, stating the issue of identity is “somewhat central to the dispute.” RP6 line 14. Despite its earlier statements, FNI assured the Court over the next four pages (RP6 - RP10) that the identity of the insured could only be

the name on the policy, i.e., Automated Home Solutions, Inc. and not V&E.

DeCourseys argued that the undisputed deposition evidence (CP680) showed that Birgh's defunct corporation had no assets to insure for fire, theft, and terrorism, no assets with which to purchase insurance, did not own its own name by which to transact business, and could not legally do the business for which the insurance was purchased. RP20 lines 4-12. On that fact alone, the Court should have entertained significant doubt that Birgh's defunct corporation was the Insured. But the Court had no doubt.

H. THE FINDINGS BELOW WERE NOT ACCORDING TO THE FACTS

The Court erred in ruling that some entity other than V&E bought the Policy, or performed, or failed to perform an action with regard to the Policy. Since Birgh's defunct corporation did not own the Policy, the Court ruled without relevance when it found:

No material questions of fact exist that ... Automated Home Solutions, Inc. did not properly tender the claim or "suit" to FNI Insurance Company of America according to the terms and requirements of the commercial liability policy. [CP892 at 19]

Every line of the judgment identifies the wrong party. The Court made no ruling about the actions or failures to act of the true owner of the policy, V&E Medical Imaging Services, Inc.

Based as it was on false and/or irrelevant finding, the judgment is in error.

I. FIRST NATIONAL'S EVIDENCE IS FLAWED

As stated on CP216, FNI's motion for summary judgment relies upon the

evidence in the declarations of Ryan Anderson (CP227 and CP867), Patricia Corns (CP235), Travis Tonn (CP242), and Russell C. Love (CP244).

DeCourseys impeached all of FNI's witnesses in the *Opposition to FNI's Motion for Summary Judgment* (CP649-CP650 and CP654), in oral argument (RP33-RP34), and in the motion for reconsideration (CP904 line 4 *et seq.*). DeCourseys argued that the testimony in the declarations is contradictory, contradicted, and insufficient. CP650. Given that these declarations were the only basis for FNI's argument that DeCourseys' claim was never tendered to FNI and that these testimonies were disputed with credible evidence, the Court should not have used the declarations in summary judgment.

Ryan Anderson testified (CP227) that his declaration was made on personal knowledge (CP227 ¶2), and that he assumed responsibility for the case after the previous claims specialist was transferred on May 19, 2010. CP227 ¶3. Yet Anderson states:

At no time did Mr. Ellis tender the DeCourseys' claim, request for a defense or authorize us to investigate or act on his behalf.

The phrase "at no time" seems to span the history of the case since DeCourseys filed claims against V&E in 2006 (CP12), but in reality Anderson has "personal knowledge" of events no earlier than May 19, 2010. CP227 ¶3.

Anderson does not identify "Mr. Ellis." He does not explain why he called Mr. Ellis nor why he considered Mr. Ellis' statements, actions, or

inactions might be significant to the case or the Insured, whom FNI repeatedly identifies as Birgh's defunct corporation. The only Mr. Ellis who might be significant to the case is Lester W. Ellis III, registered agent for V&E. CP498.

The 2011 Dex Official Directory for the Greater Eastside lists 87 people under the name Ellis and Anderson does not limit his "Mr. Ellis" to the Greater Eastside. Anderson's statements about Mr. Ellis' statements (e.g., CP228, line 11) are hearsay and should not have been admitted in evidence in this action against DeCourseys. CP659-CP660. The Court *sua sponte* applied the hearsay rule to DeCourseys' evidence (RP31) but admitted FNI's evidence.

DeCourseys impeached Ryan Anderson's declaration in the response to FNI's motion for summary judgment. C0P649 lines 6-10, CP650 lines 7-10. DeCourseys showed that all FNI's dealings with the Insured were in reality with the registered agent of V&E. CP654. To address this, FNI filed a second declaration from Anderson with the reply, specifically tailored to meet DeCourseys' impeachments.³ CP867. In that second declaration, Anderson testified that he had "personal knowledge" (CP867 ¶2) that FNI

³ A party should not be permitted to repair a problematic declaration in the reply brief. Within the protocol, DeCourseys did not have opportunity to address the new declaration and its problems. But the Court permitted it.

had not received a tender of defense of the claim from “Ellis, Birgh, or any other person.” CP867 ¶3. But the second declaration founders on the same reef as the first: Anderson’s “personal knowledge” extends no earlier than May 19, 2010. CP227 ¶3. Ryan Anderson does not offer testimony that he was in a position to monitor all the mail for FNI since 2006 when DeCourseys filed their counterclaims against V&E.

Anderson’s second declaration is further compromised by Anderson’s statement that “the first [FNI] knew of the DeCourseys’ arbitration action was on July 14, 2010.” CP867 ¶3. This is contradicted by Travis Tonn’s declaration which states FNI learned in April 2010 that DeCourseys were claiming against the Insured and its insurance, that the Insured was “possibly being sued,” that Bordelon had a letter describing the suit, and that an arbitration hearing was imminent. In April, FNI issued claim number CP519 for DeCourseys’ claim.

Patricia Corns testified (CP235) that she assumed responsibility for “this case” in February 3, 2011 and that her testimony was based on “personal knowledge. Corns’ personal knowledge of the case does not include the years between 2006 when DeCourseys filed claims against the Insured and February 3, 2011 when Corns’ personal knowledge of “this case” begins. By her own testimony, Corns’ statement that “Bordelon did not forward to us the DeCourseys’ letter of March 31 2010... until February 2011” (CP235 ¶4) is

not a fact of which she could have personal knowledge.

DeCourseys impeached some the internal contradictions in Corns' declaration. CP649.

Travis Tonn testified (CP242) that Bordelon Insurance notified FNI on April 16, 2010 of DeCourseys' claim against "AHS"⁴ and DeCourseys' letter containing details of the claim. CP242 ¶3. It is reasonable that Bordelon would not only phone in the news of the letter, but also fax in a copy to FNI – unless FNI instructed Bordelon not to. Tonn does not say whether FNI obtained the letter at that time.

According to Tonn, "Ellis" was the registered agent for "the insured AHS." CP243 line 26. Once again, this identification of the insured by the registered agent Ellis contradicts FNI's arguments that the Insured was Birgh's defunct corporation. Tonn's testimony otherwise leaves open the meaning of "AHS." It could be Tonn's abbreviation for V&E's trade name, or for Birgh's defunct corporation, Inc., or anything else. By the testimony of FNI's own witness, the identity of the Insured is a disputed fact, as DeCourseys argued. CP650 lines 16-19.

Tonn's statements that "[Bordelon] had no information about the claim" is hearsay and not admissible. CP242. It is also not credible. Corns

⁴ Tonn does not define "AHS" and no entity in Washington or at issue in this suit bears the name.

produced the letter that Bordelon had in hand on April 16 (CP238-CP240) identifying the case number, case caption, and the fact that the case was moving into arbitration. Tonn admits that Bordelon told him about the letter. CP243, line 1.

Similarly, Tonn's statement that Ellis "did not know by whom [V&E was being sued] and had not been served" is not admissible in this action against DeCourseys. It is also not credible. Lester Ellis was the person who arranged the purchase of the business in 2003 (CP759), who signed the checks (CP547-CP551), who served as general manager of the business (CP 770), and who was the sole remaining officer of the corporation when it folded (CP498). It is simply not credible that Ellis was unaware of the lawsuit filed by V&E against DeCourseys in 2006 (CP) and extending until June 2009 when V&E's attorney withdrew. CP76. Exhibit 1 of the Corns declaration (CP238-CP240) reveals that Ellis had been in touch with the Court concerning the case only a few weeks previously.

Tonn was the only witness with personal knowledge of the case prior to May 19, 2010, and Tonn's testimony was limited to events in April 2010. Tonn provided no testimony that, if the claim *had* been tendered between 2006 and 2010, he would have known about it. On cross-examination before a jury, these limitations could have been elicited. Whether FNI was notified of DeCourseys' claim remains a disputed fact.

Russell C. Love testified in the declaration he filed with FNI's motion for summary judgment that the document at CP351 *et seq.* is a suit by the Insured against DeCourseys:

Attached as Exhibit 2 is the Complaint in [sic] from the underlying action *V&E Medical Imaging Services, Inc., v. DeCoursey, et al.*, case no. 06-2-24906-6, as obtained from the court file. [CP244 lines 24-26]

Exhibit 2 states:

Plaintiff V&E Medical Imaging Services, doing business as Automated Home Solutions, through its attorney Robert C. Kaufman, by way of complaint against the defendants states ... [CP351 line 21]

Using that evidence, FNI's argues in its motion to the Court:

Plaintiff ... moves for a summary judgment as against all defendants that under its liability policy issued to **AHS** ... [CP210 line 2, emphasis added.]

On March 29, 2006 **AHS** (under the name "V&E Medical Imaging Services, Inc. dba Automated Home Solution") sued the DeCourseys and HIH in the King County District Court, East Division, Issaquah Courthouse under the Case No. 63-9587. [CP210 line 16, emphasis added.]

FNI uses the term "AHS" in both statements, indicating the Insured and the plaintiff are one and the same entity.

Russell C. Love is the attorney representing FNI in this action. Presumably, Love can read a court pleading and determine the parties. According to Love's web page, he was named "a Washington State Super Lawyer for 2007-2010 by Washington Law and Politics Magazine." CP643.

Yet as the above shows, Love's testimony is unreliable on such basic facts in underlying case as the identity of the parties. This was argued to the

Court. CP649 line 20 *et seq.*

Summary of FNI's Evidence: FNI's evidence is shown to be unreliable, ambiguous, or insufficient to establish the facts for summary judgment. Argued CP650 lines 6-11.

J. THE COURT'S FINDINGS ON FNI'S EVIDENCE

Despite the ambiguities and contradictions in FNI's evidence, the Court found that Birgh's defunct corporation was the Insured beyond any material question of fact:

No material questions of fact exist that the insured [was] Automated Home Solutions, Inc. ... [CP892, line 19]

This was an error.

The Court also found for FNI on -- not merely a lack of evidence of tender, but -- affirmative evidence of *no* tender.

No material questions of fact exist that the insured ... did not properly tender the claim or "suit" to FNI Insurance Company of America according to the terms and requirements of the commercial liability policy. [CP892, line 19-21]

The court cited no law that DeCourseys are bound by the terms of a contract signed by the Insured, nor did the Court address an insurance company's duties to a claimant under the laws of Washington. In the absence of such ruling, the question must be left open to the finder of fact. But in summary judgment, there is no finder of fact. Everything must be decided "as a matter of law" and the law was missing from the judgment.

In a dispute of facts, or the absence of undisputed facts, *United States v. Diebold, Inc.*, 369 588*588 U. S. 654, 655 (1962) stated:

In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.

K. DeCOURSEYS' EVIDENCE CLEARLY ESTABLISHED ISSUES OF MATERIAL FACT THAT DISPUTED FNI'S SUMMARY JUDGMENT

For the summary judgment hearing, DeCourseys produced multiple government records showing that V&E owned the name by which the Policy was purchased and that it was the only entity that could legally use that name. FNI did not contest any of that evidence, which included:

- The sworn deposition of Stefen Birgh, the man who started the original Automated Home Solutions, Inc. Birgh testified to selling the business and the name (but not the corporation) to Ellis, agent for V&E medical Imaging Services, Inc. in 2003, after which the defunct corporation had no assets. Birgh himself took employment with V&E. CP681.
- V&E's Master Business License and accompanying papers show that V&E registered the trade name in 2003. CP496, CP776.
- The certificate of dissolution of Brigh's defunct corporation on January 20, 2004, almost 6 months before the Policy was purchased. CP427-8.
- Washington Department of State Corporations Division record on Birgh's

defunct Automated Home Solutions, Inc. CP427, CP476.

- Washington Department of State Corporations Division record on Ellis' V&E Medical Imaging Services, Inc. CP428, CP478.
- Washington Department of Revenue record for Automated Home Solutions, Inc. CP738.
- Washington Department of Revenue record for V&E Medical Imaging Services, Inc. CP740.
- Photographs of the storefront at 16300 Redmond Way, Redmond WA, as it appeared on September 1, 2011 still bearing the "Automated Home Solutions" signs and logos since V&E Medical Imaging Services, Inc. (trade name: "Automated Home Solutions") went out of business in June 2009. CP491-4.
- FNI's June 2004 Policy covering the Insured for medical and liability while performing electrical work, CP101, and a range of perils to the Insured's assets including fire, theft, and terrorism. CP92.
- Bordelon's Hawksoft Client Management Software log for April 16, 2010 recording Bordelon's notification to FNI of DeCourseys' claim, and receiving FNI's claim number 594299924013. CP519.
- The check by which the Policy was purchased, signed by Ellis. CP716, CP547.
- Ellis' business card identifying him as General Manager of

“Automated Home Solutions” in 2004. CP770.

- Birgh’s business card identifying him as Vice President of “Automated Home Solutions” in 2004. CP770.

DeCourseys showed the Court that the Policy was purchased by V&E:

- The address on the Policy and on the check matched the registered business address of V&E at the time the insurance was purchased, according to V&E’s Master Business License. CP496.
- FNI’s contacts with “the insured” consisted of phone calls to Ellis, registered agent for V&E. CP228 ¶6, CP243 ¶4.
- Birgh’s deposition tells of Birgh selling the assets and name of his corporation more than a year before the Policy was purchased. CP484. Thereafter, it had no assets and its revenue stream ceased. CP738.

DeCourseys showed the Court that Birgh’s defunct corporation could not and would not have purchased the Policy. RP20.

- Birgh’s deposition states that all the assets had been sold to V&E in 2003, leaving the defunct corporation with nothing to purchase the Policy and no activities or assets to insure. CP483 et seq.
- The defunct corporation had no revenue stream with which to purchase the Policy; the Washington Department of revenue closed the account in April 30, 2003. CP738.
- The Policy covers the business premises that were occupied by V&E

during that period. CP772, CP776.

- Since the defunct corporation was dissolved in January 2004 (CP427), the business activities insured by the Policy (CP773) would have been illegal for the defunct corporation to perform at the time the Policy was purchased. RCW 23B.14.050(1).

Yet the Court found that the defunct corporation (and not V&E) was the Insured, and only the actions and inactions of the defunct corporation were relevant to the issue of whether FNI was notified of DeCourseys' claims.

The Court's disregard of DeCourseys' evidence was an error. In considering FNI's motion for summary judgment, the Court was required to construe all reasonable inferences in favor of DeCourseys (the nonmoving party).

All reasonable inferences from the evidence must be construed in favor of the nonmoving party. [*Lamon v. McDonnell Douglas Corporation*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)]

The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Morris v. McNicol*, 83 Wn.2d 491, 494-95, 519 P.2d 7 (1974). [*Wilson v. Steinbach*, 656 P. 2d 1030 – Wash: Supreme Court 1982]

Contrary to the standard, the Court granted summary judgment to FNI by ignoring all DeCourseys' evidence and coming to a conclusion that *no* reasonable person would reach.

L. FNI WAS NOT PREJUDICED BY LACK OF NOTICE

FNI claimed it was deprived “of the meaningful opportunity to

investigate a debatable claim before it [was] settled.” CP220, lines 16-17. FNI argues that like Centennial Insurance,⁵ FNI was “left in the dark about the status of the lawsuit.” CP221 line 16. FNI “had no notice of the suit against AHS.” CP 221 line 19. FNI “lost the ability to investigate, to prepare a defense, to select defense counsel.” CP 221, line 20.

However, this case is not so clean. FNI’s witnesses admit that FNI knew about the arbitration hearing, knew about (and possibly had a copy of) DeCourseys’ letter with the attached letter from King County Court about the Arbitration hearing – if it had not, indeed, been notified of the claim years earlier.

FNI could have called the courthouse in King County, where DeCourseys, Ellis, and Bordelon Insurance were all resident). FNI could have (and possibly did) asked Bordelon to transmit by fax the letter from DeCourseys containing the details of the suit and the arbitration, mentioned in the April 16, 2010 phone call. The request would have been a reasonable under the circumstances, and the Court had no evidence that it did not happen. After all, FNI did issue a claim number, as revealed by Bordelon’s phone log. CP519.

Instead of acting on what it knew as a responsible corporate citizen, FNI hid from the process and did not seek extensions from the court to

⁵ 100 Wn. App. 546, 997 P.2d 972 (2000)

investigate, prepare a defense, seek its own counsel, etc. FNI waited until the whole process was over and the Superior Court has passed judgment, then filed this suit for declaratory judgment asking the courts to formally anoint the “prejudice” that FNI had inflicted on itself by refusing to participate in the process.

Legal prejudice does not include being willfully blind and deaf. At one extreme, an insurance company could dodge and weave forever hiding information from itself, refusing to learn or know anything and claiming it was prejudiced. It could use a dozen shifting names, as FNI does, so that a potential claimant is unable to file or learn the status on a claim and must trace the insurer through the State Insurance Commission, as DeCourseys did.

Since tendering an insurance claim does not have a statutory definition, “notification” is not “a matter of law” under CR 56 (summary judgment), and whether FNI was “notified” of the claim (given the facts of this case) was a material issue that should have been left for the trier of fact.

M. FNI FILED ITS ANSWER LATE WITHOUT PERMISSION

The Civil Rules carefully regulate the pleadings and address every aspect of FNI’s untimely answer to DeCourseys’ counterclaim. The Rules state there shall be an answer to a counterclaim within 20 days:

CR 7(a) Pleadings. There shall be a complaint and an answer; **a reply to a counterclaim** denominated as such; an answer to a cross

claim, if the answer contains a cross claim; ... [Emphasis added]

CR 12(a)(4) The plaintiff shall serve his reply to a counterclaim in the answer **within 20 days after service** of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. [Emphasis added]

If a party misses a deadline, the Rules also govern extensions. The party may seek permission to file late if the deadline has not yet passed, or if the deadline has passed, file a motion with the Court seeking permission.

CR 6(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) **upon motion made after the expiration of the specified period**, permit the act to be done where the failure to act **was the result of excusable neglect**; ... [Emphasis added]

If a party does not answer a counterclaim, the rules provide a default answer: the party is presumed to admit to the counterclaims:

CR 8(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, **are admitted when not denied** in the responsive pleading. [Emphasis added]

Whether the party has failed to answer and acquires the default answer through CR 8(d), or has answered and later decides to amend the answers, the rules provide a mechanism by which the party may file an amendment: The party must file a motion to the Court with an unsigned proposed pleading.

CR 15(a) ... the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading **only by leave of court** or by written consent of the adverse party; and

leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, **denominated "proposed" and unsigned**, shall be attached to the motion. [Emphasis added]

If a default pleading were considered defective, the Rules also provide that a party might also repair the defective pleading with a supplemental pleading. In this case also, a motion to the Court is required.

CR 15(d): Supplemental Pleadings. **Upon motion of a party** the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. [Emphasis added]

The courts support these Rules with decisions.

The Superior Court Civil Rules require a reply to a counterclaim; it is not optional. CR 7(a). The reply must fairly meet the substance of any averment denied. CR 8(b). Failure to deny an averment in a counterclaim constitutes an admission. CR 8(d). ... A reply must be filed within 20 days. CR 12(a)(4).

Jansen v. Nu-West, Inc. 102 Wn. App. 432.

FNI's untimely answer⁶ of September 16, 2011 could be considered

1. a late filing under CR 6(a).
2. an amendment of the default pleading under CR 15(a), or
3. a repair to a defective pleading under CR 15(d)

⁶ FNI's answer to DeCourseys' counterclaims was due on February 1, 2011.

In any case, an untimely pleading requires written consent of the opponent or permission from the Court. CR 15(a) requires the amended pleading to be filed with the motion as an unsigned exhibit. Filing a signed pleading eight months late without a motion and without consent of the opposing party is not in keeping with the Rules.

All Washington precedents on untimely pleadings concern pleadings filed with a motion so that the court may determine whether the untimeliness is “excusable” or “advisable,” or whether “justice so requires” permission (q.v. the Rules cited). In all such cases, the debate centers on the court’s discretion or abuse of discretion in granting the motion based upon the arguments in the motion.

A motion to amend a pleading after the pleadings have closed is governed by Rule of Pleading, Practice and Procedure 15 (a), RCW Vol. 0, and is addressed to the sound discretion of the trial court. The trial court's action in passing upon such a motion will not be disturbed on appeal **except for a manifest abuse of discretion or a failure to exercise any discretion.** *Foman v. Davis*, 371 U. S. 178, 9 L. Ed. (2d) 222, 83 S. Ct. 227 (1962); *Hendricks v. Hendricks*, 35 Wn. (2d) 139, 211 P. (2d) 715 (1949); 1A *Barron & Holtzoff, Federal Practice & Procedure* § 445; 3 *Moore's Federal Practice* § 15.08; 3 *Wash. Prac.* (Orland) pp. 524, 525. ... Undue delay on the part of the movant in proposing the amendment, where such delay works undue hardship or prejudice upon the opposing party however, constitutes sufficient reason for denial. *Foman v. Davis*, supra. [Emphasis added.]

Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793

Without a motion accompanying the proposed pleading, how could a Court exercise discretion? How did the Plaintiff show the neglect to answer

was “excusable”? From the record available for review – and available to DeCourseys at the time – there was none.

Summary judgment is based partially on the pleadings (CR 56(c)).

The judgment sought shall be rendered forthwith **if the pleadings,** depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Emphasis added]

If the pleadings are incomplete or are still in flux, summary judgment is impossible.

Having been told weeks in advance that FNI would be moving for summary judgment and the hearing was scheduled for October 7, 2011, DeCourseys sought to prepare a cross-motion based partially the pleadings, pursuant to CR 56(c). DeCourseys could not base the motion on the pleadings without knowing what FNI would offer in defense.

DeCourseys first sought to contact FNI’s counsel to remind him that the answer had not been filed. However, after multiple calls, FNI’s counsel notified DeCourseys through a former attorney that he would not accept a call from DeCourseys. No reason was given. CP600.

Given the calendar for summary judgment prepared by FNI, DeCourseys could not have done otherwise. They could not be expected to argue against their own guesses concerning the answers and defenses that FNI might mount.

To those who live by the Rules, the Rules provide. DeCourseys based their motion for summary judgment partially on CR 8(d), presuming each of the unanswered averments to be admitted. CP446. Their cross-motion was filed on September 9, 2011, the last available day, just as FNI's motion was.

FNI then filed an answer to the counterclaim on September 16, 2011.

If one party withholds its answer, the other party is prejudiced in preparation of its case. The claiming (or counterclaiming) party cannot address the positions that the non-answering party has not announced. In this case, FNI knew DeCourseys' answers and positions on FNI's claims because DeCourseys had answered in January. But DeCourseys could not know FNI's positions because FNI had not answered – until after DeCourseys' summary judgment motion was filed.

The courts have addressed this situation in other cases.

Undue delay on the part of the movant in proposing the amendment, where such delay works undue hardship or prejudice upon the opposing party however, constitutes sufficient reason for denial.
Foman v. Davis, supra. [Emphasis added.]

Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793

Appliance Buyers concerned an amendment to the pleading. How much more prejudice is worked by a party who withholds the pleading completely?

And even worse, FNI hadn't followed the Rules. Without consultation, without motion, and without permission, FNI simply filed the answer and attempted to use its affirmative defenses from that pleading in answering

DeCourseys' summary judgment motion.

DeCourseys filed a motion to strike FNI's untimely pleading. However, the Court denied the motion, accepted the untimely pleading, did not rule that FNI's CR 8(d) failure to answer DeCourseys' counterclaims are admissions, and permitted FNI the new affirmative defenses from its answer.

The Court had no grounds on which to exercise discretion; therefore, the Court could not exercise any discretion; therefore, admitting and refusing to strike FNI's answer was "a failure to exercise any discretion" and should be reversed.

FNI's violation of the pleading Rules is particularly blatant because FNI scheduled the summary judgment hearing and filed a Summary Judgment motion. FNI had spent months preparing and scheduling the summary judgment hearing. By scheduling and filing for summary judgment, FNI indicated that the pleading phase was "closed" (in the words of CR 12(c) and *Appliance Buyers*) and the case was sufficiently mature for summary judgment, which is based partially on the pleadings.

Since Summary Judgment is based partially on the pleadings, courts must not (without good reason) permit a party to amend or supplement its pleading after the opposing party has filed a motion for Summary Judgment. No sound argument for Summary Judgment can be based on pleadings that shift after the Motion has been filed.

CR 15(a) allows amendment as a matter of course anytime before a responsive pleading is served or if the action has not been placed on the calendar, otherwise:

[A] party may amend his pleading **only by leave of the court** or by written consent of the adverse party; and leave shall be freely given when justice so requires. CR 15(a).

The purpose of CR 15 is twofold: to facilitate a decision on the merits, and **to provide parties with adequate notice of the claims or defenses asserted against them.** *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). We will reverse a trial court's denial of leave to amend under CR 15(a) only for manifest abuse of discretion. *Herron*, 108 Wn.2d at 165.

Wilson v. Horsley, 87 Wn. App. 567, 942 P.2d 1046.

The situation is worse when a party that strategically withholds its answer for eight months until after a summary judgment motion has been filed. FNI's belated Answer seemed to part of a deliberate strategy. On the chance that DeCourseys might file a cross-motion for summary judgment on the same day (September 9), by delaying the Answer to cross-claims, First National was able to review DeCourseys' motion and engineer its pleadings accordingly. Strategic delay in engineering the pleadings is not permitted.

However, the court then found that because the claims were not filed until late as **part of a deliberate strategy or tactic**, the amended claims would not relate back under CR 15(c) and, therefore, were untimely.

Stansfield v. Douglas County 107 Wn. App. 20

CR 15(c), however, does not permit relation back if the parties' delay is due to **inexcusable neglect**, *South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 77, 677 P.2d 114 (1984); *North St. Ass'n v. Olympia*, supra at 368, or to a **conscious decision, strategy or tactic.** *Veradale Vly. Citizens' Planning Comm. v. Board of Cy. Comm'rs*, 22 Wn. App. 229, 238, 588 P.2d 750 (1978).

Woodcrest Investments v. Skagit Cy., 39 Wn. App. 622.

The timing of FNI's answer shows that FNI specifically engineered the pleading to address the deficiencies in its case that DeCourseys used as arguments for Summary Judgment seven days previously.

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. **In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant** [in this case, the pleader], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given." [emphasis added]

Tagliani v. Colwell, 10 Wn. App. 227, 517 P.2d 233 (1973).

In this case, First National demonstrates (1) undue delay, (2) dilatory motive. Events reveal that the delay was part of a deliberate strategy.

For example, in the Complaint, FNI pleaded:

¶3.1 AHS Suit. On March 29, 2006, AHS (under the name "V&E Medical Imaging Services, Inc. dba "Automated Home Solutions") sued the DeCourseys and Home Improvement Help in the King County District Court ... In that suit AHS claimed ... [CP2]

In the October 7 summary judgment motion, FNI argued:

But, the registered agent for AHS had informed the court that he was not affiliated with AHS anymore, and he did not attend the arbitration or file a statement with the arbitrator. [CP212 lines 4-7]

Nevertheless, in this September 16, 2011 Answer, FNI pleaded:

Answering paragraph 41, First National admits that in 2006 V&E sued DeCourseys ... [CP 580 line 17]

Here is another example that shows the Answer was an amendment to the

pleading. In the October 2010 *Complaint*, FNI stated:

3.7 Arbitration. The arbitrator heard the DeCoursey/AHS dispute on May 10, 2010. The DeCourseys appeared pro se and AHS did not appear or file a statement. The arbitrator entered an award in favor of the DeCourseys totaling \$91,219 consisting of \$50,000 in damages, attorneys fees of \$40,663.60 and costs of \$555.40. [CP3 lines 9-13]

On September 9, 2011, before reading DeCourseys' Motion for Summary

Judgment, FNI asserted:

But, the registered agent for AHS had informed the court that he was not affiliated with AHS anymore, and he did not attend the arbitration or file a statement with the arbitrator. [CP212 line 5-7]

Then, on September 16, 2011, having read DeCourseys' *Motion for Summary*

Judgment, FNI stated:

Answering paragraph 42, First National admits that the dispute between DeCourseys and V&E was transferred to arbitration in 2010. [CP580 line 21-23]

When the Court permitted FNI to file/supplement/amend its pleading after DeCourseys' motion for Summary Judgment, DeCourseys were prejudiced by sequence of events. At the time the answer was filed and served, only 23 days remained until the summary judgment hearing.

But even worse for DeCourseys, the Court reserved ruling on the motion to strike FNI's answer until after the summary judgment hearing. RP4 lines 18-24. Thus, throughout the written and oral argument, DeCourseys could not know the state of the pleadings: Was FNI able use its new affirmative defenses? Was DeCourseys' motion granted? Was FNI defaulted to

admission of the counterclaims? Or would the Court refuse to apply CR 8(d)?

Since the Answer is an amendment of the Complaint, as DeCourseys argued in CP869, it should have been filed under CR 15 with a motion and unsigned copy of the pleading until permission to amend of amendment was granted by the Court.

When the identity of the Insured was discussed in oral argument, FNI's admission of the identity of the suing party was an important factor of the identification. But without a ruling on admissibility of the answer, the point could not be argued and DeCourseys were prejudiced.

According to the Civil Rules, the Court should not have permitted the untimely answer, particularly after the summary judgment process had been started, and particularly without a motion from the Plaintiff to enable the parties to debate the admission of the untimely pleading. Having ruled against the untimely answer, the Court should have applied CR 8(d) and announced to both parties that FNI had admitted to all counterclaims. Given FNI's admission to all counterclaims, DeCourseys' motion for summary judgment should have been granted.

RESPECTFULLY SUBMITTED this 10th day of July, 2012.

By Carol DeCoursey By Mark DeCoursey
Carol DeCoursey, *pro se* Mark DeCoursey, *pro se*

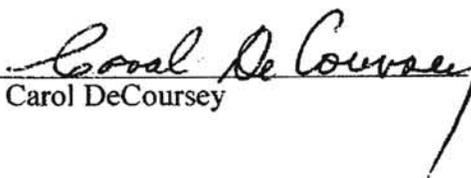
67906-6

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I caused to be served a copy of the foregoing **APPELLANTS' BRIEF** on the following person(s) in the manner indicated below at the following address(es):

Russell Love
Thorsrud Cane & Paulich
1300 Puget Sound Plaza
1325 Fourth Ave.
206-386-7755 (tel.)
206-386-7795 (fax)
rlove@teplaw.com

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**


Carol DeCoursey

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUL 11 PM 12:12

AMERICAN FAMILY MUT. INS. CO. v. TEAMCORP., INC.

659 F.Supp.2d 1115 (2009)

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, a Wisconsin insurance company, Plaintiff,

v.

TEAMCORP., INC., a Colorado corporation, d/b/a Laconia Homes and Draft-Tek or Draft-Tech; Kerry Karnan; Platt T. Hubbell; Kelley S. Hubbell; and Thane Lincicome, Defendants.

Civil Action No. 07-cv-00200-WYD-MJW.

United States District Court, D. Colorado.

September 22, 2009.

James D. Johnson, Johnson & Ayd, P.C., Max K. Jones, Jr., Kevin F. Amatuzio, Montgomery, Kolodny, Amatuzio & Dusbabek, LLP, Denver, CO, for Plaintiff.

Teamcorp, Inc., Carbondale, CO, pro se.

David Charles Colt, Colt Law Firm, P.C., Katherine Taylor Eubank, Daniel McKay Fowler, Fowler, Schimberg & Flanagan, P.C., Denver, CO, for Defendants.

Kerry Karnan, Carbondale, CO, pro se.

ORDER ON SUMMARY JUDGMENT MOTIONS

WILEY Y. DANIEL, Chief Judge.

I. INTRODUCTION

THIS MATTER comes before the Court on Plaintiff's Motion for Summary Judgment (Revised Pursuant to February 10, 2009 Order, 2009 WL 321679 (Doc. # 165)), Defendants Teamcorp. Inc. d/b/a Laconia Homes/Draft-Tek and Kerry Karnan's Motion for Partial Summary Judgment Regarding Plaintiff's Duty to Defend, and the Hubbells' Motion for Partial Summary Judgment Re: American Family's Duty to Defend Teamcorp, Inc. and Karnan. The motions relate to whether Plaintiff has a duty to defend Defendants under a Commercial General Liability ["CGL"] policy in connection with an underlying action filed by Platt and Kelley Hubbell [the "Hubbells"] against the Defendants.

II. BACKGROUND

This is an anticipatory declaratory judgment action by American Family Mutual Insurance Company ["AmFam"] seeking a declaration of the parties' rights under the CGL policy issued by AmFam to "Laconia Homes, Inc." and later by endorsement to "Teamcorp., Inc. d/b/a Laconia Home and Drafttech [sic]". The Amended Complaint asserts claims for declaratory judgment of

[659 F.Supp.2d 1119]

no coverage, recovery of defense costs incurred in defending Teamcorp, Inc. ["Teamcorp"] in an Amended Third-Party Complaint filed by the Hubbells, and a declaration that Thane Lincicome ["Lincicome"] was not an insured person under the AmFam policies issued to Teamcorp.

