

IN THE COURT OF APPEALS OF IOWA

No. 1-076 / 90-1096

FILED

JUN 25 1991

CLERK SUPREME COURT

ALLIED MUTUAL INSURANCE COMPANY,

Appellant,

vs.

**KERRY ALBERTSON; KATHY ALBERTSON, a/k/a KATHRYN ALBERTSON;
JOHN PAUL CAREY, A Minor; and DONALD MARESCH and CLARA
MARESCH, Guardians Ad Litem;**

Appellees.

Appeal from the Iowa District Court for Mahaska County,
Phillip R. Collett, Judge.

Plaintiff appeals from the district court's denial of
its motion for new trial and for judgment n.o.v. following
an adverse jury verdict in a declaratory judgment action.

AFFIRMED.

Allan C. Orsborn of Keith, Orsborn, Milani & Neary,
Ottumwa, for plaintiff-appellant.

John A. Pabst and Kevin S. Maughan of Clements, Pabst,
Hansen & Maughan, Albia, for defendants-appellees
Albertsons.

John H. Stone of Neiman, Neiman, Stone & Spellman,
P.C., Des Moines, for defendants-appellees Carey and
Maresch.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

HABHAB, J.

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This is a declaratory judgment action brought by Allied to determine whether defendants were provided with insurance coverage under a farm liability policy issued by Allied. The trial court held the defendants had coverage Allied appeals. We affirm.

Allied Mutual Insurance Company issued a farm liability policy to the Albertsons in 1984. The policy contained an exclusion for claims for bodily injury or property damage arising out of "business pursuits" other than farming. It is this provision of the policy that forms the basis of this suit.

Allied asserts selling and breeding of Rottweiler dogs rose to the level of a business pursuit within the meaning of the policy. Thus, the provisions of the exclusion apply; the Albertsons counter by contending they were not involved in the sale and breeding of dogs as a business and that what they were doing is classified as a hobby.

At the time the policy was issued, the Albertsons were not involved in selling or breeding registered Rottweiler dogs. But they contend their agent advised them farm dogs would be covered under the policy. However, the agent maintained he had no knowledge of the Albertsons' intent to breed and sell Rottweilers.

It is admitted the Albertsons were first involved in the breeding of Rottweiler dogs in 1986. They then bred three litters and sold the puppies pursuant to a "puppy

contract" prepared by their attorney. They continued their involvement in the breeding, showing, and selling of Rottweilers for the years 1986, 1987, and 1988 and reported income and losses on their tax returns. However, they contend they passed up a great many opportunities to draw a profit from selling the dogs and additionally argue this was a hobby and not a business. They further argue that they did not operate a kennel and that the dogs were treated as pets. They slept and ate in their home, and although puppies were sold, it was not for profit. They admit the breeding, selling, and showing of dogs, but claim it was done as a hobby--an activity ordinarily incident to a non-business pursuit.

In 1988 Kathryn Albertson went to Germany. Incidental to her visit, she purchased four Rottweiler dogs. She bought one of the dogs named, "Ero", for Clara Maresch and paid \$3,800. Later, she sold Ero to Maresch for \$4,300. After deducting the cost of a crate (\$310), shipping costs (\$664), U-Haul trailer expenses, special medication, long-distance phone calls, and hotel expenses, she made no profit.

Ero savagely bit the Maresch's adopted son, John Paul Carey, who incurred medical expenses in excess of \$84,000. The Mareschs and Carey then filed suit against the Albertsons in the United States District Court for Nebraska. The Albertsons filed their claim for coverage with Allied under its farm liability policy. At all times

material, the farm liability policy was in effect. Seeking to deny coverage, Allied instituted these proceedings by filing its petition for declaratory judgment.

Allied's policy excluded coverage arising out of "business pursuits" other than farming. This exclusion, Allied insists, applies to the sale and breeding of dogs. Rather than rule on this issue as a matter of law, the district court submitted the question to the jury. Allied contends this was error and further argues the court erred in communicating with the jury before they reached a verdict. Following an adverse jury verdict, the jury specifically found the Albertsons were not involved in a business pursuit. Allied moved for a new trial and for judgment n.o.v. The district court denied Allied's motions. Allied now appeals.

I.

We must first decide whether the trial court erred in finding the insurance contract to be ambiguous. Along with that issue, we must decide whether there was error in submitting the matter to the jury. Our supreme court has held that interpretation, i.e. the meaning to be given to the words, is a question of fact which may properly be submitted to the jury. Brammer v. Allied Mutual Insurance Co., 182 N.W.2d 169, 172 (Iowa 1970). However, if the evidence is so clear that a reasonable person could reach but one conclusion the question should be determined by the court as a matter of law. Id. If the evidence is disputed

or if different conclusions may be drawn from the evidence, then the question of interpretation is one of fact for the jury. Id.

