

IN THE COURT OF APPEALS OF IOWA

No. 1-317 / 90-1747

FILED

OCT 29 1991

CLERK SUPREME COURT

THE CINCINNATI INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

CAREY JOHNSON,

Defendant-Appellee,

LELA HEISEL and CHARLES HEISEL,

Invervenors-Appellees.

93

Appeal from the Iowa District Court for Wapello County,
Richard J. Vogel, Judge.

Cincinnati Insurance appeals the district court's
ruling in a declaratory judgment action. **AFFIRMED.**

J. Richard Johnson of White & Johnson, P.C.,
Cedar Rapids, for appellant.

Richard J. Gaumer of Webber, Gaumer, Emanuel & Daily,
P.C., Ottumwa, for appellee Johnson.

Charles K. Pettit, Bloomfield, and J.W. McGrath of
McGrath & McGrath, P.C., Keosauqua, for appellees Heisel.

Considered by Donielson, P.J., and Sackett and Habhab,
JJ.

SACKETT, J.

The issue in this appeal is whether plaintiff-appellant The Cincinnati Insurance Company owes a defense to defendant-appellee Carey Johnson, under the terms of a general liability policy plaintiff wrote for Johnson's employer Lancroft Farms, Inc. The trial court found plaintiff did owe defendant a defense. We agree and affirm.

The plaintiff contends our scope of review is de novo, and the appellees contend we review for correction of errors at law. We review a declaratory judgment action as we review any other judgment. See Matter of Mt. Pleasant Bank & Trust Co., 426 N.W.2d 126, 129 (Iowa 1988); Mead v. Iowa State Bd. of Parole, 331 N.W.2d 102, 103 (Iowa 1983). Our scope of review is governed by how the case was tried in the district court. See Halsey v. Coca-Cola Bottling Co. of Mid-America, Inc., 410 N.W.2d 250, 252 (Iowa 1987).

This case was tried as a law action. Objections were ruled on during trial. We treat a case on appeal in the same manner it is tried in district court. Life Investors Ins. Co. v. Heline, 285 N.W.2d 31, 35 (Iowa 1979). Our review is at law. In a law action the district court's findings of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 238 (Iowa 1988). We are not, however, bound by the trial

court's application of legal principles or its conclusions of law. State ex rel. Miller v. Internal Energy Management Corp., 324 N.W.2d 707, 710 (Iowa 1982).

Johnson, while employed by Lancroft Farms, Inc., was making a delivery at Stockport Locker, the business of appellee intervenors, Lela Heisel and Charles Heisel. Lancroft Farms, Inc., required Stockport Locker to pay cash at the time of a delivery. Johnson generally arrived at the Stockport Locker about 8:30 a.m. and would have to wait until 9:00 a.m. when the bank opened to receive payment for a delivery. Johnson would normally banter with the Heisels while he waited. While Johnson was waiting, a comment was made to him about "brown nosing." Johnson took an ink pad, opened it, and tried to touch Charles Heisel's nose. When he missed Charles' nose with the ink pad, Johnson directed the pad toward Lela's nose. Lela moved away from Johnson. Johnson grasp her between the shoulder and neck and continued to move the ink pad toward her nose. Lela was pushed backward over the side of the chair and allegedly sustained an injury to her back.

The Heisels filed suit against Lancroft Farms, Inc., and Johnson for Lela's injuries. The defense of the claim was tendered to plaintiff. Plaintiff filed a petition for declaratory judgment against defendant Johnson, asking the court to determine it was not required to defend Johnson on

the claim, and it was not required to pay a claim, demand judgment or settlement on Johnson's behalf. Lela Heisel and Charles Heisel intervened. The trial court denied plaintiff's request for declaratory judgment, holding plaintiff had an obligation to defend Johnson, and the policy of insurance extended to Johnson and Lancroft Farms, Inc.

Plaintiff appeals contending (1) the action of Johnson was a substantial deviation from his employment and it should not be required to offer Johnson coverage, and (2) the trial court should not have determined the policy covered Lancroft Farms, Inc.

The plaintiff issued an insurance policy to Lancroft Farms, Inc. This policy included comprehensive general liability insurance coverage which provided in applicable part:

Coverage A-Bodily Injury Liability
* * *

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A. Bodily Injury
* * *

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Persons Insured

Each of the following as an insured under this insurance to the extent set forth below:

- (a)
- (b)
- (c) If the named insured is designated in the declarations as other than in individual, partnership or joint venture, the organization so designated any executive officer, director or stockholder thereof while acting within the scope of his duties as such:

The policy also included a broad form liability endorsement which provided in part:

Additional Persons Insured

As respects bodily injury, property damage, and personal injury and advertising injury coverages, under the provision persons insured, the following are added as insureds:

- 1.. . . .
- 2. Employee-Any employee of the named insured while acting within the scope of his duties as such,

The question is whether plaintiff had an obligation to defend Johnson in connection with the claim filed by Lela and Charles Heisel.

Plaintiff acknowledges Lancroft Farms, Inc., would be responsible for Johnson's acts if they were done in the scope of Johnson's employment. To occur in the course of employment, the injury must occur within the period of employment. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). In the course of employment has been defined as within the period of the employment, at a place where the employee reasonably may be in the performance of his duties or engaged in doing something incidental

thereto. See Golay v. Keister Lumber Company, 175 N.W.2d 385, 386 (Iowa 1970).

The injury occurred during Johnson's working hours, and at a place where he was expected to be. Bantering with a customer while waiting for a payment could be expected. The question is, when the exchange exceeded conversation and turned to Johnson's incident with the ink pad, was Johnson no longer acting within his duties as an employee. The evidence supports a finding the act was one of fun rather than ill will.

A deviation from the employer's business or interest to pursue the employee's own business or interest must be substantial in nature, to relieve the employer from liability. See Sandman v. Hagan, 261 Iowa 560, 568, 154 N.W.2d 113, 118 (1967).

An employer's control or right to control is inapposite as a basic test of scope of employment. See Merchants Nat'l Bank of Cedar Rapids v. Waters, 447 F.2d 234, 237 (Eighth Cir. 1971). An act is within the scope of the servant's employment where such act is necessary to accomplish the purpose of the employment and is intended for such purpose, although in excess of the powers actually given the employee by the employer. Id.

The exchange between Johnson and the Heisels was not so far removed as not to be within the scope of Johnson's employment. There is substantial evidence to support the

finding the incident happened while Johnson was within the course of employment. We affirm the trial court's decision.

Plaintiff also argues the trial court incorrectly determined the policy required plaintiff to extend insurance to Lancroft Farms, Inc., and defend them. Plaintiff argues this finding is not supported by the evidence; it was not an issue the trial court was asked to decide, and Lancroft Farms, Inc., is not a party to this litigation. The plaintiff's obligation to defend Johnson was based on its responsibility to its insured, Lancroft Farms, Inc. The issue of plaintiff's obligation to defend Lancroft Farms, Inc., was relevant to the issue before the trial court. There was evidence to support the trial court's finding. Whether that finding resolves the issue of coverage between plaintiff and Lancroft Farms, Inc., was not before the trial court and is not before us.

AFFIRMED.