In the underlying Third-Party Complaint the Hubbells have asserted certain claims for relief against Teamcorp, Lincicome and Kerry Karnan ["Karnan"] [collectively, "the Teamcorp Defendants"] in a liability suit pending in this Court before Judge Arguello, Case No. 05-cv-00026-CMA-KLM, entitled *Alpine Bank v. Platt T. Hubbell, et al. v. Carney Brothers Construction, et al.* [hereinafter "the underlying action"]. The issues have not been resolved in that case, and AmFam is defending Teamcorp and Karnan in the case under a reservation of rights.

Judge Figa, who previously resided over this case, ruled in an Order dated October 16, 2007, 2007 WL 3024446, that this anticipatory declaratory judgment action can be pursued by AmFam in connection with the duty to defend. Accordingly, he declined to stay this portion of the case. Such an action appears to be appropriate for the reasons stated by Judge Figa and because (1) AmFam "asserts in good faith that its contract of insurance, as a matter of law, does not afford a duty to defend the Teamcorp Defendants in the underlying tort action, whom AmFam has undertaken to defend while the anticipatory declaratory judgment action is being resolved; and (2) the persons affected by resolution of coverage questions are parties to the underlying action and to the anticipatory declaratory judgment action." See *Progressive Cas. Ins. Co. v. Herring*, 22 P.3d 66, 67-68 (Colo.2001). Thus, to the extent the TeamCorp Defendants argue in their motion for partial summary judgment that the appropriate course of action is for AmFam to seek a declaratory judgment after the underlying action has been adjudicated and that this anticipatory suit is improper, these arguments are denied.

I note that the summary judgment motions at issue were filed after previous motions were stricken by me by Order of February 10, 2009, because they improperly cited to and/or addressed extrinsic evidence in violation of the "four-corners" rule (also referred to as the complaint rule) for determining the duty to defend. Under that rule, the duty to defend focuses on an examination of the allegations in the complaint, not by looking to facts beyond the allegations of the complaint. See *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 621 (Colo.1999); *Gen. Security Indem. Co. v. Mountain States Mut. Cas.*, 205 P.3d 529, 532 (Colo.Ct.App.2009); see also Order of February 10, 2009, at 5-6.

III. FACTS

Turning to the complaint allegations, the underlying suit for which Teamcorp and Karnan seek coverage is the Amended Third-Party Complaint filed by the Hubbells against Teamcorp, Karnan and others in the underlying case before Judge Arguello, which Complaint is attached as Exhibit 1 to Plaintiff's Motion for Summary Judgment. The original Third-Party Complaint was filed June 11, 2005, and an Amended Third-Party Complaint is now the operative complaint in the action.

The Amended Third-Party Complaint contains the following allegations:

(a) Teamcorp, Inc. d/b/a Draft-Tek is a Colorado corporation that was at all relevant times duly authorized to conduct business in the State of Colorado. (Pl.'s Mot. for Summ. J., Ex. 1, ¶ 5.)

(b) "In January 2003 the Hubbells entered into a contract with [Carney Brothers Construction or "CBC"] to

[659 F.Supp.2d 1120]

construct a single family home of approximately 6,000 square feet along with a 3,100 square foot garage and apartment" (the subject property). (*Id.*, ¶ 11.)

(c) CBC, the contractor, recommended that the Hubbells hire Draft-Tek to complete the plans and specifications for the project, and the Hubbells did so. "The Hubbells relied on CBC's recommendations" to hire Draft-Tek. (*Id.*, ¶ 14.)

(d) "Draft Tek is not a licensed architect, and none of its principals during the relevant time were licensed architects." (*Id.*, ¶ 16.) "Kerry Karnan, the principal of Draft-Tek who participated in the design of Hubbells' home, is not a licensed engineer." (*Id.*, ¶ 17.)

(e) Draft-Tek hired Lincicome, a licensed professional engineer, to perform and/or approve the structural specifications for the residence. Lincicome reviewed and approved such specifications and affixed his official stamp on the construction plans tendered to the Hubbells and CBC. (*Id.*, ¶ 18).

(f) Lincicome normally reviews drawings prepared by others who work at Draft-Tek, but does not normally perform structural design for Draft-Tek. (*Id.*, ¶ 19.) Prior to designing the Hubbells' home, Lincicome had never designed or reviewed the structural design of a building as complex as the Project. (*Id.*, ¶ 20.)

(g) Draft-Tek has no full time employees that are licensed engineers. (*Id.*, ¶ 21.)

(h) Draft-Tek and Karnan did not perform an adequate investigation to determine whether Lincicome was qualified to perform or review the structural design of the Project. (*Id.*, ¶ 22.)

(i) "Construction of the Project began in and around May 2003." (*Id.*, ¶ 24.)

(j) "Prior to the start of construction, CBC represented to the Hubbells that all necessary building permits had been obtained. The Hubbells called Alpine Bank and indicated that Richard Carney would be dropping off copies to the Bank. The Hubbells justifiably relied upon the fact that the Bank would not disburse any loan proceeds unless the necessary building permits had been issued. Despite the fact that the Bank never received the necessary building permits, it nevertheless disbursed over \$75,000 in loan proceeds to the Project." (*Id.*, ¶ 25.)

(k) "In and around the last quarter of 2003, the Hubbells became concerned about the progress of the construction and the escalating costs. There were problems with the plans and specifications. The Hubbells asked whether they should get an architect involved in the Project, but were once again told that was not necessary by CBC. There were several meetings with CBC, Ian Carney, and Alpine Bank attempting to resolve the issues. When those problems relating to the Project were brought to the attention of Alpine Bank, the Hubbells were advised by the Bank to stay with CBC because CBC 'would make it right.' At the time the Bank made these statements, it knew or had reason to know that there were significant problems with CBC and it had a duty to the Hubbells to make full disclosure of the facts it knew about the fraudulent and improper practices of CBC." (*Id.*, ¶ 31.)

[659 F.Supp.2d 1121]

(l) "[T]he Hubbells orally terminated CBC's contract on December 11, 2003." (*Id.*, ¶ 33.)

(m) "On December 12, 2003 Platt Hubbell was on site when an inspector from the Garfield County Building Department visited the construction site and stopped work on the project because CBC, despite having a contractual obligation to do so, never obtained a building permit. Ian Carney admitted to the inspector that CBC 'haven't got any' building permits for the project. Platt Hubbell also discovered that the location of the residence had never been properly 'sited' on the Property." (*Id.*, ¶ 34.) "Although over almost two-thirds of the construction loan had been disbursed by the Bank as of December 2003 for the Project, it was less than one-third complete." (*Id.*, ¶ 36).

(n) "The Hubbells thereafter hired a licensed architect and professional engineer to inspect the structure and report the condition and quality of the construction along with estimated costs to complete." (*Id.*, ¶ 35.)

(o) "The architect and professional engineer concluded, among other things, that the residence had never been sited on the Property nor had an appropriate site plan been filed with Garfield County; the structure significantly violated both Garfield County and subdivision height restrictions; the structure had not been built according to the Draft-Tek plans; the foundation had not been properly poured; the Draft-Tek plans were deficient and did not comply with applicable building codes; and the residence, if completed according to the plans, would be structurally unsound and therefore uninhabitable. The architect and the structural engineer both opined that corrective measures would be cost prohibitive and that there was no guaranty that they would adequately remedy the many problems. Indeed, they believed it may be more cost effective to demolish the existing structure and rebuild it than to attempt corrective measures." (*Id.*, ¶ 37.)

(p) "Third-Party Defendants CBC, Ian Carney, Richard Carney, Draft-Tek, Lincicome and Karnan designed and engineered the residence on the Property for the Hubbells. Third-Party Defendants CBC and T.J. Concrete constructed the improvements. Third-Party Defendants Ian Carney and Richard Carney also personally participated in the construction of the improvements." (*Id.*, ¶ 39.)

(q) "CBC, Ian Carney, Richard Carney, Draft-Tek, Lincicome, T.J. Concrete and Karnan owed a duty of care

to the Hubbells to perform their design and construction services in a competent and workmanlike manner and in compliance with applicable industry standards." (*Id.*, ¶ 40.)

(r) "CBC, Ian Carney, Richard Carney, Draft-Tek, Lincicome, T.J. Concrete and Karnan have breached their respective duties of care causing injury and damages to the Hubbells." (*Id.*, ¶ 42.)

(s) The negligence of the defendants, including Defendants Draft-Tek and Karnan, was the actual and proximate cause of the Hubbells' damages. (*Id.*, ¶ 43.)

(t) The Hubbells entered into a contract with Draft-Tek in which it agreed to provide plans sufficient to construct the Hubbells' home. (*Id.*, ¶ 57.)

[659 F.Supp.2d 1122]

(u) "Draft-Tek breached its contract with the Hubbells producing deficient plans that do not comply with applicable building codes and that would, if followed, result in a structurally unsound and uninhabitable structure." (*Id.*, ¶ 58.)

(v) "The Hubbells justifiably relied on the misrepresentations of Draft-Tek, Karnan and Lincicome." (*Id.*, ¶ 78.) "As a direct and proximate result of the misrepresentations of Draft-Tek, Karnan and Lincicome, the Hubbells have suffered damages in an amount to be proven at trial." (*Id.*, ¶ 79.)

The Hubbells asserted three causes of action against Teamcorp: negligence, breach of contract, and negligent misrepresentation. In regard to their negligence claim, they contend that Teamcorp owed a duty of care "to perform their design and construction services in a competent and workmanlike manner and in compliance with industry standards," that Teamcorp owed a duty of care to hire people or firms that "were competent and qualified to perform the design work in compliance with industry standards," and that Teamcorp breached its duties "causing injury and damages to the Hubbells." (Pl.'s Mot. for Summ. J., Ex. 1, ¶¶ 40-42.)

The Hubbells' breach of contract claim asserts that Draft-Tek breached its contract by "producing deficient plans that do not comply with applicable building codes and that would, if followed, result in a structurally unsound and uninhabitable structure." (*Id.* at ¶ 58.) Lastly, the Hubbells assert that Teamcorp, Karnan and Lincicome negligently misrepresented that "they were capable of designing and reviewing the design of the Hubbells' home." (*Id.* at ¶ 74.) As a result of the misrepresentations, "the Hubbells have suffered damages in an amount to be proven at trial." (*Id.* at ¶ 79.)

There are no allegations that Karnan, Draft-Tek or Lincicome participated in the construction of the project as opposed to the design and engineering of the project. The Amended Third-Party Complaint also does not allege that Teamcorp or Karnan expected to intended to cause property damage (or damages in general) to the Hubbells' land or to the house under construction. Further, it does not allege that Teamcorp, Karnan or Lincicome did any act or failed to do any act at the Property itself or in the actual construction of the home.

Finally, the Amended Third-Party Complaint does not sue, and does not mention, "Laconia Homes" or "Laconia Homes, Inc." However, Defendant Teamcorp is a Colorado corporation which has done business under the names of "Laconia Homes" and "Draft-Tech" (or Draft-Tek). (Am. Fam's Amended Complaint For Declaratory Relief, ¶ 2.) Teamcorp has conducted the business of erecting pre-manufactured housing under the names "Laconia Homes."

As to the policy at issue, AmFam issued a policy number 05-XE6895 to the named insured "Laconia Homes, Inc," a corporation, with an inception date of February 2, 2003. (Pl.'s Mot. for Summ. J., Ex. 2, excerpt of certified copy of the policy, pp. 1, 4.) The policy includes "Commercial General Liability Coverage".¹

After a lapse in coverage, the policy was reissued, again to "Laconia Homes, Inc.," now bearing policy number 05-XE6895-02,

for a policy period of August 5, 2003 to August 5, 2004. (*Id.*, Ex. 3 at 1, 5). Both versions of the policy identify the named insured's "Form of Business" as a "Corporation," and the named insured's "Business Description" as "MFG Home Erection." (*Id.*, Ex. 2 at p. 4, Ex. 3 at p. 5.)

Throughout the Policy, the terms "you" and "your" refer to the Named Insured shown in the Declarations and any other person or organization qualifying as a Named Insured. Section II of the CGL form identifies "Who is an Insured." When a corporation, *i.e.*, "organizations other than a partnership, joint venture or limited liability company", is designated as the Named Insured, it is an insured. In addition, the Policy provides, "Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders." (Hubbell's Mot. For Partial Summ. J. Re: American Family's Duty to Defend Teamcorp, Inc. and Karnan [hereinafter "Hubbells Mot. for Partial Summ. J."], Ex. A-1, at Am-Fam0314, Section II, (1)(d).)

During this policy period, an Endorsement was added to the reissued policy, effective May 13, 2004, that changed the name of the named insured from "Laconia Homes, Inc." to "Teamcorp, Inc. d/b/a Laconia Home and Draftech [sic]" (*Id.*, Ex. 3 at p. 2).² The Policy provides, "Any endorsement made a part of this policy, whether at the time of issue or during the policy period, amends the terms of the policy. Where the policy terms differ from similar terms in any endorsement, the endorsement will prevail. All other terms remain unchanged." (*Id.*, Ex. A-1 at AmFam0307.)

Teamcorp, Inc. d/b/a Draft-Tek and Karnan since have tendered the defense of the Hubbells' Third-Party claims to Am-Fam under the policy. (AmFam Complaint for Declaratory Relief ¶¶ 23, and Answer of Teamcorp, Inc. d/b/a Laconia Homes and DraftTek, and Kerry Karnan, Individually, dated May 14, 2007, ¶¶ 23 (admitting tender of defense)). The "Commercial General Liability Coverage Part Declarations" of the Policy identifies the "Classifications" of the business activities of the insured as the following: "91583, Contractors-Subcontracted Work-In Connection With Building Construction, Reconstruction, Repair or Erection—One or Two Family Dwellings" and 98502, "Prefabricated Building Erection." (Pl.'s Mot. for Summ. J., Ex. 2 at 6, Ex. 3 at 7.)

The "Commercial General Liability Coverage Form" of the Policy contains the following terms and provisions:

Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of `bodily injury' or `property damage' to which this insurance applies. We will have the right and duty to defend the insured against any `suit' seeking damages. However, we will have no duty to defend the insured against any `suit' seeking damages for `bodily injury' or `property damage' to which this

[659 F.Supp.2d 1124]

insurance does not apply. We may, at our discretion, investigate any `occurrence' and settle any claim or `suit' that may result.

b. This insurance applies to . . . "property damage" only if:

(1) The . . . "property damage" is caused by an "occurrence". . .

(2) The . . . "property damage" occurs during the policy period; . . .

(*Id.*, Ex. 2, at p. 18, Ex. 3 at p. 9. Section I(A)(1)). An "occurrence" is defined in the Policy as "... an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Hubbells' Mot. for Partial Summ. J., Ex. A-1 at AmFam 0318.)

The Policy contains exclusions that exclude from coverage the following:

j. Damage to Property

Property Damage to:

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."

m. Damage to Impaired Property or Property Not Physically Injured

'Property damage' to 'impaired property' or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work'; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

(Pl.'s Mot. for Summ. J., Ex. 2, p. 10; Hubbells' Mot. for Partial Summ. J., Ex. A-1, AmFam 0308, 0310, 0311.)

The Policy contains the following additional Definitions:

8. "Impaired property" means tangible property, other than "your product" or "your work," that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work;" or

b. Your fulfilling the terms of the contract or agreement.

16. "Products-completed operations hazard:"

a. Includes all "bodily injury" and "property damage" incurring away from premises you own or rent and arising out of "your product" or "your work" except:

[659 F.Supp.2d 1125]

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or

organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

17. "Property Damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

21. "Your Work"

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

(Hubbells' Mot. for Partial Summ. J., Ex. A-1, AmFam 0316-0319.)

The Policy also contains the following provision:

6. Representations

By accepting this policy, you [the insured] agrees:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

(Pl.'s Mot. for Summ. J., Ex. 2 at p. 14 at p. 17.)

The Policy does not include any kind of general exclusion for architectural services, engineering services, or drafting services. (*Id.*, Exs. 2 and 3.) The Policy also does not contain a definition for the term "accident". (*Id.*)

IV. ANALYSIS

A. *The Parties' Arguments in Their Motions*

Plaintiff AmFam moves for summary judgment asserting that there are no genuine issues of material fact and that Am-Fam is entitled to judgment as a matter of law as to a declaration that it has no duties of defense or indemnification with regard to the underlying suit by the Hubbells. Specifically, AmFam asserts that there is no potential coverage for, and thus no duty to defend (or to indemnify) these Defendants in the underlying action because: (1)

[659 F.Supp.2d 1126]

there is no "occurrence" triggering potential coverage; (2) the Hubbell's complaint does not allege covered "property damage"; (3) no property damage is alleged while Teamcorp was an insured under the policy; (4) AmFam's exclusions preclude coverage; and (5) the activities for which

Teamcorp and Draft-Tek were sued are not within the scope of the risk insured. Related to the last argument, AmFam argues that the Court should consider the application for the Policy.

AmFam also moves for summary judgment on the Counterclaims against it. AmFam asserts that upon granting the requested relief, all that would remain in the case is AmFam's affirmative claim for reimbursement of the defense fees and costs it has incurred under its reservation of rights.

The Teamcorp Defendants and the Hubbells both filed motions for partial summary judgment asking that the Court declare that AmFam has a duty to defend the Teamcorp Defendants. They argue that the Teamcorp Defendants were covered as insureds under the CGL Policies issued by AmFam during a period of time when they were providing drafting and building services to the Hubbells. They further argue that the allegations of the Hubbells' Amended Third Party Complaint trigger a duty of defense under Colorado law. Finally, the Teamcorp Defendants assert that the appropriate course of action is for AmFam to provide a defense under a reservation of rights or seek a declaratory judgment after the Hubbell action has been adjudicated.

B. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the ... moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit." *Equal Employment Opportunity Comm. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir.2000). "A dispute over a material fact is 'genuine' if a rational jury could find in favor of the nonmoving party on the evidence presented." *Id.*

"When applying this standard, [the court must] 'view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir.2000) (quotation omitted). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* (quotation omitted).

"When the parties file cross motions for summary judgment, '[the court is] entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts.'" *Id.* (quotation omitted). Cross motions for summary judgment must be treated separately—the denial of one does not require the grant of another. *Buell Cabinet v. Sudduth*, 608 F.2d 431, 433 (10th Cir.1979).

C. Whether Summary Judgment Should Be Granted Regarding the Duty to Defend

As detailed in my Order of February 10, 2009, "[t]he duty to defend pertains to the insurance company's duty to affirmatively defend its insured against

[659 F.Supp.2d 1127]

pending claims." *Constitution Assocs. v. New Hampshire Ins. Co.*, 930 P.2d 556, 563 (Colo.1996). The duty to indemnify, on the other hand, "relates to the company's duty to satisfy a judgment entered against the insured." *Id.* The Colorado Supreme Court explained as to these two duties:

The duty to defend is triggered more easily than is the duty to indemnify. Generally, the duty to defend arises where the alleged facts even potentially fall within the scope of coverage, but the duty to indemnify does not arise unless the policy actually covers the alleged harm. See *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089-90 (Colo.1991). Where there is no duty to defend, it follows that there can be no duty to indemnify. However, where there is a duty to defend, there is not necessarily a duty to indemnify.

Id.

The issue before me in connection with the summary judgment motions is the duty to defend. If I find that there is no duty to defend, there consequently will not be a duty to indemnify. *Constitution Assocs.*, 930 P.2d at 562. However, if I find that there is a duty to defend, determination of the duty to indemnify is premature since the underlying suit has not yet been resolved. *Id.* Where there is a duty to defend, there is not necessarily a duty to indemnify. *Id.*

As to the duty to defend, the Colorado Supreme Court has stated:

"an insurer seeking to avoid its duty to defend an insured bears a heavy burden, as the duty to defend arises when the underlying complaint against the insurer alleges any facts that might fall within the coverage of the policy. 'The actual liability of the insured to the claimant is not the criterion which places upon the insurance company the obligation to defend.' Rather, the obligation to defend arises from allegations in the complaint, which if sustained, would impose a liability covered by the policy. '[W]here the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim.'"

Compass Ins. Co. v. City of Littleton, 984 P.2d 606, 613-14 (Colo.1999) (quoting *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089 (Colo.1991) (citations omitted)); see also *Gen. Security Indem. Co. v. Mountain States Mut. Cas.*, 205 P.3d 529, 532 (Colo.Ct.App.2009).

To the extent that AmFam is asking me to make determinations of coverage in connection with addressing the duty to defend, I address only whether the insureds have shown "that the underlying claim may fall within policy coverage", and whether AmFam has proven that it cannot. *Compass Ins. Co.*, 984 P.2d at 614 (quotation omitted). As further explained in *Compass* in the context of exclusions:

In order to avoid policy coverage, an insurer must establish that the exemption claimed applies in the particular case, and that the exclusions are not subject to any other reasonable interpretation. The insurer has a duty to defend unless the insurer can establish that the allegations in the complaint are solely and entirely within the exclusions in the insurance policy. An insurer is not excused from its duty to defend unless there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured.

[659 F.Supp.2d 1128]

Id. at 614 (quoting *Hecla*, 811 P.2d at 1090).

I will not address whether coverage actually exists, as this must be determined in connection with the duty to indemnify. *Hecla Mining Co.*, 811 P.2d at 1089, 1092 (Colo.1991). "Whether coverage is ultimately available under the contract is a question of fact to be decided by the trier of fact." *Id.* at 1089. I now turn to the specific issues raised by AmFam.

1. Whether There Is An "Occurrence" as Required by the Policy

AmFam first argues that the case law interpreting standard CGL policies like the one at issue recognizes that mere faulty or non-complying work or products do not rise to the level of an "occurrence" or accident. I agree. However, that does not necessarily resolve the issue in this case, as discussed below.

The Colorado Court of Appeals recently addressed this issue in the *General Security Indemnity Company* case. There, a framing subcontractor's insurer brought a contribution and indemnification action against the sub-subcontractors' CGL insurers, seeking relief for the insurers' refusal to share in the costs in the defense of the framing subcontractor against a third-party complaint filed by the general contractor. *Gen. Sec. Indem. Co.*, 205 P.3d at 531-32. The trial court granted summary judgment in favor of the CGL insurers holding that they were not obligated to defend the framing subcontractor as a matter of law because the property damage was not caused by an "occurrence".

Id. at 532. The Colorado Court of Appeals affirmed, holding in a matter of first impression in a case involving tort and breach of warranty claims that damages arising from poor workmanship, standing alone, do not allege an accident that constitutes a covered occurrence in accord with the majority of jurisdictions that have considered the issue. *Id.* at 534-35.

In so finding, the court analyzed the definition of an "accident" which is required to cause an occurrence. It noted that since the word "accident" was not defined by the policies, as here, the "ordinary definition of 'accident'" should be applied to determine if the underlying complaint alleged an occurrence. *Id.* at 533-34. It also noted that courts had applied different definitions of the word "accident", and found that an accident involves some type of "fortuitous event". *Id.* at 534-35. In so finding, it rejected the minority rule that damage resulting from faulty workmanship was an occurrence so long as the insured did not intend the resulting damage because, among other things, it did not properly take into account that an accident must be fortuitous. *Id.* at 535-36.

Finally, the court noted that "a corollary to the majority rule is that an 'accident' and 'occurrence' are present when consequential property damage has been inflicted upon a third party as a result of the insured activity." *Id.* at 535; see also *Adair Group, Inc. v. St. Paul Fire and Marine Ins. Co.*, 477 F.3d 1186, 1187 (10th Cir.2007) (applying Colorado law in determining that faulty workmanship in and of itself is not an event triggering application of an insurance policy but "additional damage that resulted from the faulty workmanship was deemed to be covered under the policies").

The Colorado Court of Appeals in the *General Security* case cited *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004) in support of its opinion. In that case, the faulty installation of roof shingles caused additional consequential damage to the roof structures and other buildings which was sufficient to constitute an occurrence. *Id.* at 578-79;

[659 F.Supp.2d 1129]

see also *American Employer's Ins. Co. v. Pinkard Constr. Co.*, 806 P.2d 954, 955-56 (Colo.Ct.App.1990) (finding that there was an "occurrence" triggering coverage from installation of roof which began to corrode immediately upon its installation and later collapsed, as the progressive and continuous corrosion of the roof caused actual damages); *Colard v. American Family Mut. Ins. Co.*, 709 P.2d 11 (Colo.Ct.App. 1985) ("the unintended poor workmanship of Thone created an exposure to a continuous condition that resulted in property damage to plaintiffs . . . [h]ence, the damage here at issue was the result of an 'occurrence'").³

In the case at hand, I must broadly construe the term "occurrence" in favor of the insureds. *Pinkard Constr. Co.*, 806 P.2d at 955. Further, for purposes of AmFam's motion for summary judgment, I must construe the evidence in the light most favorable to the insureds. Under the above standard, I find that the underlying suit by the Hubbells does not merely allege poor workmanship in connection with the design of the plans and specifications, *i.e.*, that the plans were defective. It also can be read to allege consequential damages as a result of that workmanship.

Specifically, the complaint refers to the fact that the Teamcorp Defendants not only designed the plans and specifications, they also "engineered the residence on the Property for the Hubbells." (Pl.'s Mot. for Summ. J., Ex. 1 ¶ 39.) It also alleges that Draft-Tek entered into a contract in which it agreed to provide plans sufficient to construct the home. (*Id.*, ¶ 57.) Further, it alleges that the Hubbells hired an architect and professional engineer to inspect the property who concluded, among other things, that the residence had never been sited on the property, the structure significantly violated both Garfield County and subdivision height restrictions, the foundation had not been properly poured, and the residence would be structurally unsound and therefore uninhabitable if completed according to the plans. (*Id.*, ¶¶ 35, 37.) They also opined that corrective measures may not adequately remedy the many problems with the structure and that the entire structure needed to be demolished and rebuilt. (*Id.*) Finally, the complaint alleges that as a direct and proximate result of Draft-Tek's breach of contract, the Hubbells were damaged. (*Id.*, ¶ 59.)

From the foregoing, I find that the allegations of the complaint can be construed to support a claim that the design of the plans and specifications was a cause, among others, of actual consequential damages to the entire structure that require it to be rebuilt. Unlike the situation in *General Security Indemnity Company*, where ("[t]here [were] no allegations that [the insured] was responsible for placement of the foundation, or for faulty workmanship that could have caused the foundation movement, or resulted in the interior floor cracking"), here the allegations can be read to support a claim that the faulty plans and specifications prepared by the Teamcorp Defendants caused or contributed to the overall problems with the house.

[659 F.Supp.2d 1130]

Further, I agree with the Hubbells that the cases holding that "mere faulty work" do not constitute an "occurrence" may well not even be applicable. The underlying complaint alleges that Teamcorp's faulty design and engineering work resulted in damage to the Hubbells' property, not that the Hubbells' damages consists solely of having paid for faulty plans. In other words, the "property" at issue is the Hubbells' real property and partially constructed house, not the Teamcorp plans.

Accordingly, as a matter of law, I hold that AmFam is not excused from its duty to defend by operation of the "occurrence" requirement of the Policy. See *Compass Ins. Co.*, 984 P.2d at 618. AmFam's summary judgment motion is thus denied as to this issue.

2. Whether the Underlying Complaint Alleges Covered "Property Damage"

AmFam next argues that the Hubbells' Amended Third-Party Complaint merely alleges defective plans and specifications prepared by Karnan and/or Teamcorp, and that are no allegations that any property was actually damaged by their actions. Again, I find that AmFam has not met its heavy burden of showing that it has no duty based on this issue.

The Policy defines "property damage" as either "*physical injury to tangible property, including all resulting loss of use of that property*" or "*loss of use of tangible property that is not physically injured.*" Here, the complaint arguably can be read to support a claim that the alleged damage to the Hubbells' residence meets either part of the definition.

First, the injury to the Hubbell's house under construction could be construed to be a physical injury. As detailed above, the underlying complaint alleges that the Hubbells entered into a contract with Draft-Tek for it to provide plans sufficient to construct the home. Further, it provides that the Teamcorp Defendants provided the plans and specifications for the home and that damages resulted because "the structure significantly violated both Garfield County and subdivision height restrictions," the foundation was improperly poured and the structure was improperly located on the lot, that the residence if completed according to the plans would be structurally unsound and therefore uninhabitable, and that the entire structure needed to be torn down to due to these problems. The complaint could thus be construed to support a claim that the Hubbells lost the use of this home and land because of "physical injury"—with salvage at best and demolition at worst of what is remaining of the house. See also *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 304 (Colo.2003) (property damage includes economic losses resulting from loss of use of the property).

Further, even if there is not physical injury, the Hubbells' house under construction could be construed to be "tangible property". In a CGL policy insurance dispute, the Colorado Court of Appeals defined "tangible property" as that which is capable of being handled, touched, or physically possessed. *Lamar Truck Plaza, Inc. v. Sentry Ins.*, 757 P.2d 1143, 1144 (Colo.Ct.App.1988). The house under construction can be touched; it is made of cement, wood and other physical materials, and it can also be physically possessed—there is only one and it cannot be exactly duplicated. Thus, even if the complaint could not be construed to allege physical injury, the Policy would still

arguably provide coverage for loss of use of tangible property by the Hubbells.

AmFam argues, however, that because the allegations against Teamcorp and Karnan relate to the design of the project

[659 F.Supp.2d 1131]

rather than the construction of the project that "[t]here are no allegations that Teamcorp or Karnan did anything at the project that harmed anything." (Pl.'s Mot. for Summ. J. at 10-11.) I reject this argument. First, the complaint alleges that the fact that the Teamcorp Defendants "engineered the residence on the Property for the Hubbells." This could be read to state a claim that the Teamcorp Defendants actually did something at the Project.

Second, I agree with the Hubbells that there is no requirement, either in the insuring agreement or in the definition of "property damage", that the property damage be the direct result of the insured's conduct. Indeed, liability in Colorado generally requires only proximate cause, which can exist indirectly as one "link" in the chain of causation. See *Nicholas v. North Colorado Med. Center, Inc.*, 902 P.2d 462, 471 (Colo.Ct.App.1995) ("Colorado has never required an alleged cause to be the sole cause of the harm suffered. . . . [r]ather our jurisdiction has recognized that a number of acts may combined to cause an asserted injury"), *aff'd*, 914 P.2d 902 (Colo.1996). Here it is undisputed that the Hubbells have alleged harm to, and loss of use of, their tangible property (i.e., "property damage") as the result of the combined acts and omissions of Teamcorp, Karnan, and Lincicome as design professionals as well as the other third party defendants.

Based on the foregoing, I hold that Am-Fam is not excused as a matter of law from its duty to defend by operation of the "property damage" requirement of the Policy. AmFam's summary judgment motion is thus denied as to this issue.

3. *Whether Property Damage is Alleged While Teamcorp is an Insured*

AmFam argues that even if an "occurrence" and "property damage" are alleged that could trigger a duty to defend, there is still no coverage and thus no duty to defend because the underlying Amended Third-Party Complaint does not allege any property damage during the period when Teamcorp was insured under the AmFam policy. AmFam asserts that any such damage occurred at the latest by December of 2003 when work stopped on the project. AmFam further asserts that Teamcorp did not become an insured under the Policy until May 13, 2004, when the name change endorsement to the Policy took effect.

I deny AmFam's summary judgment motion on this issue as well. I agree with AmFam that under "occurrence" liability policies such as the one at issue, the trigger of coverage is the date when the alleged property damage occurred. *Pinkard Const. Co.*, 806 P.2d at 956. In other words "the time of the occurrence of an accident is not the time the wrongful act was committed, but the time when the complaining party was actually damaged." *Leprino v. Nationwide Prop. and Cas. Ins. Co.*, 89 P.3d 487, 490 (Colo.Ct.App. 2003); see also *Browder v. United States Fidel. & Guar. Co.*, 893 P.2d 132, 134 (Colo.1995) ("a third party must suffer actual damage within the policy period [for the insured] to recover under a liability policy").

In this case, however, the complaint does not specify when the property damage actually occurred or when the Hubbells were actually damaged by the Teamcorp Defendants' actions. It alleges that the construction of the Hubbell's home began in approximately May 2003, that "[i]n and around the last quarter of 2003, the Hubbells became concerned about the progress of the construction and the escalating costs. There were problems with the plans and specifications. . . ." (Pl.'s Mot. for Summ. J., Ex. 1, ¶ 31). It also

[659 F.Supp.2d 1132]

alleges that the contract was terminated in December 2003 when an architect and professional engineer discovered numerous problems with the structure. The complaint does not specifically mention any time period as to when the Teamcorp Defendants' alleged breaches and resulting damages occurred. Further, the complaint can be construed to allege ongoing property damage. Once the infrastructure was sited incorrectly and the uninhabitable structure impeded the use of the lot for its intended purpose, those conditions continued to exist and had to be corrected.

From the foregoing, although AmFam's duty to defend may not be "apparent from the pleadings", they "do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded." *Hecla*, 811 P.2d at 1089. Accordingly, "the insurer must accept the defense of the claim." *Id.*

I also agree with the Hubbells that there may be an ambiguity in connection with who the original Named Insured was meant to be since "Laconia Homes, Inc." is a nonentity and is a d/b/a of Teamcorp, Inc. See *General Cas. Co. of Wis. v. Outdoor Concepts*, 667 N.W.2d 441, 445 (Minn.App.2003) (concluding, in accord with other jurisdictions, that listing the named insured as a trade name or d/b/a results in an ambiguity). "An 'insured' must be a legal 'person,' such as an individual, partnership, or corporation." *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 42 Cal.App.4th 1194, 50 Cal.Rptr.2d 192, 194 (1996). When such an ambiguity exists, all such ambiguities must be construed in favor of the insured and against the insurer. *Hecla*, 811 P.2d at 1090-91. In *Providence*, the court held that a policy issued with a "dba" as the named insured actually covered the user of the "dba" because the "dba" was not a separate legal or insurable entity, discussing numerous cases from other jurisdictions. See also *Boling v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 696, 697-99 (Mo.1971).

