

IN THE COURT OF APPEALS OF IOWA

No. 9-437 / 88-1389

FILED

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CLERK SUPREME COURT

LEO WEBER, DANIEL WEBER, DOUG WEBER, and HOWARD WEBER,

Appellants,

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vs.

IMT INSURANCE COMPANY,

Appellee.

Appeal from the Iowa District Court for Wapello County,
Robert Bates, Judge.

Plaintiffs appeal declaratory judgment in favor of
defendant. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa,
for the appellants.

Marsha Ternus of Bradshaw, Fowler, Proctor & Fairgrave,
Des Moines, and W. Kent Thomson and Alanson K. Elgar of the
Elgar Law Office, Mt. Pleasant, for the appellee.

Considered by Oxberger, C.J., and Donielson and
Schlegel, JJ.

OXBERGER, C.J.

In this declaratory judgment proceeding, the Webers appeal the district court's determination that IMT Insurance Company was not obligated to provide coverage under a farm liability policy. The district court entered a declaratory judgment in favor of IMT and held that the policy provided no coverage under the facts of this case. On appeal, the Webers contend the district court misinterpreted the policy. They also contend they are entitled to coverage under the doctrine of "reasonable expectations." We affirm the decision of the district court.

"Our scope of review is governed by how the case was tried in the district court." In re Receivership of Mt. Pleasant Bank & Trust Co., 426 N.W.2d 126, 129 (Iowa 1988). As this case was tried as a law action, our review is on errors assigned. The district court's finding of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. Id. We are not bound, however, by the district court's application of legal principles or its conclusions of law. State ex rel. Miller v. Internal Energy Management Corp., 324 N.W. 707, 710 (Iowa 1982). In evaluating the sufficiency of the evidence, we view it in the light most favorable to sustaining the trial court's judgment, and need only consider evidence favorable to the judgment, whether or not

it is contradicted. F.S. Credit Corp. v. Shear Elevator, Inc., 377 N.W.2d 227, 232 (Iowa 1985).

The Webers operate a farm, raising both hogs and crops. They fertilize their crops in part with manure from their hog lots. In so doing, they sometimes haul manure past the Ralph Newman home about a mile away. During such hauling, manure is sometimes dropped on the gravel road from the spreader or tracked onto the road from the spreader's tires.

In 1986 Newman filed a suit against the Webers, seeking damages resulting from the alleged contamination of his sweet corn crop and other property by fumes from manure dropped or spread on the road. The Webers looked to their farm liability insurer, IMT Insurance Company, to defend them against the Newman suit. However, IMT took the position that its policy did not cover such a lawsuit and did not obligate it to provide a defense. IMT relied on policy language providing that coverage is limited to accidents "neither expected nor intended from the standpoint of the insured" and providing that there is no coverage for discharge of "waste materials" unless the discharge is "sudden and accidental."

The Webers filed the present petition for declaratory judgment against IMT, seeking a determination that IMT was obligated to provide coverage and to defend against the Newman lawsuit. However, the district court ruled in favor

of IMT, holding that IMT had no duty to defend against the Newman suit. The Webers have appealed.

The Webers contend the district court erred by holding that the policy does not provide coverage for the Newman suit or require IMT to defend against the Newman suit. First, the Webers contend the policy provides coverage because manure is not a "waste material" within the meaning of the policy exclusion.

IMT insured Leo Weber under a farm liability policy and an umbrella policy. The exclusionary language of the farmers comprehensive personal liability policy includes, in relevant part, the following:

. . . bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The Webers contend that any ambiguity in the farm liability policy's definition of "waste material and other irritants" must be resolved against IMT and in favor of the Webers. The district court concluded that this pollution exclusion was not ambiguous. The court further stated that the exclusion "applies to waste materials, a reasonable interpretation of which would include hog manure." We agree.

The Webers' request that we construe the policy language "waste materials or other irritants" to not include hog manure. The Webers maintain that since they use and will continue to use the manure as an integral part of their farming operation it should not be included in the definition of "waste materials." We find the Webers' requested construction of the policy language to be a strained and unreasonable construction. "'A strained or unreasonable construction of the language used [in an insurance policy], where there is no real ambiguity, should not be indulged in.'" Northwestern National Ins. Co. v. Kinney, 444 N.W.2d 107, 109 (Iowa App. 1989), (quoting Stover v. State Farm Mutual Insurance Co., 189 N.W.2d 588, 591 (Iowa 1971)).