II.

We agree with the trial court that it cannot be said as a matter of law that the Albertsons' activities constitute a business within the meaning of their policy. The evidence in this regard is not so clear that a reasonable person could reach only one conclusion. We believe a fact question has been generated as to whether the Albertsons were involved in a business pursuit.

The insurance policy in question provides in pertinent part:

9. "business" means:

1. a trade, profession, or occupation, other than "farming," and includes the use of any premises or portion of a residence premises for any such purposes

* * *

10. "farming" means the use of land or buildings for the purpose of raising crops or livestock.

* * *

EXCLUSIONS:

- A. COVERAGE L - Farm Liability and Coverage M - Medical Payments to Others do not apply to "bodily injury" or "property damage";
- (4) arising out of "business" pursuits of any "insured" except activities which are ordinarily incident to non-"business pursuits" or "farming."

* * *

B. COVERAGE L - Farm Liability does not apply to:

- (1) liability assumed under any unwritten contract or agreement, or by contract or agreement in connection with any "business" of the "insured"

It is clear under the policy that medical payments to others do not apply to "bodily injury" or "property damage" arising out of "business pursuits" of any insured. There is, however, the policy exception to this general exclusionary statement; and that is "except activities which are ordinarily incident to non-"business pursuits" or farming.

The Albertsons claim their selling and breeding of Rottweiler dogs was not a business pursuit within the meaning of the policy; they claim it was nothing more than a hobby--an activity which is ordinarily incident to a non-business pursuit. Allied claims to the contrary. There is testimony on each side to substantiate the respective positions of the parties. It is because of this conflict in the testimony that we believe the trial court was correct when it submitted the question to the jury and did not rule as a matter of law.

III.

Allied contends the trial court erred in instructing the jury on the definition of business pursuit. The instruction provided in order to constitute a business pursuit there must be continuity and profit motive. The scope of review concerning jury instructions is on assigned

error. Iowa R. App. P. 4, Edwards v. City of Des Moines, 349 N.W.2d 786 (Iowa App. 1984).

Allied maintains "business" was defined in the policy and thus a definition was not necessary. However, the Allied policy did not define "business pursuit." For the jury to determine whether the activities of the Albertsons constituted a business pursuit, it was necessary for the trial court to provide a definition which would enable the jury to make this determination. Based upon the issues presented from both parties, it was clear a conflict existed with regard to the proper meaning of "business pursuit" under this policy. The trial court provided the jury with a definition of "business pursuit" set forth by our supreme court in Moncivais v. Farm Mutual Ins. Co., 430 N.W.2d 438, 440 (Iowa 1988). We find this instruction to be an accurate definition of "business pursuit" and therefore determine it was not submitted in error.

IV.

Allied also contends the trial court erred in communicating with the jury during deliberations and therefore erred in failing to grant a new trial on this basis. On the second day of its deliberations, the jury gave the district court a written statement, "We, the Jury, cannot arrive at a conclusion based on the instructions and the Verdict Sheet." The court responded with a separate instruction which stated, "It would be helpful if you would advise the Court in writing why you cannot arrive at a

conclusion based on the instructions and the Verdict Sheet." Twenty minutes later the jury reached its verdict. It found that the injury to John Carey by the Rottweiler dog did not arise out of a business pursuit by the Albertsons. Allied claims the action by the trial judge was equivalent to an urging instruction and asks for a new trial.

We allow a trial court broad but not unlimited discretion in ruling upon motions for new trial and will only reverse its determination upon a finding that it has abused its discretion. Iowa R. App. P. 14(f)(3); See, Thomas Truck and Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973). When misconduct is asserted as a ground for a new trial, it must appear from the record that the misconduct caused prejudice to the moving party or that a different result would have been probable but for such misconduct. Laguna v. Prouty, 300 N.W.2d 98, 102 (Iowa 1981).

We are unable to agree with Allied that the judge urged a verdict by merely asking the jury what problem they were experiencing. "The ultimate test for determining the propriety of the instruction is whether the instruction improperly coerced a verdict or merely initiated a new train of real deliberation which terminated the disagreement." McConnell v. Aluminum Company of America, 367 N.W.2d 245, 250 (Iowa 1985). Reversal is in order only

when the surrounding circumstances demonstrate prejudice.
Id.

We conclude Allied was not prejudiced by the actions of the court. We affirm the trial court in overruling Allied's motion for new trial.

AFFIRMED.