Under the above authority and construing the evidence in the light most favorable to the insured, since Laconia Homes is not a legal or insurable entity the actual Named Insured would be the user of the d/b/a, in this case Teamcorp, Inc. d/b/a Draft-Tek. This would be true even before AmFam issued the endorsement which clarified that Laconia Homes was actually a "dba" of Teamcorp, Inc. Further, the complaint clearly alleges property damage that occurred while Laconia Homes was an insured, since it discusses damage that was discovered in 2003.

Further, AmFam has not shown that the endorsement correcting the identification of the Named Insured actually "expanded" coverage. There was no increase in the number of insureds, which has always been one corporation. The endorsement also did not alter any of the terms of insurance: the insuring agreement is the same, the exclusions are the same, and the policy limits are the same. AmFam issued the policy to Teamcorp's "dba" and then issued the name change endorsement without ever changing any other terms of the policy to exclude coverage for any of Teamcorp's operations. Construing the evidence in the light most favorable to the insureds, I find that this supports a theory or claim that AmFam intended from the beginning to insure Teamcorp.

Finally, since I find for purposes of the summary judgment motion that Teamcorp, Inc. is arguably an insured, I also find that Defendant Karnan may be an insured. The Policy provides that executive officers and directors of the insured corporation are insureds, but only with respect to their

[659 F.Supp.2d 1133]

duties as officers or directors. The underlying complaint alleges that Karnan is an officer of Teamcorp, Inc. and the principal of Draft-Tek who participated in the design of the Hubbells' home. Therefore, the complaint can be construed to mean that Karnan was sued in his capacity as an officer, making him an insured under the Policy for purposes of the underlying action.

In summary on this issue, I find that AmFam has not shown as a matter of law that Teamcorp and Karnan are not insureds under the Policy. Accordingly, AmFam's summary judgment motion is also denied as to this issue.

4. Whether AmFam's Cited Exclusions Preclude Coverage

AmFam also argues that the cited "business risk" exclusions j(5), j(6) and (m) would negate any coverage. The Tenth Circuit has held that exclusion j(5) refers to "'property damage' . . . occurring to real property during the course of the insured's work." *Advantage Homebuilding, LLC v. Maryland Cas. Co.*, 470 F.3d 1003, 1010 (10th Cir.2006). In other words, it applies "whenever property damage `arise[s] out of the work of the insured, its contractors, or its subcontractors while performing operations.'" *Id.* at 1011 (emphasis added) (quotation and internal quotation marks omitted). Exclusion j(6) applies whenever property damage "directly or consequentially occurs from the faulty workmanship of the insured and its contractors/subcontractors (i.e., work that `was incorrectly performed'"). *Id.* at 1012.

Finally, this court construed the exclusion identical to AmFam's exclusion (m) in *DCB Const. Co.*, 225 F.Supp.2d at 1233. This exclusion "applies to `damage to impaired property or property not physically injured,' and provides coverage is not contemplated for damage to property that is impaired or `has not been physically injured arising out of . . . [a] defect, deficiency, inadequacy or dangerous condition in your product or your work or . . . [a] delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.'" *Id.* (quotation and internal quotation marks omitted). The Tenth Circuit construed this exclusion to bar coverage for claims based on construction of non-complying hotel room interior walls. *Id.*

I find that AmFam's summary judgment motion should also be denied on this ground. AmFam does not provide any analysis whatsoever how the "business risk" exclusions it cites bar coverage. The bare assertion that the exclusions apply does not come close to meeting AmFam's "very heavy" burden of proving the total application of an exclusion to bar any and all potential for coverage under the allegations of the underlying complaint.

In other words, I find that it has not been shown as a matter of law that the exclusions apply in this case. The Policy's "property damage" exclusions j(5) and j(6) only apply if the insured or its contractors are performing operations or have performed work on the actual property that is damaged. In this case, there are no allegations that Teamcorp or Karnan performed any such operations or work on the Hubbells' real property or on the partially completed structure. Instead, the complaint alleges that these third-party defendants were involved in the design and engineering of the proposed home, not its construction.

Similarly, AmFam has not shown as a matter of law that the "impaired property" exclusion applies (exclusion m), both because the underlying Amended Third Party Complaint alleges damage to physical property other than Teamcorp's work product (the designs and specifications)

[659 F.Supp.2d 1134]

and because the correction of Teamcorp's faulty plans will not eliminate the property damage already done. Further, I previously found for purposes of the summary judgment motion that AmFam did not show that as a matter of law that there was no property damage, and this exclusion applies only to instances where property has not been physically injured.

Finally, the Policy does not contain any exclusions for architectural, engineering, or drafting services, even though the Named Insured endorsement references a "dba" called "Draftech".

Based on the foregoing, I find that Am-Fam has not shown as a matter of law "that the allegations in the complaint are solely and entirely within the exclusions in the insurance policy", or that "there is no factual or legal basis on which the insurer might eventually be held liable to indemnify the insured." *Compass*, 984 P.2d at 614. Accordingly, I deny AmFam's summary judgment motion as to this issue.

5. Whether the Activities for which Teamcorp and Draft-Tek were Sued Are Within the Scope of

the Risk Insured

Lastly, AmFam argues that Laconia Homes, Inc. contracted for, and obtained, general liability insurance covering its business operations only as a seller and builder of pre-manufactured homes. While the Teamcorp Defendants were free to perform engineering work or create plans and specifications, AmFam asserts that any resulting liability claims for operations beyond the business description stated in the Declarations are not covered under the Policy. AmFam asserts that the policy application expressly denied that the putative insured drew or provided plans, designs or specifications for others. AmFam asserts that this is perhaps the argument most apropos to this case, and that the Court can properly consider the Application in this case despite the four-corners rule.

Again, I deny summary judgment on this argument. The Policy Declarations page includes the "classifications" of the business activities as: "91583, Contractors-Subcontracted Work-In Connection With Building Construction, Reconstruction, Repair or Erection—One or Two Family Dwellings. . . ." AmFam has not shown as a matter of law that the short business description in the Common Declarations applies rather than the longer description in the Policy Declarations. In other words, AmFam has pointed to nothing in the language of the Policy indicating that the short business description or premium classifications limit or exclude coverage. Further, the language of these items does not do so clearly, unambiguously, and completely as necessary to act as an exclusion and bar the duty to defend.

The language in the Policy Declarations is quite broad, listing the scope of the risk as "Contractors-Subcontracted Work-In Connection With Building Construction, Reconstruction, Repair or Erection—One or Two Family Dwellings." I find that the allegations of the complaint regarding the Teamcorp Defendants' work on the designs and specifications of the Property are at least potentially or arguably within the scope of the risk insured, as they relate to construction of a family dwelling. This is particularly true as the Policy does not exclude architectural services, engineering services, or drafting services for a single-family residence. While AmFam wants me to review the application for the Policy, I decline to do so as this is extrinsic evidence that I previously held would not be admitted.

6. Conclusion Regarding the Duty to Defend

I find from the foregoing that American Family has not met its heavy burden of

[659 F.Supp.2d 1135]

showing from the complaint allegations that it has no duty to defend. Plaintiff has not shown as a matter of law that coverage is excluded based on the complaint allegations. The allegations in the underlying complaint potentially trigger coverage under the terms of the insurance policy.

Because American Family has not satisfied its heavy burden, I find that its summary judgment motion must be denied. I further find that American Family has a duty to defend the Teamcorp Defendants in the underlying litigation, and grant the Teamcorp Defendants' Motion for Partial Summary Judgment Regarding Plaintiff's Duty to Defend and the Hubbells' Motion for Partial Summary Judgment Re: American Family's Duty to Defend Teamcorp, Inc. and Karnan.

D. Whether AmFam is Entitled to Summary Judgment on the Teamcorp Defendants' Counterclaim

AmFam also moved for summary judgment on Teamcorp and Karnan's Counterclaims which seeks attorney fees and costs incurred in connection with the defense of this action on the breach of contract claim and which seek a declaratory judgment that AmFam owes them a duty of defense and indemnification. I deny summary judgment as to this argument as well. Since I have found that

AmFam did not meet its burden of showing it has a duty to defend, its argument that the Teamcorp and Karnan's counterclaim for a declaratory judgment fails as a matter of law is rejected. Moreover, I find that resolution of the Counterclaim for attorney fees and costs is premature at this time.

V. CONCLUSION

Based on the foregoing, American Family's summary judgment motion is denied. The Teamcorp Defendants and the Hubbells' motions for partial summary judgment are granted, as I find that AmFam has a duty to defend Teamcorp and Karnan in the underlying lawsuit. The allegations in the underlying complaint potentially trigger coverage under the terms of the insurance policy.

Finally, I address the procedural posture of this case given my ruling. The case is currently set for trial commencing Monday, November 30, 2009, with a Final Trial Preparation Conference set for Tuesday, November 17, 2009, at 3:00 p.m. However, it does not appear that this case is ready to go to trial. The duty to indemnify is clearly premature as the underlying case has not yet been resolved, as is the counterclaim for attorney fees and costs incurred by the Teamcorp Defendants in connection with this action. Accordingly, I address whether this case should be stayed.

Judge Figa recognized in his October 16, 2007 Order that a stay in this case might become appropriate after the duty to defend was resolved. I find, however, that this case could remain open for some time if the case is stayed given the posture of the underlying case. Accordingly, I find that the better course is to vacate the trial and to administratively close the case pursuant to D.C.COLO.LCivR 41.2. See *Quinn v. CGR*, 828 F.2d 1463, 1465 and n. 2 (10th Cir.1987) (construing administrative closure as the practical equivalent of a stay). The case may be reopened for good cause, which shall include the parties' representation in a motion to reopen this case that the underlying trial before Judge Arguello has been completed and that the parties intend to prosecute the duty to indemnify in this case.

It is therefore

ORDERED that Plaintiff's Motion for Summary Judgment (Doc. # 167) is **DENIED**. It is

[659 F.Supp.2d 1136]

FURTHER ORDERED that Defendants Teamcorp. Inc. d/b/a Laconia Homes/Draft-Tek and Kerry Karnan's Motion for Partial Summary Judgment Regarding Plaintiff's Duty to Defend (Doc. # 168) and the Hubbells' Motion for Partial Summary Judgment Re: American Family's Duty to Defend Teamcorp, Inc. and Karnan (Doc. # 169) are **GRANTED** regarding American Family's duty to defend the underlying lawsuit. It is

FURTHER ORDERED that the five (5) day trial set to commence Monday, November 30, 2009, and the Final Trial Preparation Conference set Tuesday, November 17, 2009, at 3:00 p.m. are **VACATED**. Finally, it is

ORDERED that this case is **ADMINISTRATIVELY CLOSED** pursuant to D.C.COLO.LCivR 41.2, to be reopened for good cause shown as discussed in this Order.

Footnotes

1. Although AmFam asserts that the Policy was issued based upon an Application taken by Jim Lord and completed by Tiffany Singleton, I agree with Defendants and the Hubbells that this is improper extrinsic evidence. Thus, I will not consider it in connection with resolution of the pending motions.

[Back to Reference](#)

2. AMFam asserts that this endorsement was done because on or about May 11, 2004, AmFam insurance agent Jim Lord ["Lord"] was contacted by Craig Snow on behalf of Teamcorp. Snow requested to Lord that the named insured shown on the Policy be changed from "Laconia Homes, Inc." to "Teamcorp, Inc., d/b/a Laconia Homes and Draft-Tek." (Pl.'s Mot. for Summ. J., Ex. 4, Lord Deposition at 36.) Defendants and the Hubbells object to this fact as extrinsic evidence. I agree that this is extrinsic evidence that will not be considered in connection with my decision on the summary judgment motions.

Back to Reference

3. Cf. *American Mfrs. Mut. Ins. Co. v. Seco/Warwick Corp.*, 266 F.Supp.2d 1259, 1266 (D.Colo.2003) (no occurrence giving rise to coverage where furnaces installed by contractor did not perform to contract specifications and owner sought costs to modify furnaces to make them functional since this was merely the result of poor workmanship); *DCB Constr. Co., Inc. v. Travelers Indemnity Co.*, 225 F.Supp.2d 1230, 1232 (D.Colo.2002) (no occurrence triggering coverage where construction of hotel wall was performed exactly according to design and the completed walls were completely functional but they did not muffle sound to the contractually required specifications, causing owners to tear down walls; subcontractor was not guarantor of performance).

Back to Reference

BUSHEY v. NORTHERN ASSURANCE

766 A.2d 598 (2001)

362 Md. 626

**William B. BUSHEY, Personal Representative of the Estate of Miranda L.
Bushey, et al.,**

v.

NORTHERN ASSURANCE COMPANY OF AMERICA, et al.

No. 19, Sept. Term, 2000.

Court of Appeals of Maryland.

February 8, 2001.

Michael J. Schreyer (Donahue, Seidman & Schreyer, LLC, on brief), Waldorf, for petitioners.

Mark T. Mixer (John M. Oliveri of Law Office of Mark T. Mixer, on brief), Baltimore, for respondents.

Argued Before BELL, C.J., ELDRIDGE, RODOWSKY,* RAKER, WILNER, CATHELL and HARRELL, JJ.

RODOWSKY, Judge.

In this review of a declaratory judgment, we consider two issues: first, the interpretation of an uninsured/underinsured motorist (UM/UIM) endorsement and, second, parent-child tort immunity where the defendant child is deceased.

On January 25, 1997, a tragic automobile accident resulted in the deaths of two sisters, Miranda L. Bushey (Miranda), a high school sophomore, and Susan C. Bushey (Susan), a high school senior. The accident occurred while Susan was driving a 1983 Cadillac Cimarron in which Miranda was riding as a passenger. The Cadillac was owned by the sisters' grandfather, Earl T. Weeks (Weeks). Susan crossed a double yellow line while attempting to pass a slower moving vehicle and struck an oncoming vehicle head-on. She died within one-half hour after the accident, and Miranda died from her injuries five days later. At the time of the accident, the Cadillac was insured under a Nationwide Mutual Insurance Company motor vehicle liability policy with limits of \$20,000/\$40,000.

[766 A.2d 600]

The policy was issued to Weeks, and Susan was a named insured under it.

Also in effect at the time of the accident was a commercial lines policy that William B. Bushey (Bushey), the father of Susan and Miranda, had purchased from the respondent, Northern Assurance Company of America (Northern), for his gasoline station and automotive repair business. Northern's policy contains UM/UIM provisions. The limit for that coverage is \$1,000,000.

Bushey and his wife, Linda K. Bushey, (jointly, the Parents) have asserted a wrongful death claim against the Estate of Susan. Bushey, as Personal Representative of the Estate of Miranda, also has asserted a survival claim against the Estate of Susan. The Parents, individually, and Bushey, as Personal Representative of the Estate of Miranda, are the petitioners in this Court (the Petitioners).

A controversy exists between the Petitioners and Northern concerning coverage under the UMUIM provisions of Northern's policy for the claims asserted by the Petitioners against Susan's estate. To resolve the controversy the Petitioners instituted in the Circuit Court for Charles County a declaratory judgment action which named Northern as a defendant. Northern denied coverage and, alternatively, asserted that Susan had no liability to the Parents on the wrongful death claim because of parent-child immunity. The circuit court entered judgment in favor of Northern.¹

Petitioners appealed to the Court of Special Appeals which affirmed. *Bushey v. Northern Assurance Co.*, 130 Md.App. 169, 745 A.2d 444 (2000). That court gave two reasons in support of its holding that there was no coverage. First, it said that Bushey's sole proprietorship, the named insured under the commercial lines policy, was "a business entity, not an individual," so that a critical definition in the policy concerning "family members" was said not to apply. *Id.* at 178, 745 A.2d at 449. Further, the court construed the UMUIM endorsement in the context of the entire policy as, in effect, unambiguously requiring that the motor vehicle occupied by Miranda at the time of the fatal accident be a "covered `auto' "that was scheduled in the "Garage Declarations" of the "Commercial Auto Coverage Part" of the Northern policy. The Court of Special Appeals also held that parent-child immunity applied. *Id.* at 178-81, 745 A.2d at 449-50.

Petitioners sought certiorari review in this Court, which we granted. *Bushey v. Northern Assurance*, 358 Md. 608, 751 A.2d 470 (2000). As explained below, we disagree on the interpretation of the policy with respect to the coverage issue, and we disagree as to the immunity issue.²

I

A

In *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617 (1995), we summarized the rules for interpretation of insurance policies that apply here. There we said:

"In Maryland, insurance policies, like other contracts, are construed as a whole to determine the parties' intentions. *Cheney v. Bell National Life [Ins. Co.]*, 315 Md. 761, 766-67, 556 A.2d 1135[, 1138] (1989). Words are given their `customary, ordinary, and accepted meaning,' unless there is an indication that the parties intended to use the words in a technical sense. *Id.*, see also *Chantel Associates v. [Mount] Vernon [Fire Ins. Co.]*, 338 Md. 131, 142, 656 A.2d 779[, 784] (1995). `A word's ordinary

[766 A.2d 601]

signification is tested by what meaning a reasonably prudent layperson would attach to the term.' *Bausch & Lomb [Inc.] v. Utica Mutual [Ins. Co.]*, 330 Md. 758, 779, 625 A.2d 1021[, 1031] (1993). If the language in an insurance policy suggests more than

one meaning to a reasonably prudent layperson, it is ambiguous. *Collier v. MD-Individual Practice [Ass'n]*, 327 Md. 1, [6,] 607 A.2d 537[, 539] (1992); *Pacific Indem. [Co.] v. Interstate Fire & Cas. [Co.]*, 302 Md. 383, [389,] 488 A.2d 486[, 489] (1985). A term which is clear in one context may be ambiguous in another. *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 74, 517 A.2d 730[, 732] (1986); *Bentz v. Mutual Fire [Marine & Inland Ins. Co.]*, 83 Md.App. 524, 537, 575 A.2d 795[, 801] (1990).

"Where terms are ambiguous, extrinsic and parol evidence may be considered to ascertain the intentions of the parties. *Cheney, supra*, 315 Md. at 766-67, 556 A.2d [at 1138]. 'Maryland does not follow the rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer.' *Id.* Nevertheless, 'if no extrinsic or parol evidence is introduced, or if the ambiguity remains after consideration of the extrinsic or parol evidence that is introduced, it will be construed against the insurer as the drafter of the instrument.' *Id.*; see also, e.g., *Collier, supra*, 327 Md. at 5-6, 607 A.2d [at 539]; *Mutual Fire, Marine & Inland Ins. [Co.] v. Vollmer*, 306 Md. 243, 251, 508 A.2d 130[, 134] (1986); *St. Paul Fire & Mar. Ins. [Co.] v. Prysieski*, 292 Md. 187, 193-96, 438 A.2d 282[, 285-87] (1981); *Truck Ins. Exch. v. Marks Rentals*, 288 Md. 428, 435, 418 A.2d 1187[, 1191] (1980); *Aragona v. St. Paul Fire & Mar. Ins. [Co.]*, 281 Md. 371, 375, 378 A.2d 1346[, 1349] (1977)."

Id. at 508-09, 667 A.2d at 619.

Northern's policy contains "COMMON POLICY DECLARATIONS" which, by a Policy Change Endorsement, identify the named insured as "William B. Bushey t/a Bushey's Automotive." The policy is divided into three sections: a property section insuring the building out of which the business was conducted and insuring personal property stored in that building, a crime section insuring against theft and employee dishonesty, and a "COMMERCIAL AUTO COVERAGE PART." The "GARAGE DECLARATIONS" of that part inquire as to the "Form of Business," followed by four blocks respectively labeled "Individual," "Partnership," "Corporation," and "Other." The block identifying the form of business as "Individual" was checked.

The "GARAGE DECLARATIONS" contain a chart consisting of four columns, "Coverages," "Covered Autos," "Limit," and "Premium." Among the coverages offered and purchased were "Uninsured Motorists" and "Underinsured Motorists." Under the "Covered Autos" column, on the lines referring to UM/UIM coverage were inserted the numerals "26" and "32." These insertions were pursuant to a direction under the heading, "Covered Autos," reading: "(Entry of one or more of the symbols from the COVERED AUTOS Section of the Garage Coverage form shows which autos are covered autos)." The "GARAGE COVERAGE FORM" in "Section I-Covered Autos" converts code "26" to

"OWNED 'AUTOS' SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW." Only those 'autos' you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage...."³

The policy also contains a "vehicle schedule" which lists three vehicles, a 1994
[766 A.2d 602]

Ford Explorer, a 1984 Ford Pickup, and a 1986 Ford "Rollback." Each of these is described on the schedule as "Titled to Business."

Section II of the Commercial Auto Coverage Part of the policy deals with liability coverage, § III with garage keepers coverage, § IV with physical damage coverage, §

V with garage conditions, and § VI with definitions. In § VI "'Insured' means any person or organization qualifying as an insured in the Who Is an Insured provision of the applicable coverage." The Commercial Auto Coverage Part of the policy contains a number of endorsements, e.g., auto medical payments coverage and a "Maryland Personal Injury Protection Endorsement." Our principal concern here is with the endorsement titled, "Maryland Uninsured Motorists Coverage" (the Endorsement).

The Endorsement is headed by a notice reading, "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." Immediately below its title the Endorsement reads: "For a covered `auto' licensed or principally garaged in, or `garage operations' conducted in Maryland, this Endorsement modifies insurance provided under the following." Included among "the following" are the "BUSINESS AUTO COVERAGE FORM" and the "GARAGE COVERAGE FORM."

Based on the above provisions, Northern argues that the UM/UIM coverage is limited to claimants who suffer bodily injury while occupying a covered vehicle. Northern's position, however, does not take into account the provisions of the policy, set forth below, on which the Petitioners rely. Part "A. COVERAGE" of the Endorsement provides in ¶ 1 as follows:

"We will pay all sums the `insured' is legally entitled to recover as damages from the owner or driver of an `uninsured motor vehicle.' The damages must result from `bodily injury' sustained by the `insured' ... caused by an `accident'...."⁴

Part B defines "WHO IS AN INSURED" under the Endorsement. Part B reads:

"1. You.

"2. *If you are an individual, any `family member.'*

"3. Anyone else `occupying' a covered `auto' or a temporary substitute for a covered `auto'. The covered `auto' must be out of service because of its breakdown, repair, loss or destruction.

"4. *Anyone for damages he or she is entitled to recover because of `bodily injury' sustained by another `insured'.*"

(Emphasis added).

The Endorsement, in Part F, presents "ADDITIONAL DEFINITIONS [a]s used in this endorsement." Paragraph 1 of Part F defines the term "[f]amily member" as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child."

The exclusions from UM/UIM coverage under the policy are set forth in Part C of the Endorsement which, in relevant part, excludes:

"3. `Bodily injury' sustained by:

"a. You while `occupying' or when struck by any vehicle owned by you that is not a covered `auto' for Uninsured Motorists Coverage under this Coverage Form;

"b. Any `family member' while `occupying' or when struck by *any vehicle owned by that `family member'* that is not a covered `auto' for Uninsured Motorists Coverage under this Coverage Form; or

"c. Any `family member' while `occupying' or when struck by any vehicle owned by you that is insured for Uninsured Motorists Coverage on a primary basis under any other Coverage Form or policy."

(Emphasis added).

Petitioners' reading looks primarily to Part B of the Endorsement. Petitioners say that the named insured ("You") is Bushey, an individual, and that Miranda was a "family member." Accordingly, Miranda was an "insured" under the insuring clause of the Endorsement, there is no exclusion that applies to her, and the UM/ UIM coverage applies to the claim of her estate. Similarly, and assuming that Susan's estate would be liable to the Parents, the wrongful death claim of the Parents is because of the "bodily injury" sustained by Miranda and would be covered by Part B, ¶ 4 of the Endorsement. Miranda's "bodily injury" is not excluded from the UM/UIM coverage because, although she was occupying an auto that was not a covered auto, the exclusion for claims by a family member injured while occupying a non-covered vehicle is subject to the further limitation that the non-covered vehicle be owned by the injured family member. See Endorsement, Part C, ¶ 3.b.

Northern's reading of the policy, under which the entire Endorsement is limited by its introduction to a "covered `auto'" renders Part B, ¶ 3 redundant. If, regardless of relationship to the named insured, all claimants for UM/UIM benefits must have been occupants of a "covered auto," it becomes totally unnecessary to specify in Part B, ¶ 3 that payment of those benefits for "anyone else," *i.e.*, other than the named insured or a "family" member of the named insured, depended on "occupying' a covered `auto.'" Similarly, it would have been unnecessary to exclude from "[b]odily injury" in Part C, ¶ 3.b an injury sustained by a family member in "any vehicle owned by that family member that is not a covered `auto,' "if occupying any non-covered auto, in and of itself, would exclude coverage.

The references to covered autos in the general structure of the policy on which Northern relies at best create an ambiguity. No extrinsic evidence has been offered to resolve the ambiguity. Accordingly, if Bushey is the insured and if Miranda is a "family member," there is coverage, because the ambiguity, if any, concerning occupying a "covered `auto'" is resolved against Northern.

B

The "you" of the policy is not a business entity separate from Bushey. The amendment to the policy identifies the insured as "William Bushey t/a Bushey's Automotive Repair." Northern does not dispute that Bushey's Automotive Repair is a sole proprietorship wholly owned by Bushey. Nevertheless, Northern argues that the policy was a commercial policy issued for a business and that it did not cover Bushey as an individual. Northern's argument, simply put, is wrong.

The sole proprietorship form of business provides "complete identity of the business entity with the proprietor himself...." 1 Z. Cavitch, *Business Organizations* § 1.04[1], at 1-23 (Matthew Bender 2000). "Bushey's Automotive Repair" has no legal existence apart from its owner, Bushey. See *Romans v. State*, 178 Md. 588, 597, 16 A.2d 642, 646 (1940), *cert. denied*, 312 U.S. 695, 61 S.Ct. 732, 85 L.Ed. 1131 (1941) ("If there is no statute to the contrary, a person may adopt any name by which he

may become known, and by which he may transact business and execute contracts and sue or be sued. And this without regard to his true name. Hence, if a person adopt or assume a name whereby he becomes known, so that the adopted or assumed name is sufficient for his identification, he may be prosecuted in his adopted or assumed name." (Citations omitted)).

[766 A.2d 604]

Numerous decisions recognize in the insurance context the identity of the sole proprietor with the trade name adopted by the sole proprietor. See *O'Hanlon v. Hartford Accident & Indem. Co.*, 639 F.2d 1019, 1025 (3d Cir.1981) ("We [hold] ... that where an insured purchases a policy in a trade name, the policy will be viewed as if issued in his given name"); *Duval v. Midwest Auto City, Inc.*, 425 F.Supp. 1381, 1387 (D.Neb.1977), *aff'd*, 578 F.2d 721 (8th Cir.1978) ("The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business"); *Pinkerton's, Inc. v. Superior Court of Orange County*, 49 Cal.App.4th 1342, 57 Cal.Rptr.2d 356, 360 (1996) ("Use of a fictitious name does not create a separate legal entity"); *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 42 Cal.App.4th 1194, 50 Cal.Rptr.2d 192, 195 (1996) ("The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner"); *Chmielewski v. Aetna Cas. & Sur. Co.*, 218 Conn. 646, 591 A.2d 101, 113 (1991) ("We also agree that one who operates a business under a trade name is nonetheless an individual insured under a policy issued in that trade name"); *Samples v. Georgia Mut. Ins. Co.*, 110 Ga.App. 297, 138 S.E.2d 463, 465-66 (1964) (Exclusion from coverage for temporary substitute vehicle of any vehicle owned by spouse applied to exclude vehicle titled in spouse's trade name); *Georgantas v. Country Mut. Ins. Co.*, 212 Ill.App.3d 1, 156 Ill.Dec. 394, 570 N.E.2d 870, 873 (1991) ("The universal rule is that the sole proprietor is personally responsible for the activities of the business"); *Trombley v. Allstate Ins. Co.*, 640 So.2d 815, 817 (La.Ct.App.1994) ("[A] trade name has no separate existence apart from the individual doing business under that trade name"); *Gabrelcik v. National Indem. Co.*, 269 Minn. 445, 131 N.W.2d 534, 536 (1964) ("Whether the vehicle is registered in the husband's name or in the name of the business which he owns and operates as a sole proprietorship, the result is the same; namely, that this vehicle was owned by the insured's spouse who resided in the same household"); *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 905 (N.D.1985) ("A sole proprietorship which is conducted under a trade name is *not* a separate legal entity"); *Recalde v. ITT Hartford*, 254 Va. 501, 492 S.E.2d 435, 438 (1997) ("The weight of authority in other jurisdictions has applied the concept that the individual owner and the proprietorship are a single entity in insurance contexts"). Cf. *Consolidated American Ins. Co. v. Landry*, 525 So.2d 567, 569 (La.Ct.App.1988) ("[The policy] clearly provides coverage ... only with respect to his sole proprietorship"); *Hertz Corp. v. Ashbaugh*, 94 N.M. 155, 607 P.2d 1173, 1175 (Ct.App.1980) ("[Proprietor], individually, was not the 'named insured' under the policy, and any vehicle owned by [the proprietor] individually was not a vehicle owned by the [proprietor d/b/a sole proprietorship], for purposes of application and construction of the insurance policy").

Northern primarily relies upon *Jensen v. United Fire & Cas. Co.*, 524 N.W.2d 536 (Minn.Ct.App.1994), a decision that interpreted precisely the same language used in the Endorsement. In *Jensen*, a twelve year old girl, Katie Jensen, suffered severe injuries while riding in an uninsured pickup truck, owned by the father of a friend, that

was involved in a single-vehicle accident. *Id.* at 537. The commercial policy in issue in that case provided:

"We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured' or 'underinsured motor vehicle' caused by an 'accident.'" *Id.* at 539. The declarations page identified the "Named Insured" as "EAGLE EXCAVATING JENSEN ROGER DBA." *Id.* at 539-40. The policy then described an "'insured' "as: " `1. You. 2. If you are an individual, any "family member."'" *Id.* at 540. The Minnesota intermediate appellate

[766 A.2d 605]

court held that "Eagle Excavating, the named insured in this 'commercial' policy, is not an individual; it is a business. Hence, the policy does not apply to Katie Jensen and summary judgment for United Fire was proper." *Id.* No authority was cited in support of this conclusion.

The few reported cases that deal specifically with UM/UIM coverage in policies naming a sole proprietorship as the insured find, with the major exception of *Jensen*, that the language referring to family members in the uninsured motorist endorsement renders the policy ambiguous. For example, in *American Bankers Ins. Co. v. Stack*, 208 N.J. Super. 75, 504 A.2d 1219 (Law Div. 1984), the policy had been issued to Mobile Wash Systems, a business that was a sole proprietorship, but the individual owner was not named in the policy. The sole proprietor's son was injured while a passenger in a non-covered truck, owned by another person, and not used in the business of Mobile Wash Systems. The son sought to recover uninsured motorist benefits under the policy issued to Mobile Wash Systems. *Id.* at 1219. In holding that the policy provided UM/UIM coverage for the proprietor's son, the Court stated:

"The issuance of an insurance policy to a trade-name business gives rise to disputes regarding coverage in the absence of clarifying language. It is clear that nowhere in the insurance policy issued by plaintiff to Mobile Wash Systems is it expressly stated that the policy is purely for commercial use. Item No. 6 of the policy states that the purposes for which the automobiles are to be used are 'pleasure and business.' The definition of 'insured' in the UM endorsement reads as if the named insured is a natural person. There is also no express exclusion of family members of unincorporated business enterprises."

Id. at 1221. Therefore, the New Jersey court found that the policy was ambiguous and construed it against the insurer. *Id.*

In *Purcell v. Allstate Ins. Co.*, 168 Ga.App. 863, 310 S.E.2d 530 (1983), a "'business auto policy'" was issued to "'Purcell Radiator Serv.," identified in the policy as an "'individual' business." *Purcell*, 310 S.E.2d at 531. The wife of the business owner had been struck as a pedestrian by an underinsured vehicle. *Id.* She claimed under the UIM coverage as a "family member" of the named insured. Finding that the language regarding "'family members'" did "not demonstrate that the intent of the policy was not to afford the [personal] coverage sought," *id.* at 532, the court continued:

"While it is true that the endorsement provides that it is effective 'if the named insured is an individual, there is no explanation as to why such an endorsement would be included in a 'business auto' policy issued to an 'individual' business. No explanation for the inclusion of this endorsement is readily apparent except the reasonable inference that the intent was to make what would otherwise be a 'business auto policy' issued to an 'individual' business in effect a 'personal' policy for at least some coverages afforded thereunder."

Id. at 532.