Since the term "waste materials" is not defined in the policy, "we are required to give the words their ordinary meaning rather than a specialized or technical meaning." Connie's Constr. Co. v. Fireman's Fund Ins. Co., 227 N.W.2d 207, 210 (Iowa 1975). The dictionary definition of "waste" includes "refuse from places of human or animal habitation" and "excreted by an animal body." Webster's Third New International Dictionary 2580 (1971). Contrary to the Webers contention, the manure being hauled by them certainly falls within this definition. We find the language of this exclusion to be unambiguous. We agree with the district court that "[a]llthough [manure] . . . is

beneficial when handled in a certain manner, it is waste material until it reaches this state or condition. It requires removal, spreading, and dispersal to reach its beneficial condition." Consequently, we find no error by the district court in holding that the Webers' activities fell within the exclusionary language of the policy.

Next, the Webers contend the "sudden and accidental" exception to the pollution exclusion applies to the circumstances of this case. They assert that any spillage of manure was "sudden and accidental" and was "neither expected nor intended."

IMT Insurance Company contends that the "sudden and accidental" exception to the pollution exclusion does not apply to the discharge of waste materials in this case. They assert that the runoff, spilling and depositing of manure on the county road by the Newman property was an attendant circumstance of the "Webers' regular and ongoing farming activities and occurred periodically over a ten to fifteen-year period." We agree.

We read the terms "sudden and accidental" of the exception to the pollution exclusion in their everyday meaning. "We do not believe that it is possible to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected." United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 32 (6th Cir. 1988). We read the "sudden and accidental" phrase as follows:

"Sudden" in its common usage, means "happening without previous notice or with very brief notice," while "accidental" means "occurring sometimes with unfortunate results by chance alone." The meaning of these terms is clear and should not be twisted simply to provide insurance coverage when the courts deem it desirable.

Id. at 34-35 (quoting Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927, 930 (S.D. Ohio 1987)). Consequently, we agree with the Sixth Circuit Court of Appeals holding in United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988), that "such pollution exclusion clauses apply to the release of wastes and pollutants taking place on a regular basis or in the ordinary course of business." Id. at 35.

In the case at hand, the Webers transported solid manure in a flail-type spreader one half mile south past the farm and home of Ralph Newman. As the district court noted, "[f]rom time to time as the manure is hauled along the county gravel road, it is spilled and deposited on the road." The Webers have hauled the manure from the hog confinement system since the middle 1970s to the present date. Ralph Newman has complained for several years about the Weber hog operation. The Weber farm has raised hogs for approximately 40 years, but the problem for Mr. Newman has existed for approximately 15 years. Mr. Newman made a specific complaint to the Iowa Department of Environmental Quality in 1978 or 1979 and again in 1985 and 1986. The Webers were aware of Newman's complaints concerning the hog

operation throughout the years. Mr. Newman has complained about the manure from the tires being spread on the road and about liquid drainage of the manure into the ditch along the road.

On April 4, 1986, Ralph Newman filed a petition at law against the Webers to abate a nuisance. The petition stated: "That for a number of years, the . . . [Webers], while hauling hog manure from their hog feeding operation, have repeatedly allowed manure to fall on the county road . . . and have failed to remove the same therefrom." Newman amended his petition and added the following paragraph: "That for a number of years, up to and including the present time, the defendants, in the course of operating the hog feeding operation . . . have allowed manure from the hog operation to flow onto the county road . . . as well as the grader ditches thereto."

We find the "sudden and accidental" exception to the pollution exclusion is inapplicable here where the pollutants at issue were dispersed and discharged on a regular ongoing basis. Consequently, we agree with the district court's conclusion that the deposit of manure on the county road and the runoff from the hog lot were not sudden and accidental within the meaning of the exception to the pollution exclusion clause. We find no error by the district court in holding that IMT has no duty to defend the Webers under the farmers comprehensive personal liability policy.

The Webers also contend that they are entitled to coverage under the doctrine of "reasonable expectations" because an interpretation of a farm liability policy which barred coverage for manure spillage would be bizarre and oppressive and would eliminate a dominant purpose of the policy.

The doctrine of reasonable expectations was first set out by the Iowa Supreme Court in Rodman v. State Farm Mutual Automobile Insurance Co., 208 N.W.2d 903 (Iowa 1973). In that case, the supreme court stated that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Id. at 906. Reasonable expectations giving rise to application of the doctrine may be established by evidence of the underlying negotiations or may be inferred from the circumstances under which the policy was procured or issued. Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 825 (Iowa 1987). Furthermore, the doctrine obligates the fact finder to ignore policy exclusions or other policy language if the exclusion or the language: (1) is bizarre or oppressive; (2) eviscerates terms explicitly agreed to; or (3) eliminates the dominant purpose of the transaction. Id.

We disagree that the doctrine of reasonable expectations is applicable to the facts of this case. In construction and application of a standardized insurance contract, the court strives to effectuate the reasonable expectations of the average member of the public who accepts it. C & J Fertilizer Inc., v. Allied Mutual Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975). As previously noted, the pollution exclusion is not ambiguous and consequently, we believe an ordinary laymen would not misunderstand the policy's coverage. We find that the pollution exclusion to be reasonable, and not bizarre or oppressive, and does not eliminate the dominant purpose of the transaction. We agree with the district court that the policy exclusion simply applies to the nuisance situation and does not eviscerate terms of the policy explicitly agreed to. We find no error on the part of the district court in concluding that the reasonable expectations doctrine did not apply to the facts of this case.

The Webers also seek coverage for their defense costs under the umbrella policy issued by IMT. Coverage is provided under the umbrella policy only for personal injury or property damage "caused by an occurrence." The umbrella policy contains a definition of "occurrence" as follows:

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

We think it clear from the terms of this policy that "occurrence" means an accident. See Northwestern National Ins. Co. v. Kinney, 444 N.W.2d 107, 109 (Iowa App. 1989). In Northwestern Nat'l, this court cited the supreme court's definition of "accident" in Central Bearings Co. v. Wolverine Ins. Co., 179 N.W.2d 443, 448 (Iowa 1970):

The word 'accident,' as used in insurance policies, has frequently been defined as . . . an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force. . . . (Citations omitted). . . . As used in this policy, giving to the word the meaning which a man of average understanding would, we think it clearly implies a misfortune with concomitant damage to a victim, and not the negligence which eventually results in that misfortune.

Northwestern Nat'l, 444 N.W.2d at 109.

The policy definition of "occurrence" requires that the accident result in damage which is "neither expected nor intended." In American Universal Ins. Co. v. Whitewood Custom Threaters, Inc., 707 F. Supp. 1140 (D.S.D. 1989), the court examined insurance policies with exactly the same definition of an occurrence as is contained in the umbrella policy issued by IMT in this case. Id. at 1148. The American Universal court stated: "The test of 'substantial probability' is to be used in determining whether the injury was expected or intended from the standpoint of the insured so as not to be within the definition of what constitutes an occurrence." Id. at 1148-49. We note here that substantial probability is more than reasonably foreseeable. Id.

The indications must be strong enough to alert a reasonably prudent man not only to the possibility of the results occurring but the indications also must be sufficient to forewarn him that the results are highly likely to occur.

Id. (citing City of Carter Lake v. Aetna Cas. & Sur. Co., 604 F.2d 1052, 1059 n.4 (8th Cir. 1979)).

In determining what constitutes an occurrence, the focus is on whether the resulting damages were highly likely to occur due to the deposit and discharge of this waste material on and near the Newman property. Applying the substantial probability standard to the facts of this case, we conclude that damages caused to Newman's property due to manure dropping onto the road in front of the Newman residence, and the runoff of manure into the ditch were highly likely to occur. The district court stated:

The hauling and gradual deposit over the years of waste material cannot be considered an accident. Neither the amount, method of application, or the result constitute an accident. It also cannot be said that the deposit is intentional. These facts meet the requirement of being a continuance or repeated exposure which were not intended from the standpoint of the insured. But it cannot be said that the result was not expected. The transportation of manure in either the vacuum or flail type spreader will ordinarily and necessarily result in some escape onto the road. The operator does not accidentally deposit it unless he collides or overturns. He does not drive down the road for the intentional purpose of placing it on the road, but he more or less expects that some of it will be deposited there. It is more or less a fact of life of this operation. Contrast this situation to the one where liquid or solid manure is placed on the roadbed, which causes a vehicle to skid. The latter example meets the definition of occurrence; the one at hand does not.

We agree with the analysis of the district court. Upon our review of the record, we believe the Webers' deposit and discharge of manure on the road and the runoff of manure from their hog lot were foreseen and expected. Consequently, we find the deposit and discharge of manure in this case does not fall within the policy definition of occurrence. We find no error on the part of the district court in determining that there was no coverage under the umbrella policy.

For the above reasons we affirm the decision of the district court in all respects.

AFFIRMED.