Somewhat analogous is *Aetna Cas. & Sur. Co. v. Hartford Accident & Indem. Co.*, 74 Md.App. 539, 539 A.2d 239 (1988), involving a "Garage Policy" issued by Hartford to "Sidney H. Cohen & Consumer Rent-A-Car t/a Wholesale Heaven." *Id.* at 543, 539 A.2d at 241. Hartford contended that the policy unambiguously provided liability coverage solely for the garage business known as Wholesale Heaven. *Id.* Aetna argued that the policy unambiguously provided liability coverage to Cohen, as an individual, because the declarations contained an "X" next to the "Individual" designation and principally because the endorsement for personal injury protection provided individual coverage for members of Cohen's family by using a personal insurance form. *Id.* at 545-46, 539 A.2d at 242-43. The Court of

[766 A.2d 606]

Special Appeals found that the reference to family members rendered the policy ambiguous so that the trial court properly allowed extrinsic evidence to be introduced by Hartford. *Id.* Thus, judgment on a jury verdict in favor of Hartford was affirmed.

Northern refers us to certain cases involving corporations as the named insured where courts have held that the policy's inclusion of family members as additional insureds did not result in coverage. Initially we note that there is a considerable body of authority holding that including family members as additional insureds in a policy issued to a corporation as named insured *does* result in coverage for the family members, see, e.g., *Hawkeye-Security Ins. Co. v. Lambrecht & Sons, Inc.*, 852 P.2d 1317, 1319 (Colo.Ct.App.1993); *Ceci v. National Indem. Co.*, 225 Conn. 165, 622 A.2d 545, 550 (1993); *Home Folks Mobile Homes, Inc. v. Meridian Mut. Ins. Co.*, 744 S.W.2d 749, 750 (Ky.Ct.App.1987); *Carrington v. St. Paul Fire & Marine Ins. Co.*, 169 Wis.2d 211, 485 N.W.2d 267, 270 (1992), or for the officers, shareholders, and employees, see, e.g., *Hager v. American West Ins. Co.*, 732 F.Supp. 1072, 1075 (D.Mont.1989); *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380, 1384 (1988). We need not express any opinion on this split of authority because the policy before us was issued to a sole proprietor. Consequently, the decisions relied upon by Northern are not on point.

Illustrative of the cases relied upon by Northern is *Economy Preferred Ins. Co. v. Jersey County Constr., Inc.*, 246 Ill.App.3d 387, 186 Ill.Dec. 233, 615 N.E.2d 1290 (1993). There the language in a "Preferred Business Auto Policy" issued to "Jersey County Construction, Inc." in terms extended uninsured motorist benefits to "family members." 186 Ill.Dec. 233, 615 N.E.2d at 1292. On the following rationale the court held that the policy did not insure the family of the corporate president.

"[W]e reach the conclusion that the insurance policy was not ambiguous. In doing so, after considering this case and the others cited herein, we cannot help but question why the form policies have not included a warning that the 'family member' reference does not apply when the insured is a corporation or similar-type nonfamily entity.

"The policy provides UM coverage benefits for those authorized drivers of the insured vehicles. Thus, if 'family members' were driving the vehicles, they would be covered. However, it still appears that 'family members' is a nullity when the insured is a corporation. Regardless, the policy lists the corporation as the insured of the 'Preferred Business Auto Policy.' To say the policy insured Nelson Miller, and thereby includes his family, would result in a rewriting of the policy. The named insured is not ambiguous; corporations cannot have family members. We hold that the policy is not ambiguous and that the trial court's decision was in error."

Id., 186 Ill.Dec. 233, 615 N.E.2d at 1293-94.

In the case before us the Endorsement reasonably may be read as intended for use where the named insured is either a corporation or a sole proprietorship. The concern expressed by the Illinois court is addressed in the Endorsement by the introductory conditional clause in Part B, ¶ 2, "If you are an individual."

Huebner v. MSI Ins. Co., 506 N.W.2d 438 (Iowa 1993), also cited by Northern, gives support to Petitioners' argument. That decision held that a child was not entitled to underinsured motorist coverage under a business auto policy issued to his father's corporate employer. *Id.* at 439. The decision, however, provided the following limitation:

"We are not persuaded that the result should be otherwise by the reasons expressed in the *Decker [v. CNA Ins. Co.]*, 66 Ohio App.3d 576, 585 N.E.2d 884 (1990)] or *Carrington [v. St. Paul Fire & Marine Ins. Co.]*, 169 Wis.2d 211, 485 N.W.2d 267 (1992)] decisions.

[766 A.2d 607]

Those cases found, improperly we believe, that a latent ambiguity is generated from using 'family member' language in policies issued to corporations. We believe that the only thing that this marketing practice suggests is that MSI's business auto policies were also written so as to be marketable to either individual proprietorships or to corporations. Assuming that individual proprietorships received certain coverages that corporations did not, that is so only because the contract specifies that it is so."

Id. at 441. In other words, in the view of the Iowa court, the inapplicability of the coverage provision in policies issued to corporate insureds would not make the coverage inapplicable in policies issued to sole proprietor insureds.⁵

For these reasons we hold that the named insured ("You") was Bushey, an individual, and that the trade name was nothing more than the name under which he chose to do business as an individual.

C

Northern has raised an issue that was not decided by the courts below. That issue is whether Miranda was a "family member." The definition of that term in Part F, ¶ 1 of the Endorsement requires a family member to be "a resident of your household." It appears that Susan and Miranda stayed at the home of their grandparents on school days during the school year. Northern has preserved its opportunity to contend that, under the Maryland law of residency, Miranda was not a resident of Bushey's household. Accordingly, our mandate will remand for a determination of this issue.

II

In § A.1 of the Endorsement, the insuring provision, Northern promises to pay "all sums the 'insured' is legally entitled to recover as damages from the owner or driver of an 'uninsured motor vehicle.'" In its answer to the declaratory judgment action Northern raised the issue of parent-child immunity. In effect, Northern asserted that the definition of an "insured" in Part B, ¶ 4 of the Endorsement ("Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another

'insured') did not apply to the Parents' wrongful death claim against Susan because of immunity. In response the Parents asked this Court to abrogate parent-child immunity where the claim is covered by automobile liability insurance and particularly where the defendant is deceased.

Since adopting, as a matter of Maryland common law, the doctrine of parent-child immunity in *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930), and applying it

[766 A.2d 608]

in *Yost v. Yost*, 172 Md. 128, 190 A. 753 (1937), this Court consistently has refused wholly to abrogate the doctrine. See *Eagan v. Calhoun*, 347 Md. 72, 81, 698 A.2d 1097, 1102 (1997); *Renko v. McLean*, 346 Md. 464, 480-81, 697 A.2d 468, 476 (1997); *Warren v. Warren*, 336 Md. 618, 626, 650 A.2d 252, 256-57 (1994); *Smith v. Gross*, 319 Md. 138, 145, 571 A.2d 1219, 1222 (1990); *Frye v. Frye*, 305 Md. 542, 543, 505 A.2d 826, 827 (1986).

The doctrine is limited to claims where the child in the relationship was unemancipated at the time of the alleged wrongful conduct. *Waltzinger v. Birsner*, 212 Md. 107, 125-26, 128 A.2d 617, 626-27 (1957). To date, we have recognized three other limitations on the doctrine. It does not apply to the claim of a child against a parent who killed the other parent under circumstances constituting voluntary manslaughter or murder. *Eagan*, 347 Md. at 84-85, 698 A.2d at 1103-04. *Eagan* is an extension of the exception to the doctrine applied in *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923 (1951), where a child "suffered cruel or unusually malicious conduct at the hands of a parent." *Renko*, 346 Md. at 468 n. 4, 697 A.2d at 470 n. 4. Nor does the doctrine confer immunity on the business partner of the parent of an injured child. *Hatzinicholas v. Protopapas*, 314 Md. 340, 357-59, 550 A.2d 947, 956 (1988).

In addition to its application of the doctrine in the instant matter, the Court of Special Appeals has brought the parent-child immunity defense to bear in *Shell Oil Co. v. Ryckman*, 43 Md.App. 1, 3, 403 A.2d 379, 380-81 (1979), *Montz v. Mendaloff*, 40 Md.App. 220, 221, 388 A.2d 568, 569 (1978), *Sanford v. Sanford*, 15 Md.App. 390, 395, 290 A.2d 812, 816 (1972), and *Latz v. Latz*, 10 Md.App. 720, 730, 272 A.2d 435, 440-41, cert. denied, 261 Md. 726 (1971). Federal courts, on issues governed by Maryland law, have held the defense to be dispositive. See *Sherby v. Weather Bros. Transfer Co.*, 421 F.2d 1243, 1246 (4th Cir.1970); *Villaret v. Villaret*, 169 F.2d 677, 678 (D.C.Cir.1948); *Zaccari v. United States*, 130 F.Supp. 50, 53 (D.Md.1955). In the case before us we decline, once again, to accept the invitation totally to abrogate this well established doctrine.

A more substantial issue is presented by the Parents' argument based upon the relatively instantaneous death of Susan in the same accident which caused the death of Miranda five days later. Although this Court has given a number of reasons as a basis for parent-child immunity, "[o]ur primary concern with regard to matters involving the parent-child relationship [is] the protection of family integrity and harmony and the protection of parental discretion in the discipline and care of the child." *Frye*, 305 Md. at 551, 505 A.2d at 831. Parents submit that the public policy which the immunity is intended to support is non-existent under the circumstances of the instant matter where there is no family relationship to preserve because the alleged tortfeasor is dead. This argument, that death had terminated the parent-child relationship, was made in *Smith*, 319 Md. 138, 571 A.2d 1219, but we were not required directly to address the argument under the facts in that case. *Mahnke*, 197

Md. 61, 77 A.2d 923, and *Eagan*,³⁴⁷ Md. 72, 698 A.2d 1097, are the only other Maryland decisions involving parent-child immunity in which one of the members of the relevant family relationship was killed in the occurrence giving rise to the claim.

Smith involved the death of a child whose parents were unmarried. The child, who lived with his mother, was killed in an accident while riding as a passenger in a car allegedly negligently operated by the father. This Court, over a dissent, affirmed a dismissal of the action based on parent-child immunity as it related to certain requirements of the wrongful death statute, currently codified as Maryland Code (1974, 1998 Repl.Vol.), §§ 3-902(a) and 3-901(e) of the Courts and Judicial Proceedings Article (CJ). CJ § 3-902(a) creates the cause of action by providing that "[a]n action may be maintained against a person

[766 A.2d 609]

whose wrongful act causes the death of another." "Wrongful act" is defined in CJ § 3-901(e) to mean "an act, neglect, or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if death had not ensued." We pointed out in *Smith*, by citing decisions of this Court rendered as early as 1880, that the "party injured" is the decedent. *Smith*, 319 Md. at 143 n. 4, 571 A.2d at 1221 n. 4. We further cited decisions rendered from 1877 to 1969 holding that the defenses of contributory negligence and assumption of the risk on the part of the decedent bar the survivor's wrongful death act claim. *Id.* at 144-45, 571 A.2d at 1222. Consequently, in addressing the parent-child immunity defense, we looked to the relationship between the decedent and the tortfeasor to determine whether the decedent could "maintain an action and recover damages if death had not ensued." CJ § 3-901(e).

The plaintiff-mother in *Smith*, looking at the parent-child relationship as if death had not ensued, argued that there was no relationship to protect because the child never lived with his father. We said, however, that "[r]ights and obligations, privileges and duties—the elements of parenthood—existed between the father and child despite that the child `lived with his mother from the time of his birth until his death and never lived with his father.'" *Id.* at 147, 571 A.2d at 1223. Consequently, the father was immune from the suit.

Smith never directly addressed the effect on the immunity doctrine of the termination of the relationship of parent and child by the child's death in the accident because the decision turned on the requirement of the wrongful death statute that the viability of the claim of the injured party be tested as if death had not ensued. This made the relevant period of the relationship between father and son the period before the accidental death and not after it. In the instant matter the injured person is Miranda and the alleged tortfeasor is Susan. If death had not ensued Miranda could sue Susan. There is no inter-sibling immunity.

Mahnke, 197 Md. 61, 77 A.2d 923, was not a wrongful death case, although the facts were that the plaintiff's mother had been murdered by her father who, one week later, committed suicide. Both killings took place in the immediate presence of the plaintiff. It is sufficient for present purposes to note that this Court characterized the father's acts as "atrocious." *Id.* at 63, 77 A.2d at 923. The theory of the plaintiff's case was that "as a result of her father's acts and the conditions thereby created to which she was subjected, she has suffered shock, mental anguish and permanent nervous and physical injuries." *Id.* We held that parent-child immunity did not apply under the facts presented in *Mahnke*. We reasoned that "there can be no basis for the

contention that the daughter's suit against her father's estate would be contrary to public policy, for the simple reason that there is no home at all in which discipline and tranquility are to be preserved." *Id.* at 68, 77 A.2d at 926. The facts of the case showed a "complete abandonment of the parental relation" and that "the rule giving him immunity from suit by the child, on the ground that discipline should be maintained in the home, cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges, including his immunity from suit." *Id.*

Mahnke formed the foundation for our recent decision in *Eagan*, 347 Md. 72, 698 A.2d 1097. *Eagan* involved a wrongful death action. The plaintiffs were the children of a mother who had been killed by her husband, the father of the children. The children argued that because their mother could have sued their father in negligence, free of any spousal immunity defense, their claim was not subject to parent-child immunity.⁶ We said that the

[766 A.2d 610]

children's claim "is not derivative in the sense asserted," inasmuch as the children sought "to recover damages for [their] own loss accruing from the decedent's death." *Id.* at 82, 698 A.2d at 1102. Thus, the effect of *Eagan* when coupled with *Gross* is that, in addition to the need of the plaintiff to satisfy the condition of the wrongful death statute, *i.e.*, that the claim be one which the injured person could have brought had death not ensued, this Court will also look to the relationship between the beneficial plaintiff and the tortfeasor in a wrongful death action to determine whether there is parent-child immunity.

Under the circumstances in *Eagan*, where the killing amounted at least to the crime of voluntary manslaughter, we held as a matter of law that there was no immunity on the following rationale:

"When the death is occasioned by murder or voluntary manslaughter, however, any remaining relationships are far more likely to be sufficiently shattered to be beyond further impairment by a lawsuit. The blow is not just the death itself, or even the hard fact that it was caused by the other parent, but rather that the killing was intentional and not the product of mere carelessness. Added to the psychological trauma of that are the likely collateral consequences of such criminal behavior. The evidence in this case demonstrates the point. When this suit was filed, there was no longer a family unit; Gladys was dead, John was in prison, and Laura and Kevin were in the legal and physical custody of another couple. John had no ability to exercise any parental discretion or control; because he was in prison, guardians had been appointed of the persons and the property of the children. The personal relationships between John and the children had soured to the point that there was little contact between them; John wrote to them from prison, but they did not respond. Certainly, there was no indication of any fraud or collusion between John and his children, and there was no evidence that resources that otherwise would have been devoted to the family unit would be depleted by the lawsuit. Indeed, John testified that his resources had been depleted in defending the criminal charge. In short, the underpinnings of the immunity doctrine no longer existed."

Id. at 83-84, 698 A.2d at 1103.

The facts of the case before us present an even greater lack of underpinnings for the application of the parent-child immunity doctrine than did the facts in *Eagan*. The prerequisite of the wrongful death statute is satisfied here because the injured person, Miranda, could sue her sister. Further, neither family harmony nor parental discipline can be affected in any way by the litigation because both children are dead. The wrongful death claim arose in the Parents as beneficial plaintiffs the moment the

parent-child relationship with Susan, the alleged tortfeasor, terminated.

In holding that parent-child immunity barred the claim of the Parents, the Court of Special Appeals relied heavily on a passage from this Court's opinion in *Eagan*, saying:

"The *Eagan* court specifically declined to allow for an immunity exception to acts of negligence, such as automobile accidents, because:

"[A]lthough such tragedies may well put a serious strain on some of the family relationships, they do not generally destroy a parent-child relationship. A parent who negligently causes the death of his or her spouse or of a child can still maintain a parent-child relationship; *the family, even in its grief, can survive.*"

"347 Md. 72, 83, 698 A.2d 1097[, 1103] (1997) (emphasis added). We feel constrained to follow that reasoning...."

Bushey, 130 Md.App. at 181, 745 A.2d at 450. *Eagan* was a case in which the children

[766 A.2d 611]

and their father were living. It was their mother who had been intentionally killed. In that case the children were suing the father who would have had an immunity defense had his conduct been negligent, and not intentional. Here, the Parents are not suing a living child, and the above-quoted rationale from *Eagan* is inapplicable..

Another justification advanced as a basis for parent-child immunity is "the prevention of fraud and collusion." *Warren*, 336 Md. at 625, 650 A.2d at 255. That risk is completely absent in the instant matter. From the liability standpoint the Petitioners have no family members who can testify as to the happening of the accident. Proof of Susan's liability, if any, will depend upon physical facts and independent witnesses. From the standpoint of damages, the risk, if any, of fraud and collusion that is faced by Northern would not seem to be any greater in this case than in any case in which an insured sues an insurer on first-party coverage.

The third policy justification accepted as a basis for parent-child immunity is "the threat that litigation will deplete family resources." *Id.* at 625, 650 A.2d at 255. Where, as here, there is third-party and first-party insurance coverage the reference is to "the consequences of an award that exceeds available coverage." *Renko*, 346 Md. at 479, 697 A.2d at 476 (footnote omitted). This risk would seem almost certainly to be non-existent in the instant matter. The overwhelming probability is that Susan, a seventeen year old high school student, died intestate. Thus any estate assets that would be applied to the claim of the Parents, as creditors, would be assets that would otherwise be paid by the estate to the Parents, as distributees, under Md.Code (1974, 1991 Repl.Vol.), § 3-104(b) of the Estates and Trusts Article.

For these reasons, we hold that parent-child immunity does not bar the Parents' claim against the Estate of Susan under the facts of this particular case.

III

The final matter requiring our attention is a procedural error. Once again we are presented with an appeal in a declaratory judgment case in which the trial court failed to enter a written declaration of the rights of the parties. Nor did it file any written

opinion which could be treated as a declaratory judgment. Instead, the docket entry and the separate document on which the judgment is set forth recite simply that summary judgment was entered in favor of Northern.

"This Court has reiterated time after time that, when a declaratory judgment action is brought, and the controversy is appropriate for resolution by declaratory judgment, 'the trial court must render a declaratory judgment.' *Christ v. [Maryland] Department [of Natural Resources]*, 335 Md. 427, 435, 644 A.2d 34, 38 (1994) "[W]here a party requests a declaratory judgment, it is error for a trial court to dispose of the case simply with oral rulings and a grant of ... judgment in favor of the prevailing party.' *Ashton v. Brown*, 339 Md. 70, 87, 660 A.2d 447, 455 (1995), and cases there cited."

Harford Mut. Ins. Co. v. Woodfin Equities Corp., 344 Md. 399, 414-15, 687 A.2d 652, 659 (1997).

The error, however, is not jurisdictional. This Court may, in its discretion, review the merits of the controversy and remand for the entry of an appropriate declaratory judgment by the circuit court. *Compare Maryland Ass'n of Health Maintenance Organizations v. Health Servs. Cost Review Comm'n*, 356 Md. 581, 741 A.2d 483 (1999) (remanding for the entry of a declaratory judgment); *Ashton v. Brown*, 339 Md. 70, 660 A.2d 447 (1995) (same); *Robert T. Foley Co. v. Washington Suburban Sanitary Comm'n*, 283 Md. 140, 389 A.2d 350 (1978) (same) with *Harford Mut. Ins. Co. v. Woodfin Equities Corp.*,

[766 A.2d 612]

344 Md. 399, 687 A.2d 652 (remand without reaching merits of coverage issues).

Accordingly, on remand and after resolution of the issue addressed in Part I.C, *supra*, the circuit court should enter a written declaration of the rights of the parties.

JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AND TO REMAND THIS ACTION TO THE CIRCUIT COURT FOR CHARLES COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE RESPONDENT, NORTHERN ASSURANCE COMPANY OF AMERICA.

ELDRIDGE and RAKER, JJ., concur.

ELDRIDGE, J., concurring:

I agree that the judgments below should be reversed, and I concur in Parts I and III of the majority opinion. Furthermore, the majority correctly concludes in Part II of the opinion that the parents' claim is not barred by the doctrine of parent-child immunity. Nonetheless, I do not agree with the majority that there is a sound basis for distinguishing *Smith v. Gross*, 319 Md. 138, 571 A.2d 1219 (1990). The public policy rationale for not applying parent-child immunity in this case, which is the same public policy rationale underlying our refusal to apply parent-child immunity in *Eagan v. Calhoun*, 347 Md. 72, 698 A.2d 1097 (1997), cannot be reconciled with the decision in *Smith v. Gross*. The *Smith v. Gross* decision was not supported by any enactments of the General Assembly, was not supported by any prior decisions of this Court, and was not supported by public policy. Instead of attempting to

distinguish *Smith v. Gross*, the case should be overruled.

As discussed by Judge Wilner for the Court in *Eagan v. Calhoun*, *supra*, 347 Md. at 74, 76, 698 A.2d at 1099, the doctrine of parent-child immunity from suit in tort actions did not exist under English common law or Maryland common law prior to the twentieth century. The doctrine was invented by the Supreme Court of Mississippi in 1891, *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891), and was initially adopted by this Court in 1930, *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930).¹ The doctrine has never been sanctioned by the General Assembly of Maryland.

The principal public policy in support of the judicially created parent-child immunity doctrine is "the protection of family integrity and harmony and of parental discretion in the discipline and care of the child..." *Eagan v. Calhoun*, *supra*, 347 Md. at 75, 698 A.2d at 1099. See, e.g., *Renko v. McLean*, 346 Md. 464, 469, 697 A.2d 468, 470 (1997) ("the parent-child immunity doctrine ... serv[es] the compelling public interest in preserving, under normal circumstances, the internal harmony and integrity of the family unit and parental authority in the parent-child relationship"); *Warren v. Warren*, 336 Md. 618, 626, 650 A.2d 252, 256 (1994) ("We are not willing to open the door to rebellious children and frustrated parents and allow the courts to become the arbitrator of parent-child disputes and the overseer of parental decisions"); *Frye v. Frye*, 305 Md. 542, 551, 505 A.2d 826, 831 (1986) ("the chief reason' for the rule [is] that 'such tort actions would disrupt and destroy the peace and harmony of the home which is against the policy of the law,'" quoting *Waltzinger v. Birsner*, 212 Md. 107, 126, 128 A.2d 617, 627 (1957)). We have also pointed out that the rule prevents "fraud

[766 A.2d 613]

and collusion" and prevents "litigation between parents and children [that] would deplete family resources." *Eagan v. Calhoun*, *supra*, 347 Md. at 75, 698 A.2d at 1099.²

Under circumstances where the public policy reasons underlying parent-child immunity in tort actions have no application, *i.e.*, under circumstances where, at the time of the tort action, there is no parent-minor child relationship which will be disrupted by the tort suit, this Court has generally held that the suit is not barred by the doctrine of parent-child immunity. See *Eagan v. Calhoun*, *supra*, 347 Md. at 76-77, 698 A.2d at 1099-1100 (In prior cases, "we essentially adopted the view ... that, although the doctrine was useful within the bounds of a normal parent-child relationship, it had no rational justification where the foundation did not exist"); *Warren v. Warren*, *supra*, 336 Md. 618, 650 A.2d 252 (majority opinion), 336 Md. 631, 650 A.2d 258 (Raker, J., concurring) (Parent-child immunity doctrine does not bar a child's negligence action against his stepparent; as emphasized in the concurring opinion, the stepparent did not stand *in loco parentis* to the child); *Hatzinicholas v. Protopapas*, 314 Md. 340, 357, 550 A.2d 947, 956 (1988) (Parent-child immunity is inapplicable to a tort suit brought by a minor child against her father's business partner, even though the father and business partner may have been joint tortfeasors and the partner might be able to obtain contribution from the father, with the Court stating: "Preservation of the family interests ... does not require that we extend parent-child immunity to bar any recovery from a parent's partner"); *Waltzinger v. Birsner*, *supra*, 212 Md. 107, 128 A.2d 617 (An emancipated child may sue his or her parent in tort); *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951) ("there can

be no basis for the contention that the daughter's suit against her father's estate would be contrary to public policy, for the simple reason that there is no home at all in which discipline and tranquility are to be preserved").

The above-cited cases clearly reflect the principle that the court created doctrine of parent-child immunity is inapplicable where a parent-minor child relationship does not exist and where, consequently, the public policy underlying the doctrine would not be served. The only case in this Court representing an exception to this principle is *Smith v. Gross, supra*, 319 Md. 138, 571 A.2d 1219. *Smith v. Gross* is wholly out-of-step with our other cases dealing with parent-child immunity from tort suits.

Smith v. Gross, like *Eagan v. Calhoun, supra*, 347 Md. 72, 698 A.2d 1097, and the present case, was a wrongful death action. Also, as in the case at bar, there was a count under the survival statute. Moreover, the actions in both this case and the *Smith* case were based on the death of a minor child in an automobile accident, allegedly caused by the negligent driving of another family member. In *Smith*, the parents were not married, did not live together as a family unit, and the child lived with his mother. The child had never lived with his father. A few days after the child's second birthday, the father was driving an automobile with the child as a passenger, and the child died in an accident allegedly caused by the father's negligent driving. The child's mother, who was the personal

[766 A.2d 614]

representative of the child's estate, brought wrongful death and survival actions against the father. The trial court granted a motion to dismiss based on parent-child immunity, and this Court, in a 5-2 decision, affirmed on that ground.

The plaintiff-appellant's principal argument in *Smith* was that "the parent-child immunity doctrine is inapplicable to the case at bar because there is no parent-child relationship to protect." ³ The plaintiff-appellant contended: "The key to the immunity doctrine is the protection of the parent-child relationship. Upon the death of the infant, this relationship is extinguished. There simply is no relationship to protect and no policy reason to invoke the doctrine." ⁴ Reliance was placed on *Waltzinger v. Birsner, supra*, 212 Md. 107, 128 A.2d 617, and *Mahnke v. Moore, supra*, 197 Md. 61, 77 A.2d 923.

This Court rejected the plaintiff-appellant's policy argument in *Smith* because, according to the Court, there was a parent-child relationship prior to the tortious conduct and the death. *Smith*, 319 Md. at 148, 571 A.2d at 1223. The Court pointed out that, under the wrongful death statute, "wrongful act" is defined as "an act, neglect, or default ... which would have entitled the party injured to maintain an action and recover damages if death had not ensued." Maryland Code (1974, 1998 Repl.Vol.), § 3-901(e) of the Courts and Judicial Proceedings Article. The Court also pointed out that the survival statute refers to "a personal action which the decedent might have commenced or prosecuted...." Code (1974, 1991 Repl.Vol., 2000 Supp.), § 7-401(y) of the Estates and Trusts Article. Relying on these statutory provisions, the *Smith* majority leaped to the conclusion that a "prerequisite" for bringing a wrongful death or survival action was the ability of the decedent to have brought an action if there had been no death. 319 Md. at 149, 571 A.2d at 1224. Since, in the view of the *Smith* majority, parent-child immunity would have precluded a tort action by the child against the father if there had been no death, the same judicially created immunity precluded wrongful death and survival actions.

The majority today reiterates the holding and "reasoning" of *Smith*. The majority states that there is a "requirement of the wrongful death statute that the viability of the claim of the injured party be tested as if death had not ensued." (Opinion at 609, emphasis added). Referring to *Smith*, the majority continues (*ibid.*): "This made the relevant period of the relationship between father and son the period before the accidental death and not after it." The majority then attempts to distinguish the present case from *Smith* on the ground that, "[i]f death had not ensued[,] Miranda could sue Susan. There is no inter-sibling immunity." (*ibid.*).

Preliminarily, there are problems with the majority's distinction of *Smith* and the majority's view that the relevant period of the parent-child relationship is the period before death. Miranda was a minor and could not have, herself, brought a tort action against Susan. If the sisters had not died, the action against Susan, on behalf of Miranda, would have been brought by Miranda's parents who also are Susan's parents. See Maryland Rule 2-202(b). Language in this Court's opinion in *Schneider v. Schneider*, *supra*, 160 Md. at 22-23, 152 A. at 499-500, the case adopting the doctrine of parent-child immunity, suggests that the parents, on behalf of Miranda, could not have sued their other minor child, Susan.

Furthermore, if the relevant period of the parent-child relationship is the period before the tortious death, then, arguably, both *Eagan v. Calhoun*, *supra*, 347 Md. 72, 698 A.2d 1097, and *Mahnke v. Moore*, *supra*, 197 Md. 61, 77 A.2d 923, are inconsistent with the instant opinion and with

[766 A.2d 615]

Smith v. Gross. In addition, this Court emphasized in *Eagan*, 347 Md. at 82, 698 A.2d at 1102, that a wrongful death action "is not derivative in the sense" that the defenses, or non-defenses, in a wrongful death action are the same as those in a tort action if the decedent had lived. The Court in *Eagan* continued (*ibid.*):

"It follows from the fact that the action is a personal one to the claimant that the claimant is ordinarily subject to any defense that is applicable to him or her, whether or not it would have been applicable to the decedent. Thus, the fact that [the deceased mother] would not have been barred by any doctrine of parent-child immunity from suing [the tortfeasor father] does not relieve [the children] of that impediment."

The converse should also apply. The fact that a plaintiff in a tort suit may have been barred by parent-child immunity from suing the defendant does not mean that different plaintiffs in a wrongful death action, where there is no parent-child relationship, should be barred from suing.

More importantly, however, the reasoning of the majority in *Smith v. Gross* and the majority today is fundamentally flawed. The critical language from the wrongful death act relied upon by the majority, *i.e.* the reference to an act which would have been the basis for a suit if there had been no death, is not a "prerequisite" or a "requirement" for bringing a wrongful death action. The language is simply part of the definition of "wrongful act," and is a shorthand way of describing the tortious conduct that will permit suit. At common law, there was no cognizable tort if death occurred. The references to an act which would have permitted a tort suit if there had not been death was employed in the wrongful death and survival statutes in lieu of listing basic elements of various torts and basic, established defenses.

The language in the wrongful death and survival statutes, referring to an action if death had not ensued, was in the original wrongful death act enacted by the General

Assembly in 1852 and was in the original survival statute enacted by the General Assembly in 1798. See Ch. 299, § 1, of the Acts of 1852; Ch. 101, Subch. 8, § 5, of the Acts of 1798. There was no such thing as a parent-child immunity doctrine in 1798 or 1852. As previously discussed, this Court adopted the doctrine in 1930; the General Assembly has never embraced the doctrine. Obviously, when the General Assembly enacted the survival and wrongful death statutes in 1798 and 1852, it did not contemplate parent-child immunity which was judicially created in 1930. The General Assembly very likely envisioned basic tort defenses then existing such as contributory negligence or assumption of the risk. The Legislature also may have contemplated basic general defenses to various torts which might in the future be adopted pursuant to the authority to change the common law. It is quite doubtful, however, that the Legislature intended that a judicially created defense, designed for certain circumstances because of public policy, would be applied to the entirely different circumstances addressed by the wrongful death and survival statutes, where the public policy would not be served.

The parent-child immunity doctrine was created solely for the situation involving a tort action between a live parent and a live minor child. A tort suit, otherwise authorized by the law, might disrupt the parent-child relationship in this situation. When there is no action between a live parent and a live child, and no parent-minor child relationship to be disrupted by the suit, the immunity doctrine is obviously inapplicable. It was not created by this Court to be applied under such circumstances, as shown by the decisions in *Waltzinger v. Birsner*, supra, 212 Md. 107, 128 A.2d 617, and *Mahnke v. Moore*, supra, 197 Md. 61, 77 A.2d 923. The *Smith v. Gross* opinion, however, misused statutory language, enacted long before the adoption of the parent-child immunity doctrine, to apply that

[766 A.2d 616]

doctrine to a situation where there was no parent-child relationship.

To reiterate, the parent-child immunity doctrine has no statutory basis; it was judicially created solely for the situation where there is an ongoing parent-minor child relationship which an intervivos tort action might disrupt. Where there exists no ongoing parent-minor child relationship to be disrupted, there is utterly no reason to apply the doctrine. *Smith v. Gross* should be overruled.

Judge Raker has authorized me to state that she joins this concurring opinion.

Footnotes

* Rodowsky, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

Back to Reference

1. We discuss this judgment more particularly in Part III, *infra*.

Back to Reference

2. Our disposition of the coverage issue on policy interpretation grounds makes it unnecessary for us to consider the Petitioners' argument based on Maryland Code (1997), § 19-509 of the Insurance Article, an argument that was rejected by the Court of Special Appeals. *Bushey*, 130 Md.App. at 174-77, 745 A.2d at 447-48.

Back to Reference

3. At oral argument in this Court we were advised by counsel for Northern that code "32" has no relevance to the issues in this case.

Back to Reference

4. By definition in Part F, ¶ 4 an "uninsured motor vehicle" includes an "underinsured motor vehicle."

Back to Reference

5. The remaining cases relied upon by Northern also involved policies issued to corporations. See *Marcello v. Moreau*, 672 So.2d 1104, 1105 (La.Ct.App.1996) ("While this language may be unnecessary and superfluous it is obviously irrelevant since the named insured is a corporation"); *Barnes v. Thames*, 578 So.2d 1155, 1163 (La.Ct.App.), writ denied, 577 So.2d 1009 (1991) ("Since the named is a corporation, Daniel cannot be related by blood, adoption, or marriage to the named insured"); *Royal Ins. v. Bennett*, 226 A.D.2d 1074, 642 N.Y.S.2d 125 (1996) (UM/UIM claim by sole stockholder of named corporate insureds); *Truncali v. Fireman's Fund Ins. Co.*, 208 A.D.2d 826, 618 N.Y.S.2d 50, 50 51 (1994) (denying underinsurance benefits to daughter of corporation's owner because corporate policy provided coverage for "owned autos only"); *Kitts v. Utica National Ins. Group*, 106 Ohio App.3d 692, 667 N.E.2d 30, 31 (1995), appeal denied, 74 Ohio St.3d 1513, 659 N.E.2d 1289 (1996) ("There, as here, the policy language clearly differentiated between corporate entities and individuals"); *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 459 (Tex.1997) (rejecting argument that references to family members in policy issued to corporation provided coverage for sole shareholder's daughter). Recently, an intermediate appellate court in Illinois reached a similar conclusion. *Rohe v. CNA Ins. Co.*, 312 Ill.App.3d 123, 244 Ill.Dec. 442, 726 N.E.2d 38, 43 (2000) (holding business automobile policy issued to a corporation did not provide uninsured motorist coverage for owner's son).

Back to Reference

6. Neither the children nor the amicus curiae which sought total abrogation of parent-child immunity cited *Smith v. Gross*.

Back to Reference

1. Interestingly, the Supreme Court of Mississippi overruled *Hewlett v. George* 101 years after that case was decided. See *Glaskox v. Glaskox*, 614 So.2d 906 (Miss.1992).

Back to Reference

2. The persuasiveness of these additional reasons is questionable. Thus, we have abolished the doctrine of interspousal immunity in tort actions based on negligence. See *Doe v. Doe*, 358 Md. 113, 120, 747 A.2d 617, 620 (2000); *Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983). Negligence actions between spouses present the same danger of fraud and collusion as negligence actions between parent and child.

With regard to depleting family resources, many allowable non-tort actions involving parents and children present a much greater danger that family resources will be depleted. In the case of negligence actions between parent and child, there will normally be liability insurance.

Back to Reference

3. *Briefs September Term 1989*, No. 79, appellant's brief at 3.

Back to Reference

4. *Id.* at 6-7.

Back to Reference



North Dakota Supreme Court Opinions ◀▲□/?

Carlson v. Doekson Gross, Inc., 372 N.W.2d 902 (N.D. 1985)

[\[Go to Documents\]](#)

Filed Aug. 15, 1985

HOME
OPINIONS
SEARCH
INDEX
GUIDES
LAWYERS
RULES
RESEARCH
COURTS
CALENDAR
NOTICES
NEWS
FORMS
SUBSCRIBE
CUSTOMIZE
COMMENTS

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edwin Carlson and Iva Carlson, Plaintiffs and Appellants

v.

Doekson Gross, Inc., d/b/a Doekson Gross Insurance Agents,
Defendant, Third-Party Plaintiff and Appellee

Insurance Company of North America, Third-Party Defendant and
Appellee, Union Insurance Agency, Plaintiff and Appellant

v.

Ed Carlson, Defendant and Appellant
and

Union Insurance Agency and Ed Carlson, Plaintiffs, Defendants and
Appellants

v.

American Insurance Company, Additional Party Defendant and Appellee

Civil Nos. 10,823 & 10,824

Appeal from the District Court of Ward County, Northwest Judicial
District, the Honorable Jon R. Kerian, Judge.

REVERSED AND REMANDED.

Opinion of the Court by Gierke, Justice.

Wheeler, Wolf, Peterson, Schmitz, McDonald & Johnson, P.O. Box
2056, Bismarck, ND 58502-2056, for plaintiffs and appellants Edwin
Carlson and Iva Carlson; argued by David L. Peterson.

Pearce, Anderson & Durick, P.O. Box 400, Bismarck, ND 58502, for
plaintiff and appellant Union Insurance Agency. Appearance by Joel W.
Gilbertson.

Tossett & Balerud, P.O. Box 97, Minot, ND 58701, for additional party
defendant and appellee American Insurance Company; argued by
Andrew R. Tossett.

[372 N.W.2d 904]

Carlson v. Doekson Gross, Inc.

Civil Nos. 10,823-10,824

Gierke, Justice.

Edwin Carlson, Iva Carlson, and Union Insurance Agency appeal from a judgment dismissing their claims against American Insurance Company. We reverse the judgment and remand for further proceedings.

On June 7, 1979, Willard Irwin was seriously injured while employed on Edwin and Iva Carlson's farm, commonly referred to as Harrington Ranch. Irwin and his wife sued Edwin Carlson in state district court, alleging that Carlson's negligence was the proximate cause of Irwin's injury. The Irwins also brought an action in federal district court against Massey Ferguson, Ltd. and Massey Ferguson, Inc., the manufacturer of the equipment Irwin was operating at the time of his injury, and Massey Ferguson filed a third-party complaint against Edwin Carlson.

At the time of the injury, Edwin Carlson had numerous insurance policies in effect. The instant appeal involves two policies: a comprehensive general liability policy and an "umbrella" or "excess" policy issued by American Insurance Company (hereinafter American). These policies were procured by Edwin Carlson through Union Insurance Agency [hereinafter Union], and the declarations sheet on each policy lists the named insured as "Edwin O. Carlson dba Aero Block & Cement Company and Carlson Trucking." Carlson notified American of the accident and tendered defense of the two Irwin lawsuits to American, but American denied coverage and refused to defend Carlson in the two actions.

On December 2, 1981, Union filed an action in small claims court against Edwin Carlson for additional premiums due. Carlson removed the action to district court and filed a counterclaim against Union alleging that Union had wrongfully failed to secure coverage for Carlson. Carlson and Union moved that American be joined as an additional party defendant, and each filed a separate complaint against American requesting that the court determine whether Carlson's policies with American covered Irwin's injury. The court subsequently granted American's motion for dismissal of all claims against it, holding that Irwin's injury was not covered under Carlson's policies with American. Judgment was entered in accordance with Rule 54(b), N.D.R.Civ.P., and Carlson and Union have appealed.

The issue presented on appeal is an elementary one: Who is the "named insured" under the American policies? The trial court held that the policies

covered Carlson only in his operations as "Aero Block & Cement Company" and "Carlson Trucking," and that "Harrington Ranch" was a separate entity which was not covered by the policies. Carlson and Union contend that Edwin Carlson is the named insured under the policies and that his farming activities are covered by both the comprehensive general liability policy and the umbrella policy.

Construction of a written contract of insurance is a question of law to be resolved by the court. Aid Insurance Services, Inc. v. Geiger, 294 N.W.2d 411, 413 (N.D. 1980); Kasper v. Provident Life Insurance Co., 285 N.W.2d 548, 553 (N.D. 1979); Stetson v. Blue Cross of North Dakota, 261 N.W.2d 894, 896 (N.D. 1978). On appeal, this court will independently examine and construe the pertinent policy provisions to determine whether the trial court erred in its interpretation of the policy. Aid Insurance Services, Inc. v. Geiger, *supra*, 294 N.W.2d at 413; Stetson v. Blue Cross of North Dakota, *supra*, 261 N.W.2d at 896.

The provision which requires interpretation in this case is the designation of the named insured: "Edwin O. Carlson dba Aero Block & Cement Company and Carlson Trucking." We conclude that under

[372 N.W.2d 905]

this designation the named insured is Edwin O. Carlson.

At the heart of the issue is American's contention that the various business enterprises operated by Edwin Carlson are separate entities. The trial court adopted this reasoning in its memorandum opinion:

"[N]one of the policies of insurance that Carlson had in effect for any of his entities provided coverage for the Irwin accident and Carlson could not reasonably expect that they did. Carlson had no specific policy of insurance which upon reading declared that the Irwin accident was covered.... The farming operation was insured separate and apart from anything else, as is apparent from the depositions. Carlson was content to continue the policy that Harrington had on his ranch, and his comprehensive general liability coverage policies were merely a renewal of previous policies taken out when he had not acquired the Harrington Ranch. The divorcement and segregation of these entities is clear....

The Court is not persuaded [sic] that the information Union Insurance Agency had respecting the purchase by Carlson of the Harrington Ranch was knowledge by Fireman's Fund through its agent that a new entity had been engrafted as an insured upon its policies." (Emphasis added.)

A sole proprietorship which is conducted under a trade name is not a separate legal entity:

"The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business. The individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations."

Duval v. Midwest Auto City, Inc., 425 F. Supp. 1381, 1387 (D. Neb. 1977); see also Southern Insurance Co. v. Consumer Insurance Agency, Inc., 442 F. Supp. 30, 31-32 (E.D. La. 1977). Thus, the trial court's reliance on the "separate entities" operated by Carlson is erroneous. There was only one legal "entity" -- Edwin Carlson. 2

Other courts have reached similar results in cases involving insurance policies naming as insured a trade name of an individual's business. For example, in O'Hanlon v. Hartford Accident and Indemnity Co., 639 F.2d 1019 (3d Cir. 1981), an umbrella policy had been issued to "Coe Management Company," which was a trade name under which O'Hanlon conducted business. O'Hanlon's son was injured in an auto accident while a passenger in a friend's vehicle, and coverage was sought under a provision in the umbrella policy which provided coverage to relatives of the named insured residing in the same household. The court held that the designation of the trade name was synonymous with the individual:

"However, if the description of named insured in the UM (uninsured motorist) coverage endorsement of the policy as Coe Management Company is to be read as synonymous with Patrick J. O'Hanlon, then it is plain that Brian O'Hanlon did in fact achieve status as a person insured under the UM endorsement simply by being a relative of Patrick J. O'Hanlon residing in the same household.

We believe that we are obliged to read the designation of the named insured in the UM endorsement as a synonym for Patrick J. O'Hanlon, or at least

[372 N.W.2d 906]

as though the UM endorsement had identified the named insured as "Patrick J. O'Hanlon, trading as Coe Management Company." O'Hanlon, supra, 639 F.2d at 1024.

In so holding, the court noted that it was not relying upon the doctrine of reformation or any ambiguity in the policy:

"INA argues that it would be error to apply the doctrine of reformation or to create an ambiguity where none exists in order to equate Coe Management and Patrick J. O'Hanlon. We agree that application of either theory to this case would be contrived. We are persuaded by the cases arising under non-owned and temporary substitute coverage which use neither reformation nor ambiguity in holding that an insured's trade name and given name should be equated. We, therefore, hold, as do the cases cited and discussed above, that where an insured purchases a policy in a trade name, the policy will be viewed as if issued in his given name." O'Hanlon, supra, 639 F.2d at 1025.

Similarly, in Purcell v. Allstate Insurance Co., 168 Ga. App. 863, 310 S.E.2d 530 (1983), the Court of Appeals of Georgia held that Purcell was the named insured under a "business auto policy" issued to "Purcell Radiator Serv.," and that Purcell's wife could recover as a relative of the named insured. The court based its decision primarily on the inability of Purcell Radiator Service, a sole proprietorship with no separate legal identity, to own the vehicle listed in the policy. The court characterized Purcell Radiator Service as a "non-owning non-entity," and concluded that "Purcell, as the owner of the vehicle, was the 'entity' to whom the uninsured motorist coverage was extended by Allstate's policy and was the true 'named insured' in that regard." Purcell, supra, 168 Ga. App. at 310 S.E.2d at 532-33.

In this case, where Carlson's name appears along with the trade names he does business under, we conclude that Carlson is the named insured under the policies. Carlson owns the assets of the various businesses, and he is the "entity" who would be subject to the liability indemnified against by the two American policies. Aero Block & Cement Company and Carlson Trucking are not separate legal entities: they cannot own property, are not subject to liability in any suit, and cannot enter into a contract. The "party" who contracted for the insurance in this case was Edwin Carlson -- there was no other legal entity which was capable of entering into the contract. We hold that when the designation of the named insured in the form "Individual dba,...." the individual is the named insured, irrespective of whatever language follows the "dba."

This court was presented with a similar situation in Prince v. Universal Underwriters Insurance Co., 143 N.W.2d 708 (N.D. 1966). Prince owned and operated an automobile dealership, implement dealership, service station, bulk oil plant, and appliance sales business. The auto dealership was incorporated; the other businesses were sole proprietorships operated under various designations. Prince purchased a garage liability policy which designated the named insured as "Regent

Garage Company (A corporation) and/or Leonard E. Prince d/b/a Regent Implement Company, Regent, Hettinger County, North Dakota." In holding that a fire at Prince's bulk oil plant was covered under the policy, the court concluded that the policy covered all of Prince's business operations, including the bulk oil business.

Although the reasoning employed by the court in Prince varies somewhat from our reasoning in this case, Prince supports the proposition that the designation of the named insured will not necessarily limit the risks insured against. As the court noted, if the insurer wished to limit its liability "it could have done so by an endorsement to the policy." Prince, supra, 143 N.W.2d at 714. We agree that any limitation on coverage should be accomplished by specific exclusions or endorsements to the policy, not by a limiting designation of the named insured.

Two other issues relating solely to the umbrella policy were addressed by the trial court in its memorandum opinion and

[372 N.W.2d 907]

warrant comment. First, the court held that coverage under the umbrella policy was precluded by the definition of "named insured," which required notification if additional "organizations" were acquired by the named insured. The relevant policy provision states:

"As used in this policy the following words or phrases mean:

NAMED INSURED: (1) the named insured stated in the declarations; (2) any wholly owned subsidiary of the named insured now existing or hereafter acquired; or (3) any other organization the control and management of which is now held or hereafter acquired by the named insured; provided under (2) with respect to any subsidiary hereafter acquired and under (3) with respect to any other organization the control and management of which is hereafter acquired this policy will apply only for the first 30 days following date of such acquisition unless the named insured reports such acquisition to the Company and appropriate endorsement is issued to form a part hereof."

Because we have concluded that Edwin Carlson is the named insured under the policy, it is irrelevant that he did not advise American of his purchase of Harrington Ranch. Harrington Ranch is not a separate entity or "organization" which must be listed as a named insured before coverage is afforded. Subsection 3 of the above provision applies only if the newly acquired "organization" is a separate legal entity which must be listed as a named insured. Edwin Carlson is the named insured under the

umbrella policy, and it is unnecessary to separately list Harrington Ranch, a sole proprietorship, as a named insured to afford coverage to Carlson's activities on the ranch. Absent a specific exclusion limiting coverage, all of Carlson's business enterprises operated as sole proprietorships were covered by the umbrella policy.

The trial court also found that coverage under the umbrella policy was precluded by Carlson's failure to obtain primary coverage for the Irwin accident. In the endorsement to the umbrella policy listing the schedule of primary policies, a workmen's compensation and employer's liability policy in the amount of \$100,000 for each occurrence is listed. The trial court concluded that failure to obtain the primary coverage precluded coverage under the umbrella policy, based upon Clause 11 of the "Conditions" section of the umbrella policy:

"MAINTENANCE OF PRIMARY INSURANCE

Insurance afforded by the primary policies described in item 6 of the declarations with limits of liability not less than as stated in item 6 of the declarations, or renewals or replacements thereof not more restricted, shall be in full effect at the inception of this policy and shall be maintained during the period of this policy, except for reduction of aggregate limits solely as a result of payment of claims arising out of occurrences during this policy period. If such primary insurance is not maintained in full effect by the Insured, or if any limits of liability of a primary policy are less than that stated in item 6 of the declarations, or if there is any change in the scope of coverage under any primary insurance, the insurance afforded by this policy shall apply in the same manner as though such primary policies and limits of liability as stated in item 6 had been in effect, so maintained and unchanged."

We do not read this provision to wholly deny coverage if the primary policy is never acquired. The trial court made a distinction between a situation where the primary policy is in place at the time the umbrella is purchased and later allowed to lapse, and a situation where the primary coverage is never acquired. We see no such distinction in Clause 11 of the policy. Clause 11 merely provides that if for any reason

primary coverage as listed in the endorsement is unavailable, the umbrella provides coverage as if the primary coverage had been in effect. Any other interpretation would allow the company to escape liability on a risk for which it has charged premiums.

The company is not prejudiced by this interpretation of Clause 11.

Whether or not the primary coverage is in effect, the company's potential liability is the same --

[372 N.W.2d 908]

coverage under the umbrella policy does not apply until the declared primary coverage threshold is met. We therefore conclude that coverage under the umbrella policy is not wholly precluded by any failure to obtain primary coverage as listed in the endorsement.³

For the foregoing reasons, we conclude that the trial court erred in granting judgment dismissing all claims against American. We reverse the judgment and remand to the district court for further proceedings in accordance with this opinion.⁴

H.F. Gierke III
Ralph J. Erickstad, C.J.
Gerald W. VandeWalle
Beryl J. Levine
Vernon R. Pederson, S.J.

Pederson, S.J., sitting in place of Meschke, J., disqualified.

Footnotes:

1. We note that in the umbrella policy a colon appears after the "dba" in the designation of the named insured. We find no significance in the additional colon, and treat the designations in the two policies

as identical.

2. There is some confusion in the record regarding the status of Aero Block & Cement Company. Carlson asserts in his brief that Aero Block is a

corporation, whereas Union's brief states that Aero Block is a sole proprietorship. If Aero Block is indeed a corporation the interpretation of the named insured designation in the two American policies is further complicated, because an individual obviously cannot "do business as" a corporation. We conclude, however, that any potential ambiguity created by such a designation is irrelevant to the issue in this case, which is whether Edwin Carlson is a named insured. No issue has been raised regarding coverage of Aero Block as a corporation under the policies which would require resolution of the issue. We will therefore, for the sake of clarity, treat Aero Block as a sole proprietorship for purposes of

this opinion.

3. We express no opinion on whether there has in fact been a failure to obtain primary coverage as required by the umbrella policy. Because we are remanding to the district court for further proceedings, we leave this issue for determination on remand. This issue may also be affected by the trial court's final determination on coverage under the comprehensive general liability policy.

4. We note that American in its brief intimates that it may have further defenses to coverage based upon policy provisions which were not addressed by the district court. We do not intend to foreclose any right of American to raise such defenses. If no further defenses are raised, however, the district court should enter judgment in favor of the Carlsons declaring that coverage is provided under the American policies for the Irwin accident.

[Top](#) [Home](#) [Opinions](#) [Search](#) [Index](#) [Lawyers](#) [Rules](#) [Research](#) [Courts](#) [Calendar](#) [Comments](#)

371 U.S. 178 (1962)

FOMAN

v.

DAVIS, EXECUTRIX.

No. 41.

Supreme Court of United States.

Argued November 14, 1962.

Decided December 3, 1962.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

179 *179 *Milton Bordwin* argued the cause and filed briefs for petitioner.*Roland E. Shaine* argued the cause for respondent. With him on the briefs was *Richard R. Caples*.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Petitioner filed a complaint in the District Court alleging that, in exchange for petitioner's promise to care for and support her mother, petitioner's father had agreed not to make a will, thereby assuring petitioner of an intestate share of the father's estate; it was further alleged that petitioner had fully performed her obligations under the oral agreement, but that contrary thereto the father had devised his property to respondent, his second wife and executrix. Petitioner sought recovery of what would have been her intestate share of the father's estate. Respondent moved to dismiss the complaint on the ground that the oral agreement was unenforceable under the applicable state statute of frauds. Accepting respondent's contention, the District Court entered judgment on December 19, 1960, dismissing petitioner's complaint for failure to state a claim upon which relief might be granted. On December 20, 1960, petitioner filed motions to vacate the judgment and to amend the complaint to assert a right of recovery in *quantum meruit* for performance of the obligations which were the consideration for the assertedly unenforceable oral contract. On January 17, 1961, petitioner filed a notice of appeal from the judgment of December 19, 1960. On January 23, 1961, the District Court denied petitioner's motions to vacate the judgment and to amend the complaint. On January 26, 1961, petitioner filed a notice of appeal from denial of the motions.

180 On appeal, the parties briefed and argued the merits of dismissal of the complaint and denial of petitioner's *180 motions by the District Court. Notwithstanding, the Court of Appeals of its own accord dismissed the appeal insofar as taken from the District Court judgment of December 19, 1960, and affirmed the orders of the District Court entered January 23, 1961. 292 F. 2d 85. This Court granted certiorari. 368 U. S. 951.

The Court of Appeals reasoned that in the absence of a specific designation of the provision of the Federal Rules of Civil Procedure under which the December 20, 1960, motion to vacate was filed, the motion would be treated as filed pursuant to Rule 59 (e), rather than under Rule 60 (b),^[1] since, under Rule 73 (a),^[2] a motion under Rule 59 suspends the running of time within which an appeal may be perfected, the first notice of appeal was treated as premature in view of the then pending motion to vacate and of no effect. The Court of Appeals held the second notice of appeal, filed January 26, 1961, ineffective to review the December 19, 1960, judgment dismissing the complaint because the notice failed to specify that the appeal was being taken from that judgment as well as

181 *181 from the orders denying the motions. Considering the second notice of appeal, therefore, only

as an appeal from the denial by the District Court of the motions to vacate and amend, the Court of Appeals held that there was nothing in the record to show the circumstances which were before the District Court for consideration in ruling on those motions; consequently it regarded itself as precluded from finding any abuse of discretion in the refusal of the court below to allow amendment.

The Court of Appeals' treatment of the motion to vacate as one under Rule 59 (e) was permissible, at least as an original matter, and we will accept that characterization here. Even if this made the first notice of appeal premature, we must nonetheless reverse for we believe the Court of Appeals to have been in error in so narrowly reading the second notice.

The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal.

182 It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by *182 counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action." Rule 1.

The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Rule 15 (a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), ¶¶ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

183 *183 Separate memorandum of MR. JUSTICE HARLAN, in which MR. JUSTICE WHITE joins.

I agree with the Court as to the dismissal of petitioner's appeal by the Court of Appeals. However, as

to her motion to vacate the order of the District Court and for leave to amend the complaint, I believe such matters are best left with the Courts of Appeals, and I would dismiss the writ of certiorari, in that respect, as improvidently granted.

[1] Rule 59 (e) provides:

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 60 (b) provides in relevant part:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. . . ."

[2] Rule 73 (a) provides in relevant part:

"The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules . . . granting or denying a motion under Rule 59 to alter or amend the judgment"

Save trees - read court opinions online on Google Scholar.

667 N.W.2d 441 (2003)

GENERAL CASUALTY COMPANY OF WISCONSIN, Appellant,

v.

OUTDOOR CONCEPTS, et al., Respondents.

No. C7-03-256.

Court of Appeals of Minnesota.

August 12, 2003.

442 *442 Michael W. McNee, Andrea E. Reisbord, Cousineau, McGuire & Anderson, Minneapolis, MN, for appellant.

Joel W. Brodd, Brodd Law Firm, LLC, Hudson, WI, for respondents.

Considered and decided by SCHUMACHER, Presiding Judge, RANDALL, Judge, and KALITOWSKI, Judge.

OPINION

KALITOWSKI, Judge.

On appeal from summary judgment, appellant contends that (1) respondent Joe Ebertz was not an "insured" under a commercial automobile policy issued to "**Outdoor Concepts Joe Ebertz DBA**"; and (2) Ebertz made an election within the meaning of Minn.Stat. § 65B.49, subd. 3a(5) (2002), and is precluded from recovering Personal Injury Protection or Underinsured Motorist benefits under his commercial policy or from otherwise stacking coverage.

FACTS

On August 25, 2001, respondent Joe Ebertz was riding his bicycle on a country road north of his home in Hudson, Wisconsin, when he was struck head-on by a pickup truck driven by an underinsured motorist. Following the accident, Ebertz settled his claims against the underinsured motorist for \$50,000, the liability limit under the motorist's policy.

At the time of the accident, respondent and his wife were insured under a personal automobile insurance policy issued by Allstate Insurance Company pursuant to the laws of Wisconsin. In June 2002, respondent settled with Allstate for \$50,000 in Underinsured Motorist benefits (UIM) for damages incurred in the accident.

Ebertz also insured the vehicles used in his landscaping business, **Outdoor Concepts**, under a commercial automobile policy obtained through his insurance agent in Minnesota. The agent completed an application with appellant, listing the applicant as "**Outdoor Concepts Joe Ebertz DBA**," and applied for no-fault coverage and \$250,000 in UIM coverage. Appellant prepared a declarations page for the commercial automobile policy, listing the named insured as "**Outdoor Concepts Joe Ebertz DBA**."

The commercial automobile policy contained an endorsement entitled "Minnesota Uninsured and

Underinsured Motorists Coverage," which stated that appellant will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an underinsured motor vehicle. The endorsement defined "insured" as follows:

B. WHO IS AN INSURED

1. You.
2. If you are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto."
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

The commercial policy contained another endorsement entitled the "Minnesota Personal Injury Protection" (PIP). The PIP endorsement provides that appellant will pay PIP benefits incurred for "bodily injury" sustained by an "insured" caused in an "accident." The policy defines "insured" as the "named insured."

443 Ebertz made a demand on appellant for no-fault benefits and payment of the \$250,000 in UIM benefits. Appellant denied *443 the claim, contending Ebertz was not an "insured" under the policy.

Appellant commenced a declaratory-judgment action to determine its obligations under the commercial automobile policy issued to **Outdoor Concepts Joe Ebertz DBA Cross-motions** for summary judgment were presented to the district court. The parties agreed there were no genuine issues of material fact and requested that the court determine whether Ebertz was an "insured" under the policy and whether he waived his right to recover pursuant to the anti-stacking provision of Minn.Stat. § 65B.49, subd. 3a(5) (2002).

The district court ruled in favor of Ebertz, concluding that (1) Ebertz was a named insured under appellant's policy; and (2) because the Allstate policy was not a "plan of reparation security" as defined by statute, adding the UIM limits of the Wisconsin Allstate policy to the UIM limits of appellant's policy did not constitute stacking. Appellant challenges the district court's grant of summary judgment to Ebertz.

ISSUES

1. Did the district court err in determining that Ebertz was an "insured" under the commercial automobile policy issued by appellant?
2. Did the district court err in determining that Ebertz did not waive his claims against appellant by accepting the available UIM limits under the Allstate policy?

ANALYSIS

I.

On appeal from summary judgment, this court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in applying the law. *State by*

Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

Construction of an insurance policy involves a question of law. Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 886-87 (Minn.1978). When, as here, there is no dispute of material fact, this court independently reviews the district court's interpretation of the insurance contract. Zimmerman v. Safeco Ins. Co. of Am., 605 N.W.2d 727, 729 (Minn.2000).

Appellant argues that the commercial automobile policy covers only the named insured and that the named insured is **Outdoor Concepts**, Ebertz's business, not Ebertz as an individual. Appellant relies primarily on Jensen v. United Fire & Cas. Co., 524 N.W.2d 536 (Minn.App. 1994), review denied (Minn. Feb. 3, 1995). In Jensen, a father claimed UIM benefits for his daughter under an insurance policy that listed the father's sole proprietorship as the named insured. *Id.* at 539-40. Specifically, the insurance policy listed the named insured as "EAGLE EXCAVATING JENSEN ROGER DBA." *Id.* This court affirmed the district court's grant of summary judgment in favor of the insurer, finding that the named insured was a business, not an individual, and noting the "commercial" nature of the policy. *Id.*

444 But the language in Jensen addressing who is insured when a commercial automobile policy insures a sole proprietorship is contrary to the Minnesota Supreme Court's decision in Gabrelcik v. Nat'l Indem. Co., 269 Minn. 445, 131 N.W.2d 534 (1964). Gabrelcik involved a woman who was involved in an accident while driving a car she borrowed from the used-car dealership owned by her husband as a sole proprietor. *Id.* at 445-47, 131 N.W.2d at 535. The woman asserted she was entitled to liability benefits under the substituted vehicle clause of her policy. *Id.* But because *444 the substituted vehicle clause did not provide coverage where the named insured or the named insured's spouse owned the substituted vehicle, the insurer argued that the woman's husband owned the borrowed car as the sole proprietor of the business, and therefore, the woman was not entitled to coverage. *Id.* The woman argued that her husband did not own the car because it was owned by a separate legal entity—the used-car dealership. *Id.* The Minnesota Supreme Court ruled in favor of the insurer, holding the husband and the used-car dealership were one and the same. *Id.* at 449, 131 N.W.2d at 537.

Whether the vehicle is registered in the husband's name or in the name of the business which he owns and operates as a sole proprietorship, the result is the same; namely, that this vehicle was owned by the insured's spouse who resides in the same household.

Id. at 536.

Here, the district court concluded that because it was a decision of the Minnesota Supreme Court, the holding in Gabrelcik is controlling, and Ebertz qualifies as a named insured under the commercial automobile policy. We agree.

A significant majority of authorities support the view that when an insurance policy lists a sole proprietorship's trade name as the "named insured," the policy extends coverage to the sole proprietor as well as the business. For example, in O'Hanlon v. Hartford Accident & Indem. Co., 639 F.2d 1019, 1026 (3d Cir.1981), the Third Circuit held that an insurance policy issued in the insured's trade name, and agreeing to cover the named insured's resident relatives, provided uninsured motorist coverage to the named insured's son. In that case, O'Hanlon sought uninsured motorist coverage under the policy after his son suffered serious injuries. The policy agreed to cover "the Named Insured * * * and, while residents of the same household, the * * * relatives of [the named insured]." *Id.* at 1026. The policy designated the named insured as "Coe Management Company," the trade name under which O'Hanlon operated his business. *Id.* at 1021. In conducting its

analysis, the Third Circuit stated that "an insured's trade name and given name should be equated" and that "where an insured purchases a policy in a trade name, the policy will be viewed as if issued in his given name." *Id.* at 1025.

Similarly, in *Purcell v. Allstate Ins. Co.*, 168 Ga.App. 863, 310 S.E.2d 530, 533 (1983), the Court of Appeals in Georgia held that Purcell was the named insured under a commercial automobile policy listing the named insured as "Purcell Radiator Serv." and that Purcell's wife could recover as a relative of the named insured. The court based its decision primarily on the inability of Purcell Radiator Service, a sole proprietorship with no separate legal identity, to own the vehicle listed in the policy. *Id.* at 532. The court concluded that

Purcell, as the owner of the vehicle, was the 'entity' to whom the uninsured motorist coverage was extended by Allstate's policy and was the true 'named insured' in that regard.

Id.

Numerous other jurisdictions have agreed that policies that list a trade name as the "named insured" extend coverage to the individuals operating those businesses. See, e.g., *Simmons v. Ins. Co. of N. Am.*, 17 P.3d 56, 62 (Alaska 2001) (when a business owner acquires insurance in his trade name, coverage extends to the owner as well as the business); *Bushey v. N. Assurance Co. of Am.*, 362 Md. 626, 766 A.2d 598, 603 (2001) (policy identifying insured as "William Bushey t/a Bushey's Automotive Repair" covers the individual); *445 *Chmielewski v. Aetna Cas. & Sur. Co.*, 218 Conn. 646, 591 A.2d 101, 113 (1991) ("We also agree that one who operates a business under a trade name is nonetheless an individual insured under a policy issued in that trade name."); *Carlson v. Doekson Gross, Inc.*, 372 N.W.2d 902, 905 (N.D. 1985) ("A sole proprietorship which is conducted under a trade name is not a separate legal entity"); *Patrevito v. Country Mut. Ins. Co.*, 118 Ill.App.3d 573, 74 Ill. Dec. 259, 455 N.E.2d 289, 290-91 (1983) (driver was "named insured" within automobile policy provisions issued to his noncorporate business).

Likewise, several insurance treatises support the proposition that when issuing a policy to an individual operating a business under a trade name, the named insured is the individual. Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 110:5 at 110-12, 110-13 (3d ed.1997) (a policy purchased by an insured father in his trade name would be interpreted as issued in his given name, and references to the named insured would be deemed to refer to him individually); Irvin E. Schermer, *Automobile Liability Insurance* § 40.02[2] at 40-13, 40-14 (3d ed.1995); Alan I. Widiss, *Uninsured and Underinsured Motorist Coverage* § 4.4(C) at 62 (2d ed.1985) (when automobile insurance is issued in an insured's trade name, coverage claims by that individual's relatives have usually been sustained).

In addition, as an alternative holding, the district court concluded that because the declaration page of the commercial automobile policy states that the named insured is an "Individual" but then lists the named insured as "**Outdoor Concepts Joe Ebertz DBA**," the language in appellant's policy is ambiguous and must be resolved against the insurer. See *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn.1989) (courts must construe ambiguous language in an insurance policy against the insurer and in favor of the insured). We agree.

And other jurisdictions have concluded that listing the named insured as an individual d/b/a a trade name results in an ambiguity. In *Stockton v. N.C. Farm Bureau Mut. Ins. Co.*, 139 N.C.App. 196, 532 S.E.2d 566, 568-69 (2000), the North Carolina Court of Appeals concluded that an ambiguity was present when the named insured was listed as "Oak Farm." The court reasoned that "Oak Farm" had no legal existence in itself and the named insured had meaning only in reference to the person

who bought the policy and gave the listing as "Oak Farm." *Id.* Likewise, the appeals court in New Jersey concluded that an automobile insurance policy issued to "Mobile Wash Systems," an unincorporated trade name, was ambiguous and the sole proprietor was the named insured. *American Bankers Ins. Co. v. Stack*, 208 N.J.Super. 75, 504 A.2d 1219, 1221-22 (Law Div.1984); see also *Young v. Ray Am., Inc.*, 673 S.W.2d 74, 81 (Mo.Ct.App. 1984) (finding that listing the named insured as "Dennis and Marjorie Klatt, DBA Klatt Real Estate, Inc." created an ambiguity).

In conclusion, following *Gabrelcik*, we hold that the commercial policy at issue that insured "**Outdoor Concepts** Joe Ebertz DBA" provided coverage for Joe Ebertz, the sole proprietor, as an individual.

II.

Appellant argues that even if we conclude that the commercial automobile policy insures Ebertz as an individual, it is still not liable for payment of benefits. Appellant contends that because Ebertz 446 accepted available coverage under the Allstate policy, requiring appellant to pay ~446 benefits to Ebertz would violate Minnesota's prohibition on stacking. See Minn. Stat. § 65B.49, subd. 3a(5) (insured must select any one limit of liability for any one vehicle). We disagree.

Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). The anti-stacking provision in section 65B.49, subdivision 3a(5), directs "insureds" to select a limit of liability afforded by a "plan of reparation security." According to Minn.Stat. § 65B.43 (2002), certain words and phrases are defined by statute for the purposes of Minn.Stat. §§ 65B.41 to 65B.71 (2002). Thus, an "insured" is defined by statute as "an insured under a plan of reparation security as provided by sections 65B.41 to 65B.71 * * *." Minn.Stat. § 65B.43, subd. 5 (2002). Moreover, "plan of reparation security" is defined as

a contract, self-insurance, or other legal means under which there is an obligation to pay the benefits described in section 65B.49 [the anti-stacking provision].

Minn.Stat. § 65B.43, subd. 15 (2002).

Here, Ebertz's Allstate policy is not a plan of reparation security as defined by the statute because there was no obligation for Allstate to pay the benefits described in the Minnesota No-Fault Automobile Insurance Act, Minn.Stat. §§ 65B.41 to 65B.71. The Allstate policy was issued to Ebertz as a Wisconsin resident and is governed by the laws of the State of Wisconsin. Because the Allstate policy is not a "plan of reparation security," Ebertz is not an "insured" for the purposes of the Minnesota No-Fault Automobile Insurance Act. Thus, the restrictive language of the anti-stacking provision in Minn.Stat. § 65B.49, subd. 3a(5), does not apply to Ebertz. We therefore conclude that Ebertz did not waive his claims against appellant or make an election in accepting the available coverage under the Allstate policy issued pursuant to the laws of Wisconsin.

Finally, appellant argues that the district court erred by refusing to award it an offset from the UIM benefits Ebertz recovered under the Allstate policy. But this argument relates to damages and the ultimate amount of recovery, issues that are not before us in this appeal of a declaratory-judgment action brought to determine liability. Thus, we grant respondents' motion to strike appellant's May 2, 2003, letter submission on the ground that the issue it raises was not presented to the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988).

DECISION

The district court properly held that Ebertz is an "insured" under the commercial automobile insurance policy. And Ebertz did not waive his claims against appellant by accepting benefits under the Allstate policy, which was issued pursuant to the laws of Wisconsin.

Affirmed; motion granted.

Save trees - read court opinions online on Google Scholar.

442 N.W.2d 308 (1989)

Chester HUBRED, et al., Petitioners, Appellant,
v.
CONTROL DATA CORPORATION, as a corporation, and as Trustee of the
Control Data Health Care Plan, Respondent.

No. C1-88-1160.

Supreme Court of Minnesota.

July 14, 1989.

309 *309 J. Kevin McVay, McVay & O'Connor, Minneapolis, for appellant.

Barbara A. Leininger, Minneapolis, for respondent.

Heard, considered and decided by the court en banc.

KEITH, Justice.

I.

Plaintiffs, Chester and Evangeline **Hubred**, bring this appeal from an unpublished court of appeals decision affirming summary judgment in favor of defendant, **Control Data** Corporation, (hereinafter CDC). The Hubreds' suit alleged that defendant had wrongfully denied coverage under the CDC Health Care Plan for personal injuries suffered by Chester **Hubred**.

The Hubreds based their claim of coverage on Evangeline **Hubred's** status as an employee of CDC and a participant in the health care plan. She paid an additional premium in order to extend coverage under the health care plan to her husband, who was not an employee of CDC. CDC denied the claims because they arose in the course of Chester **Hubred's** work at his own business. CDC has maintained that an exclusion in the health care plan unambiguously denies coverage in this circumstance. The Hubreds argued that the exclusion on which the denial of coverage was based is ambiguous and that coverage should be extended based on the reasonable-expectations doctrine. The trial court ruled that the exclusion was not ambiguous and that the reasonable-expectations doctrine did not apply because there was no ambiguity or hidden exclusion in the policy. The court of appeals affirmed. We also affirm.

II.

310 Plaintiff, Chester **Hubred**, was injured on May 22, 1985, while working at his place of business, Seasonal Enterprises, Inc. **Hubred** was inspecting the blades of a large lawnmower set on blocks, when it fell on him causing serious injuries. Checking such equipment was part of **Hubred's** regular duties and responsibilities. **Hubred** is *310 the president and majority owner of the business. His salary at the time of the injuries was \$500 a week. **Hubred** was not covered by worker's compensation at this time but he and his employees had all been covered at times prior and subsequent to the accident.

Following the accident, the Hubreds began submitting medical claims to CDC for payment, and

CDC commenced payment of the claims. Subsequently, in January of 1986, CDC stopped making payments, relying on an exclusion stated in the **Control Data** Employee Hand Booklet, a summary of the health care plan, which had been given to the Hubreds prior to the accident. The exclusion describes as "expenses not covered" the following:

Medical expenses necessary because of an injury or disease incurred during employment for wages or profit at or outside of **Control Data**, or covered by the Workers' Compensation Act or similar laws, statutes or decrees.

Control Data's Master Plan contained a similar but more detailed provision which excluded from coverage:

Expenses attributable to an injury or disease due to employment for wages or profit, whether during the performance of duties as an Employee, as an employee of another employer or during self-employment;

Expenses attributable to an injury or disease which are covered by the Workers' Compensation Act or a similar law;

A copy of the Master Plan containing the above language had *not* been provided to plaintiffs prior to Mr. **Hubred's** accident. The trial court based its decision on the exclusion as it appeared in the health care plan summary in the CDC employee hand booklet, because it was on that provision that CDC denied coverage. We also rely on the exclusion as it appears in summary form in the Employee Handbook.

III.

On appeal from a summary judgment the reviewing court determines whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn. 1979). The parties agree the material facts are not in dispute and the only questions before us are questions of law. Thus, no deference need be given to the decisions below. *A.J. Chromy Const. Co. v. Commercial Mechanical Services, Inc.*, 260 N.W.2d 579, 582 (Minn.1977).

A. Ambiguity

The Hubreds maintain that the policy exclusion as it appears in the plan summary is ambiguous.^[1] Specifically, they argue it is unclear whether Chester **Hubred's** activities as an employee of his own business fall within the scope of the policy exclusion. We disagree.

An insurer has the burden of proving a policy exclusion applies. *Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn.1986). This court has said "[e]xclusions in insurance contracts are read narrowly against the insurer." *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 276 (Minn.1985). Any ambiguity in the insurance contract must be construed in favor of the insured. *Henning Nelson*, 383 N.W.2d at 652. Where clauses are irreconcilably inconsistent or susceptible of two meanings the policy will be construed against the insurer. *Rusthoven v. Commercial Standard Ins. Co.*, 387 N.W.2d 642, 644-45 (Minn.1986). The reviewing court may not, however, read an ambiguity into the plain language of an insurance contract. *Henning Nelson*, 383 N.W.2d at 652. "The policy must be construed as a whole,

311 and unambiguous *311 language must be given its plain and ordinary meaning." *Id.* at 652.

In determining the meaning of the words of the policy exclusion, the trial court relied on dictionary definitions and concluded that the plain and ordinary meaning of "employment for wages or profit at or outside of **Control Data**" included people in Chester **Hubred's** circumstances. We agree. We also note that despite his being president of Seasonal Enterprises, Inc., Chester **Hubred** received a salary and would, under most circumstances, be considered an employee of that corporation. Thus, as an employee of the corporation, Chester **Hubred's** injury during the course of his duties falls squarely within the scope of the exclusion.

Hubred's citation to *Korovilas v. Bon Ton Renovating Co.*, 219 Minn. 294, 17 N.W.2d 502 (1945) does not lead to a different conclusion. *Korovilas* held that the president and major stockholder of a corporation was in business for himself and thus was not an employee of that corporation for purposes of the workers' compensation act, Minn.Stat. § 176.01 et seq. (1941). *Korovilas* was decided on its facts and does not suggest that a president and major stockholder of a corporation might never be that corporation's employee in other contexts. Moreover, as *Korovilas* focuses on the distinction between employee and employer, it is of doubtful value in analyzing whether the phrase "employment for wages or profit" is ambiguous. Similarly, the Hubreds' reliance on *Pederson v. Pederson*, 229 Minn. 460, 39 N.W.2d 893 (1949) also is misplaced. *Pederson* held a partner was not an employee of a partnership for purposes of the workers' compensation act which predicated coverage on a "contract of hire." 229 Minn. at 466, 39 N.W.2d at 897. *Pederson* did not purport to interpret an exclusion in an insurance contract similar to the instant exclusion.

Additionally, the Hubreds argue that the purpose of the instant exclusion is to avoid double recovery of insurance benefits. Since there is no possibility of double recovery here, the Hubreds maintain they should recover under the CDC health plan. We cannot agree. We think the disjunctive "or" which separates the two major clauses of the exclusion makes it quite clear that the purpose of this exclusion goes beyond the desire to avoid double recovery. Thus, the purpose of the exclusion here does not dictate recovery in these circumstances.

B. Reasonable-Expectation Doctrine

The Hubreds argue that the courts below erroneously failed to apply the reasonable-expectations doctrine as enunciated by this court in *Atwater Creamery Co. v. Western Nat'l. Mut. Ins. Co.*, 366 N.W.2d 271 (Minn.1985). In *Atwater* we said, because of the unique circumstances surrounding a layperson's purchase of insurance, "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Id.* at 277. (quoting Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv.L.Rev. 961, 967 (1970)). The doctrine does not remove from the insured the responsibility to read the policy but at the same time does not hold the insured to an unreasonable level of understanding of the policy. See *Id.*, at 278. Other factors to be considered are the presence of ambiguity, language which operates as a hidden exclusion, oral communications from the insurer explaining important but obscure conditions or exclusions, and whether the provisions in a contract are known by the public generally. See *Id.* at 277, 278. In short, the doctrine asks whether the insured's expectation of coverage is reasonable given all the facts and circumstances.

It is true that nothing in our opinion in *Atwater* suggests that the doctrine of reasonable-expectations is not to be applied except in the presence of peculiar circumstances such as ambiguity or a hidden exclusion. The Hubreds, however, point to no facts or circumstances which, despite the clear import of the exclusion, would justify a reasonable expectation of coverage in this case. The fact that the

312 Hubreds *312 were not orally informed of the exclusion does not, standing alone, free them of the

responsibility of having read the exclusion at least as it appeared in the handbook. Thus, in light of the unambiguous exclusion there was no reasonable expectation of coverage in these circumstances.

Affirmed.

[1] CDC argues on appeal that all the state law claims advanced by the Hubreds are preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1144 (1982) (ERISA). Because CDC did not present this argument to the trial court we refuse to consider it for the first time on appeal. See Lienhard v. State, 431 N.W.2d 861, 866 (Minn.1988); See also Johnson v. Armored Transport of California, Inc., 813 F.2d 1041, 1043-1044 (9th Cir.1987); Amalgamated Cotton Garment & Allied Indus. Fund v. Dion, 341 Pa.Super. 12, 491 A.2d 123, 124 (Pa.Super. 1985).

Save trees - read court opinions online on Google Scholar.

118 Ill. App.3d 573 (1983)

455 N.E.2d 289

**HELEN PATREVITO, Ex'x of the Estate of James A. Patrevito, Deceased,
Plaintiff-Appellant,**

v.

COUNTRY MUTUAL INSURANCE COMPANY, Defendant-Appellee.

No. 3-83-0070.

Illinois Appellate Court — Third District.

Opinion filed October 13, 1983.

George Coniglio, of Blue Island, for appellant.

E. Kent Ayers and Roger D. Rickmon, both of Murphy, Timm, Lennon, Spesia and Ayers, of Joliet, for appellee.

Reversed and remanded.

574 *574 PRESIDING JUSTICE STOUDEER delivered the opinion of the court:

This action for declaratory judgment was commenced by Helen **Patrevito** as executrix of the estate of James **Patrevito** seeking a declaration of rights under an insurance policy issued by **Country Companies**. The circuit court of Will County granted the defendant's motion to dismiss the complaint and this appeal follows.

Count I alleged that uninsured motorist coverage in a policy issued by the defendant was applicable to the death of James **Patrevito** caused by an unknown hit and run driver. Count II of the complaint sought recovery for vexatious delay in settling the claim. Defendant's motion to dismiss the complaint alleged no uninsured motorist coverage was provided by the policy because the decedent, **Patrevito**, was not within the terms of the policy at the time he died.

According to the complaint and the numerous exhibits attached to it, on March 18, 1981, James **Patrevito** was operating a van, traveling northbound on I-57. Because of extremely icy conditions, **Patrevito** lost control of his vehicle. It spun around and came to rest facing south off the paved travel portion of the road in the area designated as the shoulder. A vehicle operated by Kenneth Weig was caused by **Patrevito's** spinning vehicle to also run out of control. This vehicle came to rest south of the **Patrevito** vehicle, also facing south of the area of the road designated as the shoulder.

Both drivers, James **Patrevito** and Kenneth Weig, alighted from their vehicles, checked their respective vehicles for damage while standing between them and discussed moving the vehicles. While conversing, both **Patrevito** and Weig were apparently struck by an unidentified motor vehicle.

Injuries suffered by James **Patrevito** resulted in his death on March 23, 1981. Weig sustained fractured ribs and injuries to his right shoulder and ankles.

Because of the icy conditions and because of the disablement of the **Patrevito** and Weig vehicles, other vehicles experienced difficulties. The affidavits of two other vehicle operators whose vehicles had left the highway but whose vehicles had not collided with either **Patrevito** or Weig were included with the complaint. No information was available concerning the vehicle which may have struck

Patrevito and Weig or their vehicles, and the driver of such vehicle was also unknown.

The policy of insurance provides in pertinent part that an "uninsured motor vehicle" means:

575 *** a hit and run vehicle and neither the driver nor owner can be identified. The vehicle must hit an insured, a covered *575 auto or a vehicle an insured is occupying. Part VI(A)(3)(d)."

An "insured" is defined as the person or organization shown on the policy as the named insured or:

"Anyone else occupying a covered vehicle * * * Part VI(D)(2)."

The term "occupying" is defined as:

"* * * in, upon, getting in, out or off. Part VI(A)(2)."

The trial court found **Patrevito** was not an (insured) (named insured) and was not occupying an insured vehicle at the time of the incident. On this appeal the plaintiff argues the trial court erred in both holdings.

In our opinion **Patrevito** was an insured within the terms of the policy and for that reason this issue will be the only one addressed. The problem arises because the policy was issued to **Patrevito's** Florist & Greenhouse. This business was owned by James **Patrevito** who was doing business under the aforementioned name with his wife Helen **Patrevito**, an active participant in the business.

The trial court held James **Patrevito** was not an insured or named insured in the policy because he was not so specifically named but rather the name of his business was designated, relying on *Polzin v. Phoenix of Hartford Insurance Cos. (1972)*, 5 Ill. App.3d 84, 283 N.E.2d 324. We believe the facts in the *Polzin* case are distinguishable from those in the case at bar and consequently a different result should ensue.

In *Polzin*, the policy of insurance was issued to "A.B.C. Lithoplate & Graining Services, Inc." The policy covered two vehicles owned by the corporation. One of the vehicles was customarily used by Polzin, the injured party, who was also shareholder, President and chief operating officer of the corporation. He was injured while a pedestrian by an uninsured motor vehicle. The court in *Polzin* held the plaintiff had not sustained his burden of establishing that he was an insured in the policy but on the contrary was charged with knowledge that the Lithoplate corporation was the only insured so named. The court also held that extending the designation of insured beyond those named in the policy was not required by statute and would change the contract between the parties.

576 The major difference between the facts in the *Polzin* case and the instant case is that the designation in the policy in this case is not a corporation, is not an entity but is merely the name and style under which James **Patrevito** did business. This difference is of critical significance. Unlike the designation in *Polzin* in which the designation described a legal entity complete in itself as the named insured, the designation in this policy becomes meaningful only in reference to the *576 person doing business under the designation. In its brief, the defendant suggests that the *Polzin* decision has broader implications to businesses as distinguished from individuals. However, we discern no such implications. In our opinion James **Patrevito** was the named insured under the policy under the name and style of the business which he operated. There was no entity which could bring an action on the policy. If any action were to be brought the action would be brought by James **Patrevito**.

For the foregoing reasons we conclude that the court erred in holding that uninsured motorist

coverage was not afforded by the policy issued by the defendant.

With respect to count II of the complaint seeking damages for vexatious delay occasioned by the defendant in settling the claim, we conclude the trial court's judgment dismissing this count was dependent upon its judgment dismissing count I. In view of our decision the trial court erred in its dismissal of count I, we believe it appropriate that count II be reconsidered by the trial court. This is particularly true since the count was disposed of without consideration of any evidence so that the reasonableness or unreasonableness of any delay is not easily ascertainable by allegations in the complaint.

For the foregoing reasons the judgment of the circuit court of Will County is reversed and this cause is remanded for further proceedings consistent with the views expressed herein.

Reversed and remanded.

ALLOY and HEIPLE, JJ., concur.

Save trees - read court opinions online on Google Scholar.

42 Cal.App.4th 1194 (1996)

50 Cal. Rptr.2d 192

PROVIDENCE WASHINGTON INSURANCE COMPANY, Plaintiff and Appellant,**v.****VALLEY FORGE INSURANCE COMPANY et al., Defendants and Respondents.**Docket No. A070009.**Court of Appeals of California, First District, Division One.**

February 26, 1996.

1197 *1197 COUNSEL

Wilson, Elser, Moskowitz, Edelman & Dicker, Martin W. Johnson and Ronald F. Berestka for Plaintiff and Appellant.

Larson & Burnham, James L. Wraith and Anne Cobble Dick Gritzer for Defendants and Respondents.

OPINION

STRANKMAN, P.J.

An insurance company sued other insurance companies to recover contribution on the settlement of third party claims. The third parties had been injured when their rental van's tire blew out, overturning the van on the freeway, and they claimed that the van's owner negligently maintained and rented the van. The van was registered to a sole proprietorship rental agency and had received regular maintenance at service stations owned by the same sole proprietor. Plaintiff insurance company defended the sole proprietor under a business automobile liability policy issued in his rental agency's trade name, and then sued other insurers for contribution. Defendants denied coverage under commercial general liability and garage operations policies issued to the proprietor, doing business as the service stations. On defendants' motion for summary judgment, the trial court found that the underlying bodily injuries arose out of the rental van's use and were therefore excluded from coverage by policy exclusions of damages arising out of the use of autos, or rented autos, owned by the insured. The trial court rejected plaintiff's argument that the van's owner was the rental car agency and the insured the service station enterprise, finding instead that the van was owned by the insured, the individual proprietor. We affirm the judgment.

1198 *1198 **I. FACTS**

In November 1988, nine Nigerian musicians were traveling in a rented van to a Southern California engagement when a tire exploded, sending the van out of control. The van overturned on the freeway, injuring the driver and passengers. Personal injury lawsuits were filed the next year upon claims that the van's owner negligently maintained and rented the van. At least one of the lawsuits charged that the owner knew the tire had been leaking air and inadequately patched the problem with "stop leak." An investigating police officer said the tire blowout was caused by low air pressure heating and detaching the tread, and the officer found evidence of an emergency sealant like "stop leak" inside the tire.

The van was owned by sole proprietor Paul Hifai, doing business as A-1 Rent-A-Car, an agency which operated 95 vehicles. Hifai also individually owned two gasoline service stations, doing business as Tennyson Mobil Service. The A-1 Rent-A-Car vehicles were routinely serviced by the Mobil stations, and the rental van was serviced at one of those stations just days before the freeway accident.

Appellant **Providence Washington** Insurance Company (**Providence**) had issued business automobile and rental excess liability insurance policies to Hifai, under his trade name A-1 Rent-A-Car. The business auto policy covered bodily injury caused by an accident resulting from automobile ownership, maintenance or use. **Providence** defended Hifai in the underlying personal injury actions and settled them in 1992, at a cost of almost \$1.2 million. Hifai had tendered the underlying actions to other insurers as well, but they had denied coverage.

Providence then instituted this action in 1993, seeking contribution from Hifai's other insurers. Respondent **Valley Forge** Insurance Company (**Valley Forge**) had issued a commercial general liability policy to Hifai, doing business as Tennyson Mobil Service. Respondent Transportation Insurance Company (Transportation) had issued a garage operations policy to Hifai, doing business as Tennyson Mobil Service. **Valley Forge's** policy generally covers bodily injury caused by an accident and Transportation's policy has the same general coverage, if the injury results from "garage operations." But respondents' policies limit coverage for an insured's "owned-autos." The **Valley Forge** policy excludes coverage for bodily injury "arising out of the ownership, maintenance, [or] use" of any auto owned by any insured. The Transportation policy excludes coverage for bodily injury arising out of "an auto owned or sublet by an insured while rented, leased or loaned to another." (Italics omitted.)

1199 *1199 The trial court granted summary judgment to **Valley Forge** and Transportation on the following logic: (1) the policies do not cover bodily injury arising out of an insured's "owned-autos," or "owned-autos" while rented to another, (2) the policies' insured is Hifai, (3) Hifai owned the rental van causing bodily injury, (4) therefore the policies do not cover the bodily injuries from the van accident compensated in the underlying litigation. **Providence** appealed and contests the second and third premises, claiming that the business enterprise of Tennyson Mobil Service is the insured, not Hifai, and that the accident did not solely arise out of the use of the van but was independently caused by negligent garage repairs.

II. DISCUSSION

(1) We determine de novo whether there is a genuine issue of material fact and the moving parties were entitled to summary judgment as a matter of law. (*Jambazian v. Borden* (1994) 25 Cal. App.4th 836, 844 [30 Cal. Rptr.2d 768].) Here, the dispositive facts are undisputed and our review focuses on the legal significance of those facts. Similar legal issues are presented by both disputed policies, but there are differences between the policies' particular coverage and exclusion provisions that require separate discussions.

A. The Valley Forge policy does not cover the underlying bodily injuries

The **Valley Forge** commercial general liability policy lists the named insured as "Paul Hifai DBA: Tennyson Mobil Service." The policy generally covers bodily injury caused by an accident but excludes coverage for bodily injury "arising out of the ownership, maintenance, [or] use" of any auto

owned by any insured. Appellant **Providence** argues that the van was not owned by the insured and that the bodily injuries suffered by the van occupants did not "arise out of" the ownership, maintenance or use of the van.

1. The van was owned by Hifai, individually, and Hifai is the insured

(2) The issue of the van's ownership is easily settled. **Providence** acknowledges that the van was registered to A-1 Rent-A-Car, a business owned by Hifai as a sole proprietorship. Inescapably, Hifai is the owner of the van. **Providence's** contention that A-1 Rent-A-Car is the owner is untenable because that business has no existence apart from Hifai. "A sole proprietorship is *not* a legal entity itself. Rather, the term refers to a natural person who *directly* owns the business...." (Friedman, Cal. Practice Guide: Corporations 1 (The Rutter Group 1995) ¶ 2:3, p. 2-1.) An auto *1200 registered in a sole proprietor's trade name is owned by the sole proprietor. (Gabrelcik v. National Indemnity Company (1964) 269 Minn. 445 [131 N.W.2d 534, 535-537] [auto registered in insured's spouse's trade name was owned by the spouse, and therefore not covered by an auto liability policy covering substitute auto not owned by the insured or her spouse].)

The remaining question is whether Hifai is the insured. The insured is listed in the policies as "Paul Hifai" and the next line states "DBA: Tennyson Mobil Service." **Providence** claims that the insured is Tennyson Mobil Service, rather than Hifai individually. But, as we have just stated, a sole proprietorship like Tennyson Mobil Service is not a legal entity. An "insured" must be a legal "person," such as an individual, partnership, or corporation. (**Ins. Code**, § 151.) The designation "dba" or "doing business as" simply indicates that Hifai operates his sole proprietorship under a fictitious business name. (See **Bus. & Prof. Code**, § 17900 et seq. [regulating fictitious business names].) "The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business." (Duval v. Midwest Auto City, Inc. (D.Neb. 1977) 425 F. Supp. 1381, 1387, affd. (8th Cir.1978) 578 F.2d 721.) The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner. Here, our conclusion that Hifai individually, and not his business, is the insured is supported by the identification of the insured's status, in both policies, as an individual. Accordingly, Hifai is the insured and the van he owned is subject to the policy exclusion.

A number of courts in other states have reached similar conclusions. The Colorado Court of Appeal recently held that a personal automobile liability policy covering "non-owned" autos used with the owner's permission did not cover an individual's use of an auto titled in the individual's business name. (Allstate Ins. Co. v. Willison (Colo.Ct.App. 1994) 885 P.2d 342, 343-344.) In Willison, the insured was in an accident while driving a motor home titled to "Bill's Service and RV Center," the insured's sole proprietorship. (*Id.* at p. 343.) The court recognized that a sole proprietorship is not a distinct entity, and rejected the claim that the motor home was owned by the business itself, and not the individual insured. (*Id.* at p. 344; accord, Kelly v. Craig (W.D.Mo. 1967) 263 F. Supp. 570, 570-572 [auto liability policy covering nonowned substitute autos for the named insured "'Dorothy Craig DBA Ace Cab Co.'" did not cover a substitute auto owned by Craig].)

The North Dakota Supreme Court has also recognized that "[a] sole proprietorship which is conducted under a trade name is *not* a separate legal *1201 entity." (Carlson v. Doekson Gross, Inc. (N.D. 1985) 372 N.W.2d 902, 905.) In Carlson, the named insured on comprehensive general liability and excess policies was "'Edwin O. Carlson dba Aero Block & Cement Company and

Carlson Trucking." (*Id.* at p. 904.) The court held that coverage was not limited to Edwin Carlson's operations under those business names, but extended to Carlson's farm where an employee was injured. (*Id.* at pp. 904-907.) The designation "doing business as" following the individual's name did not alter the risks undertaken — the individual was the insured. (*Id.* at p. 906.)

Many courts have likewise determined that the individual, not the enterprise, is the insured under policies listing the insured by a trade name or as a "dba." The named insured under a commercial auto liability policy, "Coe Management Company," was equated with the individual conducting business under that trade name and the policy found to cover the individual's household member killed by an uninsured motorist. (*O'Hanlon v. Hartford Acc. & Indem. Co.* (3d Cir.1981) 639 F.2d 1019, 1020-1021, 1023-1025; accord, *Purcell v. Allstate Ins. Co.* (1983) 168 Ga. App. 863 [310 S.E.2d 530, 531-533] [business auto liability policy naming "Purcell Radiator Serv." as the insured applied to individual operating under that trade name and, by extension, to his family member injured by an uninsured motorist].) Similarly, an individual's personal auto liability policy and a business auto policy insuring the individual "d/b/a Crest Hill Florists," a sole proprietorship, was found to be the same insured on both policies, preventing the stacking of the policy limits. (*Georgantas v. Country Mut. Ins. Co.* (1991) 212 Ill. App.3d 1 [156 Ill.Dec. 394, 570 N.E.2d 870, 871-873]; see *Chmielewski v. Aetna Cas. and Sur. Co.* (1991) 218 Conn. 649 [591 A.2d 101, 113] [stating, in a stacking case, that "one who operates a business under a trade name is nonetheless an individual insured under a policy issued in that trade name"].)

In short, it is commonly held that "[a]n individual who does business under several different names, and whose insurance policies are written out to the individual doing business under certain trade names, is not a separate entity in his capacity in operating each of such businesses, but rather there is only one legal entity, the individual, for the purposes of insurance coverage." (46 C.J.S. (rev. 1993) Insurance, § 948, p. 300.)

1202 However, not all courts agree that the individual, not the enterprise, is the insured under policies listing the insured by a trade name or as a "dba." The New Mexico Court of Appeal held that an auto liability policy issued to "Tilman H. Ashbaugh dba Corky's Wrecker Service" covering temporary substitute autos "not owned by the named insured" covered an auto owned *1202 by Ashbaugh individually. (*Hertz Corp. v. Ashbaugh* (1980) 94 N.M. 155 [607 P.2d 1173, 1174-1176].) The court found "named insured" to be ambiguous and looked to the parties' intention to insure the business alone. (*Id.* at p. 1176.) The Louisiana Court of Appeal likewise held that an insured named as a "dba" was not synonymous with the individual operating the business, but did so upon different reasoning. The Louisiana court found no ambiguity in a business liability policy issued to "LANDRY, LERSEY DBA LANDRY'S APARTMENTS" and quickly concluded that it did not cover losses arising from Landry's operation of a carpentry business. (*Consolidated American Ins. Co. v. Landry* (La. Ct. App. 1988) 525 So.2d 567, 567-569.) The court found the designation "DBA LANDRY'S APARTMENTS" to be a "limiting phrase" in the naming of the insured. (*Id.* at p. 568.)

We are not persuaded by *Ashbaugh* and *Landry*. Unlike *Ashbaugh*, we discern no ambiguity in the listing of the named insured. The insured is the individual, and the "dba" designation simply means that the individual operates under a fictitious name. *Ashbaugh* is inattentive to the force of the principle that a trade name does not create a separate entity and wrongly relies on cases finding individual partners distinct from the insured partnership. (*Hertz Corp. v. Ashbaugh, supra*, 607 P.2d at p. 1176.) Such cases are not analogous, since a partnership is a legal entity, often deemed separate from the individual partners, but a sole proprietorship is not separate from its individual owner. (See *Bartolome v. State Farm Fire & Casualty Co.* (1989) 208 Cal. App.3d 1235, 1242 [256 Cal. Rptr. 719] [property owned by a partnership is not owned by insured individual partner].)

Landry's error lies in construing the "dba" designation as a "limiting phrase" restricting the meaning of the named insured. (*Consolidated American Ins. Co. v. Landry, supra*, 525 So.2d at p. 568.) We agree with the *Carlson* court that such a limitation cannot be fairly read in the designation of an individual as a "dba," although coverage limited to certain business operations could be the subject of specific exclusions or endorsements. (*Carlson v. Doekson Gross, Inc., supra*, 372 N.W.2d at p. 906.) Also, it is not clear that even Louisiana adheres to the reasoning of *Landry* anymore. The same circuit of the Louisiana Court of Appeal that decided *Landry* has recently departed from that approach in recognizing that the individual, not the enterprise, is the insured under policies listing the insured as a "dba." The Louisiana court interpreted a policy similar to the one before us and held that a business liability policy issued to "RICHARD A. SOILEAU DBA THE MEDICINE SHOPPE" which excluded coverage for bodily injury arising out of the use of an auto owned by the insured did not cover injuries caused by the use of an auto registered to Soileau individually. (*Trombley v. Allstate Ins. Co.* (La. Ct. App. 1994) 640 So.2d 815, 816-818 [640 So.2d 815].)

1203 *1203 **2. The bodily injury in the underlying actions arose out of the ownership, maintenance or use of the van**

(3) Anticipating our determination that Hifai is the owner of the van and the insured, appellant **Providence** presents a secondary argument: the bodily injury in the underlying actions did not solely "arise out of" "the ownership, maintenance, [or] use" of the van. Our Supreme Court has held that an auto exclusion clause such as the one presented here "does not preclude coverage when an accident results from the concurrence of a non-auto-related cause and an auto-related cause." (*State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 97 [109 Cal. Rptr. 811, 514 P.2d 123].) In *Partridge*, the insured negligently filed his pistol's trigger mechanism to create a "hair trigger" and, while hunting jackrabbits off road from his moving truck, hit a bump which discharged one of the pistol's bullets into a passenger. (*Id.* at pp. 97-98.) The court held that the insured was covered under both his auto liability and homeowners policies, the latter of which contained an auto exclusion similar to the one before us. (*Id.* at pp. 96-99.) The court found that the accident was "caused jointly by an insured risk (the negligent filing of the trigger mechanism) and by an excluded risk (the negligent driving)." (*Id.* at p. 102.) "[W]hen two such risks constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy." (*Ibid.*) The concurrent causes must be independent: the liability of the insured arising from his non-auto-related conduct must exist independently of any use of his car. (*Id.* at p. 103.)

Here, **Providence** claims the freeway accident was caused jointly by an insured risk (negligent garage repairs) and by an excluded risk (maintenance or use of the van). **Providence** has contrived a non-auto-related independent cause where there is none. The proposed insured risk of negligent garage repairs is really nothing more than the excluded risk of the insured's negligent use or maintenance of the van. The negligent use of tire sealant — which is the negligent garage repair alleged here — has been held to fit within the meaning of auto "maintenance" and to be excluded from coverage under an insurance policy with an auto exclusion almost identical to the **Valley Forge** exclusion. (*State Farm Fire & Casualty Co. v. Salas* (1990) 222 Cal. App.3d 268, 270-278 [271 Cal. Rptr. 642].)

In *Salas*, the insured injected a flammable tire sealant into his auto's leaking tire and, when the repair did not work, took the tire to a mechanic for servicing. (*State Farm Fire & Casualty Co. v. Salas, supra*, 222 Cal. App.3d at pp. 271-272.) The mechanic, unadvised of the earlier repair, started to weld the tire's rim and the tire exploded, injuring him. (*Ibid.*) The insured *1204 was denied defense and indemnification under his homeowners policy that excluded coverage, as does the

policy here, for bodily injuries "arising out of the ownership, maintenance [or] use" of an insured's auto. (*Id.* at pp. 270-271.) The court held that the insured's attempt to preserve the tire's air pressure with sealant was auto "maintenance" and was therefore excluded from coverage. (*Id.* at pp. 272-275.) The court rejected the insured's invocation of *Partridge*, finding that the injuries "arose out of" auto maintenance, rather than the insured's failure to warn the mechanic of the presence of tire sealant. (*Salas, supra*, at pp. 275-278.) Any failure to warn was "inextricably linked" to the insured's auto maintenance and was not an independent cause of injury. (*Id.* at p. 278.)

Other courts have likewise concluded that an insured's auto repairs or renovations are auto-related conduct subject to insurance policy auto exclusions, and not conduct independent of an auto's ownership, maintenance or use. (*Gurrola v. Great Southwest Ins. Co.* (1993) 17 Cal. App.4th 65, 67-70 [21 Cal. Rptr.2d 749]; *State Farm Fire & Cas. Co. v. Camara* (1976) 63 Cal. App.3d 48, 53-56 [133 Cal. Rptr. 600].) In *Camara*, the insured designed his Volkswagen into a dune buggy. (63 Cal. App.3d at p. 53.) While driving off road, the insured's passenger was injured when the dune buggy overturned, allegedly because the vehicle was negligently designed, constructed and assembled. (*Id.* at p. 50.) The court held that the insured's homeowner's policy containing an auto exclusion did not cover the passenger's bodily injuries. (*Id.* at pp. 53-56.) Any injury producing design, construction or assembly of the vehicle was found to arise out of the insured's ownership or use of the vehicle. (*Id.* at p. 54.) Moreover, the renovations were not an independent cause of the passenger's bodily injuries since "the *only* way in which [the passenger] could have been exposed to the claimed design risk was through the operation or use of the motor vehicle." (*Id.* at p. 55.) Almost prophetic of the situation presented here, the court commented that an auto exclusion like the one before us would not cover an insured's negligent brake repair or failure to replace worn tires before they suffer a blowout. (*Id.* at p. 55.)

Gurrola also bears features similar to the case presented here. (*Gurrola v. Great Southwest Ins. Co., supra*, 17 Cal. App.4th 65.) In *Gurrola*, the insured owned a welding business insured against business liabilities but excluding auto-related losses. (*Id.* at p. 67.) The insured rebuilt autos as a hobby, including a Bantam Coupe with a chassis he welded to the frame. (*Ibid.*) The insured and his passenger were killed while speeding in the auto, and another motorist injured. (*Ibid.*) The accident was caused by the insured's negligent driving and negligent reconstruction of the vehicle, including the *1205 welding. (*Ibid.*) The court denied coverage, finding that "the only way that [the other motorist or passenger] could have been exposed to the risk of the negligent welding was through the operation or use of the motor vehicle." (*Id.* at p. 68) A homeowners or business liability policy provides "no coverage for auto-related accidents unless there are "two negligent acts or omissions of the insured, one of which, *independently of the excluded cause*, renders the insured liable for the resulting injuries...."" (*Ibid.*, citations omitted.)

It is true, as appellant **Providence** points out, that not every court that has considered the matter has held that an auto exclusion precludes coverage of driving accidents caused by the insured's negligent auto repairs or renovations. The Second District, Division One, held that a homeowners policy excluding auto-related losses did cover injuries arising from the insured's negligent home repair of his vehicle's brakes. (*Gonzales v. St. Paul Mercury Ins. Co.* (1976) 60 Cal. App.3d 675, 677-681 [131 Cal. Rptr. 626].) But *Gonzales* concerned exclusionary language different from that presented here. In *Gonzales*, the exclusion was of damages arising out of "the ownership, maintenance, operation [or] use ... of ... automobiles ... *while away from the premises* ..." and the court held that the highlighted phrase modified all terms of the exclusion so that "liability arising from maintenance of the car on the insured's premises is not excluded." (*Id.* at pp. 678-679, italics added.) Whatever the wisdom of the *Gonzales* court's policy interpretation, **Valley Forge's** broad exclusion is not governed by it. Moreover, *Gonzales's* conclusion that an insured's negligent auto

repairs are outside an auto exclusion has been universally disapproved in more recent California cases, including a case from another division of the Second District. (*Gurrola v. Great Southwest Ins. Co.*, *supra*, 17 Cal. App.4th at pp. 68-69; *Allstate Ins. Co. v. Jones* (1983) 139 Cal. App.3d 271, 278, fn. 3 [188 Cal. Rptr. 557]; *State Farm Fire & Cas. Co. v. Camara*, *supra*, 63 Cal. App.3d at pp. 55-56.) We, too, decline to apply *Gonzales* here. The bodily injuries in the underlying actions arose out of the "ownership, maintenance, [or] use" of the insured's van and are therefore excluded from coverage under **Valley Forge's** commercial general liability policy.

B. The Transportation garage operations policy does not cover the underlying bodily

(4) The Transportation garage operations policy matches the **Valley Forge** policy in listing the named insured as "Paul Hifai DBA: Tennyson Mobil Service." The policy generally covers bodily injury caused by an accident and resulting from "garage operations." "Garage operations" includes the "ownership, maintenance or use" of garage premises, "all operations necessary or incidental to a garage business," and also specifically *1206 includes the ownership, maintenance or use of covered autos. However, covered autos for purposes of liability claims are limited to autos used in the garage business and not owned by the insured. The policy also contains a rental exclusion, excluding bodily injuries arising out of "an auto owned or sublet by an insured while rented, leased or loaned to another."

Appellant **Providence** dismisses the issue of whether the van is a "covered auto" and instead argues that the underlying bodily injuries are covered by the general premises liability and garage business provisions that encompass negligent auto repairs. As for the rental exclusion, appellant claims the underlying bodily injuries did not arise solely out of an auto owned by the insured while rented to another, but were independently caused by negligent auto repairs covered under the general liability provisions.

On the first point, it has been held that a garage's negligent auto maintenance was covered by a garage liability policy insuring bodily injury caused by accidents arising out of the "ownership, maintenance or use" of the garage premises and "operations necessary or incidental thereto." (*Miesen v. Bolich* (1960) 177 Cal. App.2d 145, 149-150, 155 [1 Cal. Rptr. 912], italics omitted.) However, the second point — the rental exclusion — remains even if we assume that the underlying accident falls within the Transportation policy's general coverage. The rental exclusion is dispositive here.

1. The rented van was owned by Hifai, individually, and Hifai is the insured

The policy excludes bodily injury "arising out of ... an auto owned ... by an insured while rented, leased or loaned to another." (Italics omitted.) Clearly, the van was "rented, leased or loaned to another"; it was rented to the Nigerian musicians. Appellant **Providence** denies that the van was owned by an insured, again arguing that the owner was A-1 Rent-A-Car and the insured Tennyson Mobil Service. As discussed earlier, sole proprietorships operating under trade names are not distinct legal entities and, therefore, the van registered to Hifai's sole proprietorship, A-1 Rent-A-Car, was owned by Hifai individually and Hifai is the insured on policies issued to Hifai doing business as Tennyson Mobil Service, another sole proprietorship. Accordingly, the rented van is subject to the policy exclusion.

2. The bodily injury in the underlying actions arose out of the rented van's use

On a note similar to the one sounded above, appellant **Providence** argues that the bodily injuries in the underlying actions are outside the terms of the *1207 exclusion because the injuries did not solely "arise out of" an auto owned by an insured while rented to another. Appellant claims the injuries also arose out of negligent repair of the van's tire.

The Transportation policy excludes injuries "arising out of ... an auto" owned by the insured while rented to another, while the **Valley Forge** policy excludes injuries "arising out of the ownership, maintenance, [or] use ... of any ... auto." While the Transportation policy displays an irksome lapse of grammar in referring to injuries arising out of an auto, instead of use of an auto, we believe it nevertheless clear in excluding auto-related injuries. Therefore, we are presented with essentially the same question discussed earlier: does an exclusion of injuries arising out of an auto's use preclude coverage of driving accidents caused by the insured's negligent auto repairs? The reasoning of *Partridge* and its later application in cases specifically resolving that question compels an affirmative answer. (*State Farm Mut. Auto. Ins. Co. v. Partridge, supra*, 10 Cal.3d at pp. 101-107; *Gurrola v. Great Southwest Ins. Co., supra*, 17 Cal. App.4th at pp. 67-70; *State Farm Fire & Cas. Co. v. Camara, supra*, 63 Cal. App.3d at pp. 53-56.)

No coverage exists under insurance policies excluding injuries arising out of an auto's use unless "the liability of the insured arises from his non-auto-related conduct, and exists independently of any 'use' of his car." (*State Farm Mut. Auto. Ins. Co. v. Partridge, supra*, 10 Cal.3d at p. 103.) As with the negligently designed dune buggy of *Camara*, any van repair was auto related and the injuries arising from any negligent repairs were dependent upon the van's operation or use. (*State Farm Fire & Cas. Co. v. Camara, supra*, 63 Cal. App.3d at pp. 53-55.) The only way the plaintiffs in the underlying actions could have been exposed to the claimed negligent repair was through the operation or use of the auto. (*Ibid.*)

Appellant **Providence** seeks refuge in a case that found coverage under a garage liability policy with a rental exclusion. (*Miesen v. Bolich, supra*, 177 Cal. App.2d at pp. 147-155.) In *Miesen*, the insured service station operators maintained and rented trucks owned by another person. (*Id.* at pp. 148-149.) A man was injured while unloading furniture from one of the rented trucks, in a fall precipitated by negligently maintained truck side racks and stakes. (*Id.* at pp. 149, 155.) The insureds' garage liability policy excluded its application to rented autos. (*Id.* at pp. 149-150.) The court found coverage for the injuries under the policy, concluding that the cause of the accident was the "faulty maintenance of the truck, not the fact that the truck was rented to a third person...." (*Id.* at p. 155.)

Miesen is not controlling because there are significant differences between the policy language in that case and the policy language here, and *Miesen* *1208 predates *Partridge* and its authoritative evaluation of coverage for alleged auto-related injuries under policies with auto exclusions. In *Miesen*, the policy's list of exclusions stated "'This Policy does not apply: [¶] ... [¶] (b) to any automobile while rented to others by the named insured....'" (177 Cal. App.2d at p. 150, italics omitted.) Here, the policy states that "this insurance does not apply to bodily injury or property damage arising out of a. an auto owned or sublet by an insured while rented, leased or loaned to another...." (Original italics deleted; new italics added.) The *Miesen* policy did not require the court to ask if the accident arose out of the auto, as we are required to ask here, and as *Partridge* and its progeny likewise asked.^[11] We conclude that the bodily injuries in the underlying actions arose out of an auto owned by an insured while rented to another and are therefore excluded from coverage under Transportation's garage operations policy.

DISPOSITION

The judgment is affirmed.

Dossee, J., and Swager, J., concurred.

[1] Appellant's reliance on *McConnell v. Underwriters at Lloyds* (1961) 56 Cal.2d 637 [16 Cal. Rptr. 362, 365 P.2d 418], is likewise misplaced, since it predated *Partridge*, concerns dissimilar policy language, and is factually distinct.

Save trees - read court opinions online on Google Scholar.

168 Ga. App. 863 (1983)

310 S.E.2d 530

PURCELL et al.

v.

ALLSTATE INSURANCE COMPANY.

66327.

Court of Appeals of Georgia.

Decided September 7, 1983.

Rehearing Denied November 16, 1983.

James E. Hardy, for appellants.

Y. Kevin Williams, Arthur H. Glaser, for appellee.

CARLEY, Judge.

Appellants Perry and Behre **Purcell** are husband and wife. Mr. **Purcell** is self-employed and does business as **Purcell** Radiator Service. In 1976, Mr. **Purcell** purchased a Chevrolet Sport Van. The purchase was financed by **Allstate** Enterprises, Inc., and Mr. **Purcell** obtained this loan through an agent of appellee **Allstate** Insurance Company (**Allstate**). Credit life insurance in the amount of the loan was obtained from **Allstate** Life Insurance Company and covered the life of Mr. **Purcell**. Mr. **Purcell** also obtained insurance coverage on the vehicle from **Allstate**. This coverage was obtained through the same **Allstate** agent who had arranged the financing. The policy which was issued was denominated as a "business auto policy" and the named insured was listed as "**Purcell** Radiator Serv.," an "individual" business. Premiums were paid by checks drawn on the account of **Purcell** Radiator Service.

864 *864 In 1981, while Mrs. **Purcell** was walking across a street, she was struck by an automobile and sustained extensive personal injuries. The automobile which struck Mrs. **Purcell** was being operated by Donald E. Majors. Mr. Majors carried only the basic no fault coverage, pursuant to which Mrs. **Purcell** received \$2,500, an amount equal to approximately half of her medical expenses. Mr. and Mrs. **Purcell** subsequently filed individual suits against Majors. Discovery revealed that Mr. Majors' liability coverage contained a \$10,000 limit, the full amount of which his insurer offered the Purcells in settlement of their pending actions. At that point, the Purcells filed an action in two counts against **Allstate**. In Count I, the Purcells sought to recover some \$2,450 pursuant to the no fault provisions of the **Allstate** policy, an amount representing the balance of Mrs. **Purcell's** medical bills remaining after deducting the \$2,500 payment from Mr. Majors' no fault carrier. In Count II, the Purcells sought to recover \$15,000 pursuant to the uninsured motorist provisions of the **Allstate** policy, an amount representing the balance between that policy's \$25,000 limit for such coverage and the \$10,000 limit of Major's liability policy. It is undisputed on the record before us that **Allstate** paid the Purcells the \$2,450 that they sought as no fault benefits under the policy, leaving as the only issue remaining unresolved whether they were entitled to recover under the uninsured motorist provisions of the **Allstate** policy.

Because the Purcells' actions against Majors were still pending, **Allstate** filed its own complaint against the Purcells and Majors seeking a declaration that the Purcells would not be entitled to coverage pursuant to the uninsured motorist provisions of the **Allstate** policy in payment of any

judgment that might be obtained against Majors. All parties agreed to the enjoining of the Purcells' lawsuits against Majors, and **Allstate** subsequently moved for summary judgment in the instant declaratory judgment action. The trial court granted **Allstate's** motion and it is from that order that the Purcells bring the instant appeal.

865 With regard to policies of insurance, as with any other contract, "[t]he cardinal rule of construction is to ascertain the intention of the parties." [Cit.] Alley v. Great American Ins. Co., 160 Ga. App. 597, 599 (287 SE2d 613) (1981). It is essentially **Allstate's** position that the intent of its policy was to provide coverage consistent only with the Chevrolet's status as a business vehicle and not as Mr. **Purcell's** personal automobile. In this regard, **Allstate** relies upon the fact that the named insured in the "business auto policy" is "**Purcell Radiator Serv.**" rather than Mr. **Purcell** personally. Since the only definition by which Mrs. **Purcell** could be an "insured" under the policy for purposes of uninsured motorist coverage would be as a *865 "family member" (further defined in the policy as "a person related to [the named insured] by blood, marriage, or adoption who is a resident of the [named insured's] household . . ."), and since Mrs. **Purcell** is clearly not related by marriage to "**Purcell Radiator Serv.**," the named insured, **Allstate** asserts that no uninsured motorist coverage is afforded to Mrs. **Purcell** under the "business auto policy." See Fowler v. U. S. Fid. & Guar. Co., 133 Ga. App. 842 (212 SE2d 486) (1975). Conceding that the result would be different if the intent of the policy was to insure the Chevrolet as Mr. **Purcell's** personal vehicle, **Allstate's** final assertion is that any lack of personal coverage in the instant case must be deemed the result of Mr. **Purcell's** failure to read the "business auto policy" which was issued. Gilly's Sausage Co. v. Cotton States Mut. Ins. Co., 165 Ga. App. 105 (299 SE2d 413) (1983).

That the named insured on the policy is "**Purcell Radiator Serv.**" rather than Mr. **Purcell** does not demonstrate that the intent of the policy was not to afford the coverage sought by the Purcells in the instant case. "A trade name is merely a name assumed or used by a person recognized as a legal entity. [Cits.] A judgment against one in an assumed or trade name is a judgment against him as an individual. [Cits.] `An undertaking by an individual in a fictitious or trade name is the obligation of the individual.' [Cit.] The fact that [Mr. **Purcell**] purchased this automobile in the name that he used in doing business does not contradict the fact that he owned the automobile as an individual. . . Under [OCGA § 40-1-1 (34) and (38) (Code Ann. § 68A-101)] the owner of an automobile must necessarily be a natural person, firm, copartnership, association, or corporation. [Mr. **Purcell**] doing business in the trade name [**Purcell Radiator Service**] could be none of these except a natural person." Samples v. Ga. Mut. Ins. Co., 110 Ga. App. 297, 299 (138 SE2d 463) (1964). Accordingly, it is clear that Mr. **Purcell**, not **Purcell Radiator Service**, was the owner of the vehicle insured by **Allstate**. Compare Fowler v. U. S. Fid. & Guar. Co., *supra*. OCGA § 33-7-11 (a) (1) (Code Ann. § 56-407.1) provides that "[n]o automobile liability policy or motor vehicle liability policy shall be issued or delivered in this state to the owner of such vehicle. . . unless it contains an endorsement or provisions undertaking to pay the *insured* all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motorist vehicle..." (Emphasis supplied.) Accordingly, it would follow that Mr. **Purcell**, as the owner of the vehicle, was the "entity" to whom the uninsured motorist coverage was extended by **Allstate's** policy and was the true "named insured" in that regard. See O'Hanlon v. Hartford Acc. and Indemnity Co., 639 F2d 1019, 1024 (3d Cir. 1981) (citing Samples v. Ga. Mut. Ins. Co., *supra*).
866 Moreover, *866 there are at least two unexplained and interrelated circumstances which are inconsistent with a holding that, as a matter of law, the clear "intent" of the policy was to exclude all personal coverage thereunder.

The first is the inclusion of a certain endorsement in the original **Allstate** policy. It is a general rule that "[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider,

endorsement, or application made a part of the policy." OCGA § 33-24-9 (Code Ann. § 56-2410). The relevant endorsement in the instant case is entitled "Individual Named Insured" and is headed by the following cautionary language: "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." The endorsement then provides in relevant part that, if the named insured is an individual, "the policy is changed as follows: . . . The words [named insured] include [the named insured's] spouse if a resident of the same household..." (Emphasis supplied.) While it is true that the endorsement provides that it is effective "if the named insured is an individual, there is no explanation as to why such an endorsement would be included in a "business auto" policy issued to an "individual" business. No explanation for the inclusion of this endorsement is readily apparent except the reasonable inference that the intent was to make what would otherwise be a "business auto policy" issued to an "individual" business in effect a "personal" policy for at least some coverages afforded thereunder.

"In construing an insurance policy, [t]he test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean. The policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney.' [Cit.] 'Where a provision in a policy is susceptible to two or more constructions, the courts will adopt that construction which is most favorable to the insured. [Cit.] [Cits.]" Greer v. IDS Life Ins. Co., 149 Ga. App. 61, 63 (253 SE2d 408) (1979). It was apparently the Purcells' understanding that the policy afforded them personal coverage. If the intent was that the policy insure only a "business auto" and not to extend any personal coverage, the question must become why an "Individual Named Insured" endorsement such as appears in the policy in the instant case was included in the "individual business auto policy." No answer is supplied on the record before us.

867 This analysis is somewhat related to the second unexplained circumstance in the instant case, that being **Allstate's** payment of Mrs. **Purcell's** no fault claim under its "business auto policy." Our *867 review of the relevant endorsement provisions regarding no fault coverage under the policy demonstrates that, under the circumstances of the case, the only way in which Mrs. **Purcell** apparently could be afforded coverage as an "eligible injured person" thereunder would be as a "relative" of the "named insured." For purposes of no fault coverage, a "relative" is further defined by the policy as "the spouse or any other person related to the named insured, whether or not temporarily residing elsewhere . . ." (Emphasis supplied.) Thus, assuming that Mrs. **Purcell** was a "relative" of the "named insured" for purposes of no fault coverage under the policy, there is no explanation why under the same policy she would not be a "family member" of the same "named insured's" household for purposes of uninsured motorist coverage. On the record before us, this unexplained apparent inconsistency in **Allstate's** consideration of Mrs. **Purcell's** status under the policy precludes a finding, as a matter of law, that the clear intent of the policy was that she would not be afforded coverage under the uninsured motorist provisions. While **Allstate's** payment of Mrs. **Purcell's** no fault claim would not estop it to deny coverage under the policy's uninsured motorist provisions, Washington v. Hartford Acc. & Indem. Co., 161 Ga. App. 431, 432 (2) (288 SE2d 343) (1982), it is a factor which can be considered in determining the "intent" of the parties to the contract. "The construction placed upon a [contract] by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them.' [Cit.] It is well to keep in mind that the [insurer] prepared the contract." (Emphasis supplied.) Copenhaver v. United American Inv. Co., 96 Ga. App. 562, 566 (101 SE2d 203) (1957).

For the reasons discussed above, the "intent" of the parties that the **Allstate** Policy not provide uninsured motorist coverage to Mrs. **Purcell** was not established as a matter of law and summary judgment was erroneously granted to **Allstate**. The trial court erred in granting summary judgment

to **Allstate** on the basis that **Purcell** Radiator Service, a non-owning non-entity, was the only "named insured" under the policy.

Judgment reversed. Deen, P. J., and Banke, J., concur.

Save trees - read court opinions online on Google Scholar.

492 S.E.2d 435 (1997)

Alfonso C. RECALDE, t/a A & R Sweeping & Cleaning

v.

ITT HARTFORD.

Record No. 970437.

Supreme Court of Virginia.

October 31, 1997.

436 *436 Marc Fiedler (Roger C. Johnson, Washington, DC; Gerald F. Daltan, Fredericksburg; Alan S. Toppelberg, Washington, DC; Koonz, McKenney, Johnson, DePaolis & Lightfoot, Falls Church; Scott, Daltan & Van Lear, Fredericksburg, on briefs), for appellant.

Stephen A. Horvath, (Melissa S. Hogue; Trichilo, Bancroft, McGavin, Horvath & Judkins, Fairfax, on brief), for appellee.

Present: CARRICO, C.J., COMPTON, LACY, HASSELL, KEENAN, and KINSER, JJ., and GORDON, Retired Justice.

KINSER, Justice.

On April 18, 1997, we accepted for consideration a question of Virginia law that the District of Columbia Court of Appeals certified to us.^[1] That court stated in its certification order that the certified question is determinative of the appeal pending before it. The certified question is:

[W]hether under Virginia law, for the purpose of deciding the scope of coverage of a commercial insurance policy for injury or property damage arising from the use of a motor vehicle, a sole proprietorship named as the insured is a legal entity separate and distinct from the individual owner doing business in that name.

I.

The underlying lawsuits arose out of an automobile accident that occurred in Virginia on September 22, 1989. An employee of A & R Sweeping and Cleaning (A & R), while in the course of his employment, left a Ford pickup truck, owned by Alfonso C. **Recalde** and his wife, Anita G. Mora, unattended without removing the keys. Another individual stole the truck, drove it away at a high rate of speed, and collided with an automobile driven by Donald E. Reynard. Alleging that he sustained injuries in the accident, Reynard filed a personal injury action in the Superior Court of the District of Columbia against Alfonso C. **Recalde** and A & R Sweeping and Cleaning. Judith A. Reynard, Donald E. Reynard's wife, sought recovery in a separate count of the same action for loss of consortium.

During the pendency of the Reynard action, a dispute ensued concerning available insurance coverage. Consequently, **Recalde** filed a complaint for declaratory judgment styled on behalf of
 437 "Alfonso C. **Recalde**, t/a A & R Sweeping and Cleaning"^[2] in the Superior *437 Court of the District of Columbia against ITT Hartford (**Hartford**), A & R's insurance carrier. **Recalde** sought a declaration that, pursuant to the "Business Auto Coverage Part" of an insurance policy issued by **Hartford** to A &

R, **Hartford** has a duty to defend A & R and to provide insurance coverage in the Reynard action.^[3] After staying the Reynard action pending resolution of the declaratory judgment proceeding, the superior court granted summary judgment for **Hartford**. **Recalde** appealed that ruling to the District of Columbia Court of Appeals, which in turn certified the question of law to us.

The disputed insurance policy is a "Special Multi-Flex Policy" consisting of two "Coverage Parts," the "Business Auto Coverage Part" and the "Commercial General Liability Coverage Part." The crucial provisions are the designation of the "named insured" in both "Coverage Parts" and the two classes of motor vehicles identified as "covered autos" in the "Business Auto Coverage Part."

The named insured under the policy is "A & R Industrial Sweeping & Cleaning," and its mailing address is "5108 Ninian Ave., Alexandria, VA 22310." The parties agree that this address is **Recalde's** home and business address. The definition of "covered autos" in this policy includes only the following two categories of vehicles:

HIRED AUTOS ONLY. Only those autos you lease, hire, rent or borrow. This does not include any auto you lease, hire, rent or borrow from any of your employees or members of their households.

NONOWNED AUTOS ONLY. Only those autos you do not own, lease, hire or borrow which are used in connection with your business. This includes autos owned by your employees or members of their households but only while used in your business or your personal affairs.

The superior court interpreted the designation of the "named insured" and the categories of "covered autos" to deny coverage in the Reynard action. In reaching this conclusion, the court rejected the argument that A & R Sweeping and Cleaning is a legal entity separate and distinct from Alfonso C. **Recalde**. Instead, the court found that **Recalde** and A & R are one and the same and that "to name one as the 'named insured' is to name the other." Thus, the court found no coverage under the "Business Auto Coverage Part" on the basis of the definitions of "Hired Autos Only" and "Nonowned Autos Only." The court also held that the Reynard claims fall within the coverage exclusion in the "Commercial General Liability Coverage Part" for "'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any... 'auto' ... owned or operated by or rented or loaned to any insured."

The effect of the superior court's decision is that the **Hartford** policy, which covered only nonowned autos, provided no coverage for the Reynard claims because the named insured and the owner of the pickup truck were the same entity.

II.

We are of opinion that the certified question should be answered in the negative because of the definition and nature of a sole proprietorship. Furthermore, the weight of authority from other jurisdictions that have dealt directly with the issue is in accord.

A sole proprietorship is "[a] form of business in which one person owns all the assets of the business in contrast to a partnership, trust or corporation. The sole proprietor is solely liable for all the debts of the business." Black's Law Dictionary 1392 (6th ed.1990).^[4] Even when an individual does business as a sole proprietorship under a different name, the individual remains personally liable for all obligations of the business. Carlson v. Doekson Gross, Inc., 372 N.W.2d 902, 905 (N.D.1985). "Doing business under another name does not create an entity distinct from the

438 person operating the *438 business. The individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations." *Id.* (quoting *Duval v. Midwest Auto City, Inc.*, 425 F.Supp. 1381, 1387 (D.Neb.1977)); see also *Toulousaine de Distribution et de Serv. v. Tri-State Seed and Grain*, 2 Neb.App. 937, 520 N.W.2d 210, 215 (1994); *Patterson v. V & M Auto Body*, 63 Ohio St.3d 573, 589 N.E.2d 1306, 1308 (Ohio 1992).

The weight of authority in other jurisdictions has applied the concept that the individual owner and the proprietorship are a single entity in insurance contexts. In *Allstate Ins. Co. v. Willison*, 885 P.2d 342 (Colo.Ct.App. 1994), the owner of a sole proprietorship titled a vehicle in the name of the business, Bill's Service and RV Center. In addition to a business insurance policy which was not the subject of the litigation, the owner, Willison, had a personal automobile policy issued by Allstate. Willison had an accident while driving the business vehicle, and Allstate denied coverage on the basis that its policy covered only nonowned autos used in the business. Finding in favor of Allstate, the court held that, even though the vehicle was titled in the proprietorship name, Willison was nevertheless the owner. Thus, the vehicle was an "owned" vehicle under the Allstate policy. *Id.* at 344. Accord *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 42 Cal.App.4th 1194, 50 Cal.Rptr.2d 192, 194 (1996) (a van registered to sole proprietorship was owned by the individual proprietor since the sole proprietorship "has no existence apart from [the individual owner]"); *Samples v. Georgia Mutual Ins. Co.*, 110 Ga.App. 297, 138 S.E.2d 463, 465 (1964) ("The fact that the plaintiff's husband purchased this automobile in the name that he used in doing business does not contradict the fact that he owned the automobile as an individual.").

Recalde contends that the decision in *Consolidated American Ins. Co. v. Landry*, 525 So.2d 567 (La.Ct.App.1988), is applicable.^[5] There, however, the sole proprietor operated two different businesses: an apartment rental business and a carpentry business. The insurance policy in question insured the individual doing business as Landry's Apartments. Thus, the court found no coverage for a claim arising out of his separate carpentry business. That outcome does not address the issue presently before this Court and, in a more recent case, *Trombley v. Allstate Ins. Co.*, 640 So.2d 815 (La.Ct.App.1994), the Louisiana court specifically held that a sole proprietor doing business under a trade name was not "a juridical person separate and apart from the natural person...." *Id.* at 817.

Nor is *Hertz Corp. v. Ashbaugh*, 94 N.M. 155, 607 P.2d 1173 (1980), also relied upon by **Recalde**, persuasive. There the court found no coverage for a temporary substitute vehicle owned by the proprietor under an insurance policy issued to him "d/b/a Corky's Wrecker Service." That court relied upon an inapposite case involving insurance issued to a partnership. See *id.* at 1176 (citing *Farley v. American Auto. Ins. Co.*, 137 W.Va. 455, 72 S.E.2d 520 (1952)). Therefore, we do not find the *Hertz* decision persuasive, especially in light of the authorities discussed above.

III.

We conclude, therefore, that a sole proprietorship is not a legal entity separate and distinct from the individual owner doing business in that name, and hence the certified question will be answered in the negative.

Certified question answered in the negative.

[1] This Court's jurisdiction to accept the certified question is pursuant to Va. Const. art. VI, § 1. See also Rule 5:42.

[2] No party to this appeal disputes that A & R Sweeping and Cleaning, sometimes rendered as A & R Industrial

Sweeping and Cleaning, is a sole proprietorship owned by **Recalde**.

[3] A & R's claim against **Hartford** in effect sought a declaration respecting excess coverage because Allstate Insurance Company insured the **Recalde** pickup truck under a separate policy.

[4] In contrast to a sole proprietorship, "a corporation is a legal entity that is completely separate and distinct from its shareholders...." *Bogese, Inc. v. State Highway Comm'r*, 250 Va. 226, 230, 462 S.E.2d 345, 348 (1995).

[5] **Recalde** also argued extensively on brief and orally that the **Hartford** insurance policy unambiguously identified only A & R as the named insured. However, questions concerning ambiguity, contract interpretation, or coverage are not before this Court on the certified question of law.

Save trees - read court opinions online on Google Scholar.

118 U.S. 394 (1886)

SANTA CLARA COUNTY

v.

SOUTHERN PACIFIC RAILROAD COMPANY.
CALIFORNIA

v.

CENTRAL PACIFIC RAILROAD COMPANY.
CALIFORNIA

v.

SOUTHERN PACIFIC RAILROAD COMPANY.

Supreme Court of United States.

Argued January 26, 27, 28, 29, 1886.

Decided May 10, 1886.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

397 *397 *Mr. E.C. Marshall*, Attorney General of California for all the plaintiffs in error.*Mr. S.W. Sanderson*, *Mr. George F. Edmunds* and *Mr. William M. Evarts* for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

These several actions were brought — the first one in the Superior Court of **Santa Clara County**, California, the others in the Superior Court of Fresno **County**, in the same State — for the recovery of certain **county** and State taxes, claimed to be due from the **Southern Pacific Railroad** Company and the Central **Pacific Railroad** Company under assessments made by the State Board of Equalization upon their respective franchises, roadways, roadbeds, rails, and rolling stock. In the action by **Santa Clara County** the amount claimed is \$13,366.53 for the fiscal year of 1882. For that sum, with five per cent. penalty, interest at the rate of two per cent. per month from December 27, 1882, cost of advertising, and ten per cent. for attorney's fees, judgment is asked against the **Southern Pacific**

398 *398 **Railroad** Company. In the other action against the same company the amount claimed is \$5029.27 for the fiscal year of 1881, with five per cent. added for non-payment of taxes and costs of collection. In the action against the Central **Pacific Railroad** Company judgment is asked for \$25,950.50 for the fiscal year of 1881, with like penalty and costs of collection.

The answer in each case puts in issue all the material allegations of the complaint, and sets up various special defences, to which reference will be made further on.

With its answer the defendant, in each case, filed a petition, with a proper bond, for the removal of the action into the Circuit Court of the United States for the District, as one arising under the Constitution and laws of the United States. The right of removal was recognized by the State court, and the action proceeded in the Circuit Court. Each case — the parties having filed a written stipulation waiving a jury — was tried by the court. There was a special finding of facts upon which judgment was entered in each case for the defendant. The general question to be determined is, whether the judgment can be sustained upon all, or either, of the grounds upon which the defendants rely.

The case as made by the pleadings and the special finding of facts is as follows:

By an act of Congress, approved July 27, 1866, 14 Stat. 292, the Atlantic and **Pacific Railroad** Company was created, with power to construct and maintain, by certain designated routes, a continuous **railroad** and telegraph line from Springfield, Missouri, to the **Pacific**. For the purpose — which is avowed by Congress — of facilitating the construction of the line, and thereby securing the safe and speedy transportation of mails, troops, munitions of war, and public stores, a right of way over the public domain was given to the company, and a liberal grant of the public lands was made to it. The **railroad** so to be constructed, and every part of it was declared to be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and to such regulations as Congress might impose for restricting the charges

399 for government transportation. By the *399 18th section of the act, the **Southern Pacific Railroad** Company — a corporation previously organized under a general statute of California, passed May 20, 1861, Stat. Cal. 1861, p. 607 — was authorized to connect with the Atlantic and **Pacific Railroad** at such point, near the boundary line of that State, as the former company deemed most suitable for a **railroad** to San Francisco, with "uniform gauge and rate of freight or fare with said road;" and in consideration thereof, and "to aid in its construction" the act declared that it should have similar grants of land, "subject to all the conditions and limitations" provided in said act of Congress, "and shall be required to construct its road on like regulations, as to time and manner, with the Atlantic and **Pacific Railroad**." §§ 1, 2, 3, 11 and 18.

In November, 1866, the Atlantic and **Pacific Railroad** Company, and the **Southern Pacific Railroad** Company, filed in the office of the Secretary of the Interior their respective acceptances of the act.

By an act of the legislature of California, passed April 4, 1870, to aid in giving effect to the act of Congress relating to the **Southern Pacific Railroad** Company, it was declared that:

"To enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the State of California hereby consents to said act, and the said company, its successors and assigns, are hereby authorized to change the line of its **railroad** so as to reach the eastern boundary line of the State of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them to construct, maintain, and operate by steam or other power the said **railroad** and telegraph line mentioned in said acts of Congress, hereby confirming to, and vesting in, the said company, its successors and assigns, all the rights, privileges, franchises, power and authority conferred upon,

400 *400 granted to, or vested in said company by the said acts of Congress, and any act of Congress which may be hereafter enacted."

Subsequently, by the act of March 3, 1871, 16 Stat. 573, Congress incorporated the Texas **Pacific Railroad** Company, with power to construct and maintain a continuous **railroad** and telegraph line from Marshall, in the State of Texas, to a point at or near El Paso, thence through New Mexico and Arizona to San Diego, pursuing, as near as might be, the thirty-second parallel of latitude. To aid in its construction, Congress gave it, also, the right of way over the public domain, and made to it a liberal grant of public lands. The 19th section provided:

"That the Texas **Pacific Railroad** Company shall be, and it is hereby, declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: *Provided*, That said road shall be subject to the use of the United States for postal, military, and all other governmental services, at fair and reasonable rates of compensation,

not to exceed the price paid by private parties for the same kind of service, and the government shall at all times have the preference in the use of the same for the purpose aforesaid."

The twenty-third section of that act has special reference to the **Southern Pacific Railroad** Company, and is as follows:

"SEC. 23. That, for the purpose of connecting the Texas **Pacific railroad** with the city of San Francisco, the **Southern Pacific Railroad** Company of California is hereby authorized (subject to the laws of California) to construct a line of **railroad** from a point at or near Tehacapa Pass, by way of Los Angeles, to the Texas **Pacific railroad**, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said **Southern Pacific Railroad** Company of California by the act of July twenty-seven, 401 eighteen hundred and sixty-six: *Provided, however,* That this section shall in no way *401 affect or impair the rights, present or prospective, of the Atlantic and **Pacific Railroad** Company, or any other **railroad** company."

Under the authority of this legislation, Federal and State, the **Southern Pacific Railroad** Company constructed a line of **railroad** from San Francisco, connecting with the Texas and **Pacific Railroad** (formerly the Texas **Pacific Railroad**) at Sierra Banca, in Texas; and with other railroads it is operated as one continuous line (except for that part of the route occupied by the Central **Pacific Railroad**) from Marshall, Texas, to San Francisco. It is stated in the record that the **Southern Pacific Railroad** Company of California, since the commencement of this action, has completed its road to the Colorado River, at or near the Needles, to connect with the Atlantic and **Pacific Railroad**, and that with the latter road it constitutes a continuous line from Springfield, Missouri, to the **Pacific**, except as to the connection, for a relatively short distance, over the road of the Central **Pacific Railroad** Company.

On the 17th of December, 1877, the said **Southern Pacific Railroad** Company, and other **railroad** corporations, then existing under the laws of California, were legally consolidated, and a new corporation thereby formed, under the name of the **Southern Pacific Railroad** Company, the present defendant in error, 59.30 miles of whose road is in **Santa Clara County** and 17.93 miles in Fresno **County**.

On the 1st of April, 1875, this company was indebted to divers persons in large sums of money advanced to construct and equip its road. To secure that indebtedness, it executed on that day a mortgage for \$32,520,000 on its road, franchises, rolling-stock and appurtenances, and on a large number of tracts of land, in different counties of California, aggregating over eleven million acres. These lands were granted to the company by Congress under the above-mentioned acts, and are used for agricultural, grazing, and other purposes not connected with the business of the **railroad**. Of those patented, 3138 acres are in **Santa Clara County** and 18,789 acres in Fresno **County**. When these proceedings were instituted no part of its above mortgage debt had been paid, except the 402 accruing interest *402 and \$1,632,000 of the principal, leaving outstanding against it \$30,898,000.

In the year 1852 California, by legislative enactment, granted a right of way through that State to the United States for the purpose of constructing a **railroad** from the Atlantic to the **Pacific** Ocean — declaring that the interests of California, as well as the whole Union, "require the immediate action of the Government of the United States, for the construction of a national thoroughfare, connecting the navigable waters of the Atlantic and **Pacific** Oceans, for the purpose of the national safety, in the event of war, and to promote the highest commercial interests of the Republic." Stat. Cal. 1852, p. 150. By an act passed July 1, 1862, 12 Stat. 489, § 1, 8, Congress incorporated the Union **Pacific Railroad** Company, with power to construct and maintain a continuous **railroad** and telegraph line

to the western boundary of what was then Nevada Territory, "there to meet and connect with the line of the Central **Pacific Railroad** Company of California." The declared object of extending government aid to these enterprises was to effect the construction of a **railroad** and telegraph line from the Missouri River to the **Pacific**, which, for all purposes of communication, travel, and transportation, so far as the public and the General Government are concerned, should be operated "as one connected continuous line." *Ibid.* §§ 6, 9, 10, 12, 17, 18.

In 1864 the State of California passed an act to aid in carrying out the provisions of this act of Congress, the first section of which declared that:

"To enable said company more fully and completely to comply with and perform the provisions and conditions of said act of Congress, the said company, their successors and assigns, are hereby authorized and empowered, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate the said **railroad** and telegraph line, not only in the State of California, but also in the said Territories lying east of and between said State and the Missouri River, with such branches and extensions of said **railroad** and telegraph line, or either of them, as said company may deem necessary or proper, and also the right of way for said **railroad** and telegraph line over any lands belonging to *403 this State, and on, over, and along any streets, roads, highways, rivers, streams, water, and water courses, but the same to be so constructed as not to obstruct or destroy the passage or navigation of the same, and also the right to condemn and appropriate to the use of said company such private property rights, privileges, and franchises as may be proper, necessary, or convenient for the purposes of said **railroad** and telegraph, the compensation therefor to be ascertained and paid under and by special proceedings, as prescribed in the act providing for the incorporation of **railroad** companies, approved May 20th, 1861, and the act supplementary and amendatory thereof, said company to be subject to all the laws of this State concerning **railroad** and telegraph lines, except that messages and property of the United States, of this State, and of said company shall have priority of transportation and transmission over said line of **railroad** and telegraph, hereby confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, and vested in said company by said act of Congress, hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted."

In 1870, the Central **Pacific Railroad** Company of California and the Western **Pacific Railroad** Company formed themselves into one corporation under the name of the Central **Pacific Railroad** Company, the defendant in one of these actions, 61.06 miles of whose road is in Fresno **County**. The company complied with the several acts of Congress, and there is in operation a continuous line of railway from the Missouri River to the **Pacific** Ocean, the Central **Pacific Railroad** Company owning and operating the portion thereof between Ogden, in the Territory of Utah, and San Francisco.

When the present action was instituted against this company the United States had and now have a lien, created by the acts of Congress of 1862 and 1864, for \$30,000,000, with a large amount of interest, upon its road, rolling-stock, fixtures and franchises; and there were also outstanding bonds for a like amount issued by the company prior to January 1, 1875, and secured by a mortgage upon the same property.

404 Such were the relations which these two companies held to *404 the United States and to the State when the assessments in question were made for purposes of taxation.

It is necessary now to refer to those provisions of the constitution and laws of the State which, it is claimed, sustain these assessments.

The constitution of California, adopted in 1879, exempts from taxation growing crops, property used exclusively for public schools, and such as may belong to the United States, or to that State, or to any of her **county** or municipal corporations, and declares that the legislature "may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to *bona fide* residents" of the State. It is provided in the first section of Article XIII. that, with these exceptions — "all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership."

The fourth section of the same article provides:

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi-public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the **county**, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof: *Provided*, That if any
 405 such security or indebtedness shall be *405 paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

The ninth section makes provision for the election of a State Board of Equalization, "whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purpose of taxation." The boards of supervisors of the several counties constitute boards of equalization for their respective counties, and they equalize the valuation of the taxable property therein for purposes of taxation — assessments, whether by the State or **county** boards, to "conform to the true value in money of the property" contained in the assessment roll.

The tenth section declares:

"All property, *except as hereinafter in this section provided*, shall be assessed in the **county**, city, city and **county**, town, township, or district in which it is situated, in the manner prescribed by law. The *franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county* in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

The assessments in question, it is contended, were made in conformity with these constitutional provisions, and with what is known as § 3664 of the Political Code of California. That section made it the duty of the State Board of Equalization, on or before the first Monday in May in each year to "assess the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one **county** — to which class belonged the defendants. It required every corporation of that class, by certain officers, or by such officer as the State Board should designate, to furnish the board with a

sworn statement showing, among other things, in detail, for the year ending March 1, the whole
406 number of miles of railway owned, operated, or leased by it in the State, the value thereof *406 per
mile, and all of its property of every kind located in the State; the number and value of its engines,
passenger, mail, express, baggage, freight and other cars, or property used in operating and
repairing its railway in the State, and on railways which are parts of lines extending beyond the limits
of the State. It is also directed that "the said property shall be assessed at its actual value;" that the
"assessment shall be made upon the entire railway within the State, and shall include the right of
way, road-bed, track, bridges, culverts, and rolling-stock;" and that "the depots, station grounds,
shops, buildings, and gravel beds shall be assessed by the assessors of the **county** where
situated, as other property." It further declares:

"On or before the fifteenth day of May, in each year, said board shall transmit to the **county** assessor
of each **county** through which any railway, operated in more than one **county**, may run, a statement
showing the length of the main track or tracks of such railway within the **county**, together with a
description of the whole of said tracks within the **county** including the right of way by metes and
bounds, or other description sufficient for identification, and the assessed value per mile of the
same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise,
roadway, road-bed, rails, and rolling-stock of such railway, within this State. Said statement shall be
entered on the assessment roll of the **county**. At the first meeting of the board of supervisors, after
such statement is received by the **county** assessor, they shall make and cause to be entered in the
proper record-book an order stating and declaring the length of the main track, and the assessed
value of such railway lying in each city, town, township, school district, or lesser taxing district in their
county, through which such railway runs, as fixed by the State Board of Equalization, which shall
constitute the taxable value of said property for taxable purposes in such city, town, township,
school, road, or other district." Stat. Cal. 1881, ch. 73, § 1, page 82.

These companies, within due time, filed with the State Board the detailed statement required by that
section.

At the trials below, no record of assessment against the respective defendants, as made by the
407 State Board, was given in evidence, and there was introduced no written evidence of the *407
assessment except an official communication from the State Board to each of the assessors of
Santa Clara and Fresno Counties, called, in the special findings, the assessment roll for the
particular **county**. The roll for Fresno **county**, in 1881, relating to the **Southern Pacific Railroad**
Company, is as follows:

408 *408 There were similar rolls in reference to the Central **Pacific Railroad** in the same **county**, for the
same year, and the **Southern Pacific** in **Santa Clara County** for 1882. For each of those years the
board of supervisors of the respective counties made an apportionment of the taxes among the
legal subdivisions of such counties.

It is stated in the findings that the delinquent lists for those years, so far as they related to the taxes
in question, were duly made up in form corresponding with the original assessment roll; that in
pursuance of § 3738 of the Political Code of California, the board of supervisors of the respective
counties duly passed an order, entered on the minutes, dispensing with the duplicate assessment
roll for that year; that the controller of the State transmitted a letter to the tax collector of the **county**, in
pursuance of the provisions of § 3899 of that Code, directing him to offer the property for sale but
once, and if there were no *bona fide* purchasers to withdraw it from sale; that the tax collector, in
obedience to the provisions of that section, transmitted to the controller, with his endorsement
thereon of the action had in the premises, a certified copy of the entry upon the delinquent list
relating to the tax in question in these several actions; that such endorsement shows that the tax

collector had offered the property for sale and had withdrawn it because there was no purchaser for the same; and that the controller, in pursuance of the provisions of the same section, transmitted to the tax collector of the **county** a letter directing him to bring suit.

In each case there were, also, the following findings:

"The State Board of Equalization, in assessing said value of said property to and against defendant, assessed the full cash value of said **railroad**, roadway, road-bed, rails, rolling-stock, and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid, to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of the said mortgage; and in making said assessment the said State Board of Equalization did not consider or treat said
409 mortgage as an interest in said property, but assessed *409 the whole value thereof to the defendant, in the same manner as if there had been no mortgage thereon."

"The State Board of Equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at \$300 per mile."

The special grounds of defence by each of the defendants were: 1. That its road is a part of a continuous postal and military route, constructed and maintained under the authority of the United States, by means in part obtained from the General Government; that the company having, with the consent of the State, become subject to the requirements, conditions, and provisions of the acts of Congress, it thereby ceased to be merely a State corporation, and became one of the agencies or instrumentalities employed by the General Government to execute its constitutional powers; and that the franchise to operate a postal and military route, for the transportation of troops, munitions of war, public stores, and the mails, being derived from the United States, cannot, without their consent, be subjected to State taxation. 2. That the provisions of the constitution and laws of California, in respect to the assessment for taxation of the property of railway corporations operating railroads in more than one **county**, are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads operated in one **county**, and of other corporations, and of natural persons, for the value of the mortgages covering the property assessed; thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the laws. 3. That what is known as § 3664 of the Political Code of California, under the authority of which in part the assessment was made, was not constitutionally enacted by the legislature, and had not the force of law. 4. That no valid assessment appears in fact to have been made by the State Board.
410 5. That no interest is recoverable in this action until after judgment. 6. *410 That the assessment upon which the action is based is void, because it included property which the State Board of Equalization had no jurisdiction, under any circumstances, to assess, and that, as such illegal part was so blended with the balance that it cannot be separated, the entire assessment must be treated as a nullity.

The record contains elaborate opinions stating the grounds upon which judgments were ordered for the defendants. Mr. Justice Field overruled the first of the special defences above named, but sustained the second. The circuit judge, in addition, held that § 3664 of the Political Code had not been passed in the mode required by the State Constitution, and, consequently, was no part of the law of California. These opinions are reported as *The Santa Clara Railroad Tax Case*, in 9 Sawyer, 165, 210.

The propositions embodied in the conclusions reached in the Circuit Court were discussed with marked ability by counsel who appeared in this court for the respective parties. Their importance cannot well be over-estimated; for, they not only involve a construction of the recent amendments to the National Constitution in their application to the Constitution and the legislation of a State, but upon their determination, if it were necessary to consider them, would depend the system of taxation devised by that State for raising revenue, from certain corporations, for the support of her government. These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise. Whether the present cases require a decision of them depends upon the soundness of another proposition, upon which the court below, in view of its conclusions upon other issues, did not deem it necessary to pass. We allude to the claim of the defendant, in each case, that the entire assessment is a nullity, upon the ground that the State Board of Equalization included therein property which it was without jurisdiction to assess for taxation.

411 The argument in behalf of the defendant is: That the State Board knowingly and designedly included in its assessment of "the franchise, roadway, road-bed, rails, and rolling-stock" of *411 each company, the value of the fences erected upon the line between its roadway and the land of coterminal proprietors; that the fences did not constitute a part of such roadway, and, therefore, could only be assessed for taxation by the proper officer of the several counties in which they were situated; and that an entire assessment which includes property not assessable by the State Board against the party assessed is void, and, therefore, insufficient to support an action, at least, when — and such is claimed to be the case here — it does not appear, with reasonable certainty, from the face of the assessment or otherwise, what part of the aggregate valuation represents the property so illegally included therein.

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.

That the State Board purposely included in its assessment and valuation the fences erected on the line between the railroads and the lands of adjacent proprietors, at the rate of \$300 per mile, is undoubtedly true: for it is so stated in the special finding of facts, and that finding must be taken here to be in disputable. It is equally true that that tribunal has no general power of assessment, but only jurisdiction to assess "the franchise, roadway, road-bed, rails, and rolling-stock" of **railroad** corporations operating roads in more than one **county**, and that all other property of such corporations, subject to taxation, is assessable only "in the **county**, city, city and **county**, town, township, or district, in which it is situated, in the manner prescribed by law." Such is the declaration of the State constitution. *People v. Sacramento County*, 59 Cal. 321, 324; Art. XIII. § 10. It must also be conceded that "fences," erected on the line between these railroads and the lands of adjoining proprietors, were improperly included by the State Board in its assessments, unless they constituted a part of the "roadway." Some light is thrown upon this question by that clause of § 3664
412 of the Political Code of California — which, in the view *412 we take of these cases, may be regarded as having been legally enacted — providing that "the depots, station grounds, shops, buildings, and gravel beds" shall be assessed in the **county** where situated as other property. From this it seems, that there is much of the property daily used in the business of a **railroad** operated in more than one **county**, that is not assessable by the State Board, but only by the proper authorities of the municipality where it is situated. So that, even if it appeared that the fences assessed by the State Board were the property of the **railroad** companies, and not of the adjoining proprietors, they could not be included in an assessment by that board unless they were part of the roadway itself;

for, as shown, the jurisdiction of that board is restricted to the assessment of the "franchisé, roadway, road-bed, rails and rolling-stock," We come back, then, to the vital inquiry, whether the fences could be assessed under the head of roadway? We are of opinion that they cannot be regarded as part of the roadway for purposes of taxation.

The Constitution of California provides that "land and improvements thereon shall be separately assessed." Art. XIII. § 2; and, although that instrument does not define what are improvements upon land, the Political Code of the State expressly declares that the term "improvements" includes "all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land." § 3617. It would seem from these provisions that fences erected upon the roadway, even if owned by the **railroad** company, must be separately assessed, as "improvements," in the mode required in the case of depots, station grounds, shops, and buildings owned by the company, namely, by local officers in the **county** where they are situated. The same considerations of public interest or convenience upon which rest existing regulations for the assessments of depots, station grounds, shops, and buildings of a **railroad** company operated in more than one **county**, would apply equally to the assessment and valuation for taxation of fences erected upon the line of railway of the same company.

413 In San Francisco and North Pacific Railroad Co. v. State Board of Equalization, 60 Cal. 12, 34, which was an application, *413 on *certiorari*, to annul certain orders of the State Board assessing the property of a **railroad** corporation, one of the questions was as to the meaning of the words "road-bed" and "roadway." The court there said: "The road-bed" is the foundation on which the superstructure of a **railroad** rests. Webster. The roadway is the right of way, which has been held to be the property liable to taxation. *Appeal of N.B. & M.R.R. Co.*, 32 Cal. 499. The rails in place constitute the superstructure resting upon the road-bed." This definition was approved in San Francisco v. Central Pacific Railroad Co., 63 Cal. 467, 469. In the latter case the question was whether certain steamers owned by the **railroad** company, upon which were laid **railroad** tracks, and with which its passenger and freight cars were transported from the eastern shore of the bay of San Francisco to its western shore, where the railway again commenced, were to be assessed by the city and **county** of San Francisco, or by the State Board of Equalization. The contention of the company was that they constituted a part of its road-bed or roadway, and must, therefore, be assessed by the State Board. But the Supreme Court of the State held otherwise. After observing that all the property of the company, other than its franchise, roadway, road-bed, rails, and rolling-stock, was required by the Constitution to be assessed by the local assessors, the court said: "They are certainly not the franchise of the defendant corporation. They may constitute an element to be taken into the computation to arrive at the value of the franchise of such corporation, but they are not such franchise. It is equally as clear that they are not rails or rolling-stock... Are they, then, embraced within the words roadway or road-bed, in the ordinary and popular acceptance of such words as applied to railroads? These two words, as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same. The *road-bed* referred to in § 10, in our judgment, is the bed or foundation on which the superstructure of the **railroad** rests. Such is the definition given by both Worcester and Webster, and we think it correct. The *roadway* has a
414 more extended signification as applied to railroads. In addition to the part denominated *414 road-bed, the roadway includes whatever space of ground the company is allowed by law in which to construct its road-bed and lay its track. Such space is defined in subdivision 4 of the 17th section and the 20th section of the act 'to provide for the incorporation of **railroad** companies,' etc., approved May 20, 1861. Stat. 1861, p. 607; S.F. & N.P.R.R. Co. v. State Board, 60 Cal. 12."

The argument in support of the proposition that these steamers — constituting, as they did, a necessary link in the line of the company's railway, and upon which rails were actually laid for the

running of cars — were a part either of the road-bed or roadway of the **railroad**, is much more cogent than the argument that the fences erected upon the line between a roadway and the lands of adjoining proprietors are a part of the roadway itself. It seems to the court that the fences in question are not, within the meaning of the local law, a part of the roadway for purposes of taxation; but are "improvements" assessable by the local authorities of the proper **county**, and, therefore, were improperly included by the State Board in its valuation of the property of the defendants.

The next inquiry that naturally arises is, whether the different kinds of property assessed by the State Board are distinct and separable upon the face of the assessment, so that the company being thereby informed of the amount of taxes levied upon each, could be held to have been in default in not tendering such sum, if any, as was legally due? Upon the transcript before us, this question must be answered in the negative. No record of assessment, as made by the State Board, was introduced at the trial, and presumably, no such record existed. Nor is there any documentary evidence of such assessment, except the official communication of the State Board to the local assessors, called, in the findings, the assessment roll of the **county**. That roll shows only the aggregate valuation of the company's franchise, roadway, road-bed, rails, and rolling-stock in the State; the length of the company's main track in the State; its length in the **county**; the assessed value per mile of the railway as fixed by the pro rata distribution per mile of the assessed value of its
 415 whole franchise, roadway, road-bed, rails, *415 and rolling-stock in the State; and the apportionment of the property so assessed to the **county**.

It appears, as already stated, from the evidence, that the fences were included in the valuation of the defendants' property; but under what head, whether of franchise, roadway, or road-bed, does not appear. Nor can it be ascertained, with reasonable certainty, either from the assessment roll or from other evidence, what was the aggregate valuation of the fences, or what part of such valuation was apportioned to the respective counties through which the **railroad** was operated. If the presumption is, that the State Board included in its valuation only such property as it had jurisdiction under the State constitution to assess, namely, such as could be rightfully classified under the heads of franchise, roadway, road-bed, rails, or rolling-stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of those heads, the fences in question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal — assuming for the purposes of this case only, that the assessment was, in all other respects, legal — and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for, such amount, if any, as was justly due. But no such evidence was introduced. The finding that the fences were valued at \$300 per mile is too vague and indefinite as a basis for estimating the aggregate valuation of the fences included in the assessment, or the amount thereof apportioned to the respective counties. Were the fences the property of adjacent proprietors? Were they assessed at that rate for every mile of the **railroad** within the State? Were they erected on the line of the **railroad** in every **county** through which it was operated, or only in some of them? Wherever erected, were they assessed for each side of the railway, or only for one side? These questions, so important in determining the extent to which the assessment included a valuation of the fences erected upon the line between the **railroad** and coterminous proprietors, find no solution in the record presented to this court.

416 If it be suggested that, under the circumstances, the court *416 might have assumed that the State Board included the fences in their assessment, at the rate of \$300 per mile for every mile of the **railroad** within the State, counting one or both sides of the roadway, and, having thus eliminated from the assessment the aggregate so found, given judgment for such sum, if any, as, upon that basis, would have been due upon the valuation of the franchise, road-bed, roadway, rails and rolling-stock of the defendant, the answer is, that the plaintiff did not offer to take such a judgment;

and the court could not have rendered one of that character without concluding the plaintiff hereafter, and upon a proper assessment, from claiming against the defendant taxes for the years in question, upon such of its property as constituted its franchise, roadway, road-bed, rails and rolling-stock. The case as presented to the court below, was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit — such assessment including property not legally assessable by the State Board, and the part of the tax assessed against the latter property not being separable from the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied. Cooley on Taxation, 295-6, and authorities there cited; Libby v. Burnham, 15 Mass. 144, 147; State Randolph, &c. v. City of Plainfield, 38 N.J. Law (9 Vroom), 93; Gamble v. Witty, 55 Mississippi, 26, 35; Stone v. Bean, 15 Gray, 42, 45; Moshier v. Robie, 11 Maine (2 Fairfield), 137; Johnson v. Colburn, 36 Vt. 695; Wells v. Burbank, 17 N.H. 393, 412.

It results that the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value, which the State Board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.

417 *417 It follows that there is no occasion to determine under what circumstances the plaintiffs would be entitled to judgment against a delinquent tax-payer for penalties, interest, or attorney's fees; for, if the plaintiffs are not entitled to judgment for the taxes arising out of the assessments in question, no liability for penalties, interest, or attorney's fees, could result from a refusal or failure to pay such taxes.

Judgment affirmed.

California v. Northern Railway Company. Error to the Circuit Court of the United States for the District of California. The facts in this case are substantially those which appear in **County of Santa Clara, &c. v. Railroad Companies**, just decided. For the reasons given in the opinion in that case, and upon the ground therein stated, the judgment is

Affirmed.

Save trees - read court opinions online on Google Scholar.

640 So.2d 815 (1994)

James M. TROMBLEY, Plaintiff-Appellant,
v.
ALLSTATE INSURANCE CO., et al., Defendants-Appellees.

No. 93-1669.

Court of Appeal of Louisiana, Third Circuit.

June 1, 1994.

816 *816 John Michael Artigue, for James Michael Trombley.

Christopher E. Lawler, for Allstate Ins. Co., et al.

Edward Paul Landry, for American Cas. Co.

Before KNOLL, THIBODEAUX and SAUNDERS, JJ.

KNOLL, Judge.

This appeal concerns the interpretation of an exclusionary clause in a liability insurance contract. American Casualty Company of Reading, Pennsylvania (American), moved for summary judgment, claiming that the exclusionary clause in the policy issued by American absolved American from liability in this case. The trial court granted the summary judgment and the plaintiff, James Trombley, appeals. For the reasons that follow, we affirm the judgment of the trial court.

FACTS

On January 22, 1992, in New Iberia, Louisiana, an automobile collision occurred between James Trombley and a minor, Christie Soileau. The vehicle Ms. Soileau was driving was registered in the name of her father, Richard A. Soileau. At the time of the accident, Ms. Soileau was acting in the employ of her father's sole proprietorship, The Medicine Shoppe, by delivering medication to a customer. Mr. Trombley first filed suit against Mr. Soileau and the insurer of the Soileau vehicle, Allstate Insurance Company. Later Mr. Trombley amended his petition to include The Medicine Shoppe, alleging it was a Louisiana corporation. Mr. Trombley's amended petition also named American as the insurer of The Medicine Shoppe. However, nowhere else in the record is The Medicine Shoppe referred to as an incorporated entity. In fact, Mr. Trombley's appellate brief admits The Medicine Shoppe is a sole proprietorship. We accept this as conclusive regarding the business's legal status.

The trial court granted American's motion for summary judgment on September 17, 1993. The record contains no reasons for the summary judgment. Mr. Trombley brings this appeal.

EXCLUSIONARY PROVISION

In the American policy, the "named insured" appears as:

"RICHARD A. SOILEAU

DBA THE MEDICINE SHOPPE"

The policy reads, in pertinent part:

"SECTION I—COVERAGES

Coverage A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of `bodily injury' or `property damage' to which this insurance applies.

817

*817 2. Exclusions

This insurance does not apply to:

g. `Bodily injury' or `property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, `auto' or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and `loading or unloading.'"

At the time of the accident, an "endorsement" had modified the policy by adding the following pertinent language:

"HIRED AUTO LIABILITY

The insurance provided under COVERAGE A (Section 1) applies to `bodily injury' or `property damage' arising out of the maintenance or use or a "hired auto" by you or your employees in the course of your business.

NON-OWNED AUTO LIABILITY

The insurance provided under COVERAGE A (Section 1) applies to `bodily injury' or `property damage' arising out of the use of any `non-owned auto' in your business by any person other than you."^[1]

The plaintiff urges the trial court erred when it found the vehicle registered to Richard A. Soileau was owned by the named insured in the American policy, Richard A. Soileau d/b/a The Medicine Shoppe. In essence, the plaintiff argues Richard Soileau is a separate legal entity from Richard Soileau d/b/a The Medicine Shoppe, making it impossible for Richard Soileau d/b/a The Medicine Shoppe to be the owner of the vehicle as envisioned by the exclusionary clause in the American policy.

The plaintiff has cited no authority for the proposition that an individual doing business under a trade name is a separate legal entity from the individual. Further, our research indicates that just the opposite is true; a trade name has no separate existence apart from the individual doing business under that trade name. In reaching this conclusion, we first note that the Code of Civil Procedure treats the trade name and the individual operating thereunder as one entity. LSA-C.C.P. Art. 736 provides:

"A person who does business under a trade name is the proper defendant in an

action to enforce an obligation created by or arising out of the doing of such business."

The comments to Article 736 elaborate further:

"It has been held that a suit brought against the owner only in the trade name used was sufficient to justify rendition of judgment against the owner.

It is regarded as being completely unsound, since the business being done under a trade name is not a legal entity, and is without procedural capacity or status."

Thus it has been held that a trade name is not a separate entity capable of being sued. Guidry v. City of Houma, 471 So.2d 1056 (La.App. 1 Cir.1985). It has also been held that any judgment rendered against a trade name is a nullity. Leonardi v. Dress Rack, 444 So.2d 780 (La.App. 4 Cir.1984). Citing federal jurisprudence, this court noted in Krawfish Kitchen Restaurant, Inc. v. Ardoin, 396 So.2d 990, 993 (La.App. 3 Cir.1981):

"The designation 'd/b/a' means 'doing business as' but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business. The individual who does business as a sole proprietor under one or several names remains one person ..."

In view of this authority, we hold Richard A. Soileau d/b/a The Medicine Shoppe is not a juridical person separate and apart from the natural person, Richard A. Soileau. Rather, in law and in fact, they are the same entity. Therefore, the vehicle driven by Richard Soileau's daughter and registered in his name was not "owned by another" as contemplated in the American policy. Since the vehicle was owned by the insured, the accident falls squarely within the exclusionary clause. For the same reason, the vehicle *818 was not a "hired auto", nor a "non-owned auto".

CONCLUSION

Finding the trial court did not err in holding the exclusionary provision absolved American from liability, we affirm its judgment. Costs are assessed to the plaintiff.

AFFIRMED.

SAUNDERS, J., dissents.

[1] The policy defines "non-owned auto" as "... any 'auto' you do not own, lease, hire, rent, or borrow which is used in connection with your business."

Save trees - read court opinions online on Google Scholar.

369 U.S. 654 (1962)

UNITED STATES

v.

DIEBOLD, INCORPORATED.

No. 286.

Supreme Court of United States.

Argued April 23, 1962.

Decided May 14, 1962.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Daniel M. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Cox*, *Assistant Attorney General Loevinger*, *Richard A. Solomon* and *Irwin A. Seibel*.

William L. McGovern argued the cause for appellee. With him on the briefs were *Abe Fortas* and *Victor H. Kramer*.

Edgar Barton filed a brief for the Mosler Safe Co. in opposition to appellee's motion to unseal sealed papers.

PER CURIAM.

This is a civil antitrust suit by the Government challenging Diebold's acquisition of the assets of the Herring-Hall-Marvin Safe Company as being violative of § 7 of the Clayton Act. On motion of Diebold the District Court entered summary judgment against the Government on the ground that the acquired firm was a "failing company" under the doctrine of *International Shoe Co. v. Federal Trade Comm'n*, 280 U. S. 291 (1930). The case is here on direct appeal. 368 U. S. 894.

655 *655 In determining that the acquisition of the assets of Herring-Hall-Marvin Safe Company was not a violation of § 7, the District Court acted upon its findings that "HHM was hopelessly insolvent and faced with imminent receivership" and that "Diebold was the only bona fide prospective purchaser for HHM's business." The latter finding represents at least in part the resolution of a head-on factual controversy as revealed by the materials before the District Court of whether other offers for HHM's assets or business were actually made. In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n*, it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56 (c).

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

Save trees - read court opinions online on Google Scholar.