FILED
MAY 20 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NORMA J. SPINDLER,
Appellant,
v.
NEW YORK LIFE INSURANCE COMPANY,
Appellee.

Filed May 20, 1977

127

NORMA J. SPINDLER,
Appellant,
v.
THE PENN MUTUAL LIFE INSURANCE COMPANY,
Appellee.

32
2-58019

Appeal from Cerro Gordo District Court - L. E. Plummer, Judge.

Appellant appeals a jury verdict which denied her recovery under the double indemnity provisions of her decedent's life insurance policies. Reversed and remanded with directions to enter judgment for plaintiff.

Don W. Burington, of Laird, Burington, Bovard & Heiny, of Mason City, for appellant.

C. F. Beck, of Beck, Pappajohn & Shriver, of Mason City, for appellee, New York Life Insurance Company.

Robert S. Kinsey, of Brown, Kinsey & Funkhouser, of Mason City, for appellee, The Penn Mutual Life Insurance Company.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Plaintiff appeals a jury verdict which denied her recovery under the double indemnity provisions of her decedent's life insurance policies. Plaintiff's husband, Victor Spindler, and Wayne Klinner were killed in an airplane crash in the early morning hours of December 15, 1969, near Mason City. Plaintiff challenges the sufficiency of the evidence to support defendants'-insurers' affirmative defense that their policies' exclusions preclude double indemnity since Spindler was receiving instruction during the flight.

I. Construction of policies - sufficiency of evidence.

Both insurance policies contained similar exclusions of which New York Life's clause is typical:

> . . . no Double Indemnity Benefit will be payable on account of the death of any person which. . . results from. . . travel or flight in any kind of aircraft (including falling or otherwise descending from or with such aircraft in flight) while such person is participating in aviation training in such aircraft. . . .

Trial court interpreted this exclusion in its jury instructions and post-verdict motions to apply if aviation instruction was to be received at any time during the fatal flight, a construction urged by the insurers here.

There is no Iowa case interpreting such an exclusionary clause, but we are guided by the general legal principle that when an insurer seeks avoidance of a claim through an exclusionary clause in the policy, such exclusion is to be strictly construed. Connie's Const. v. Fireman's Fund Ins., 227 N.W.2d 207, 210 (Iowa 1975); *see also,* C & J Fert., Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176-177 (Iowa 1975). Other jurisdictions, applying rules of construction similar to Iowa's, have held that this clause is capable of two meanings: (1) that the relevant point of time to determine if the insured is piloting the craft or

receiving instruction is at any time during the flight, or (2) the relevant point of time is at or imminently near the time of the crash. *See* Alliance Life Ins. Co. v. Ulysses Vol. Fire. Relief Assn., 215 Kan. 937, 529 P.2d 171, 176-180 (1974). In strictly constructing the exclusion, courts have held that the insured must be piloting the airplane or receiving instruction at the time of the crash in order for it to preclude recovery. Alliance Life Ins. Co. v. Ulysses Vol. Fire. Relief Assn., supra; *accord*, State Auto. & Cas. Under. v. Hartford Acc. & Ind. Co., 166 N.W.2d 761, 763 (Iowa 1969). With benefit of this guidance, it follows that trial court's construction of the policy exclusion as reflected in jury instruction nine was error.

Viewing insurers' evidence in the light most favorable to them under this construction, we find it failed to generate a jury issue whether Spindler was receiving instruction at the time of the accident. The insurers' evidence, which was entirely circumstantial, showed that Spindler had been receiving instructional flights from Klinner for a period of time. In fact, every flight taken by Klinner and Spindler was logged as instruction for the entire time of the flight. On the day of the crash, Spindler was to attend a business seminar in Fort Dodge and made arrangements to fly there with Klinner. The insurers adequately demonstrated that a secondary purpose of the flight was instruction in night flying. No one saw the plane take off or its crash which occurred immediately thereafter.

Although the evidence is close, we believe it was not sufficient to generate a jury question on whether Spindler was receiving instruction at the time of the crash. While a jury issue would have been generated as to whether Spindler had the status of instructee on the flight, the insurers must undertake to prove

more by the terms of their exclusions. *See* Alliance Life Ins. Co. v. Ulysses Vol. Fire. Relief Assn., supra. "While participating in aviation training" is a phrase which connotes action rather than the mere status as instructee. Alliance Life Ins. Co. v. Ulysses Vol. Fire. Relief Assn., supra at 179. Consequently, it was incumbent upon insurers to present some evidence that the act of instruction was occurring at or near the time of the crash.

Under this record no one knows what Spindler was doing at the time of the accident, if anything. Those who bore the burden of proving this hypothesis had a virtually impossible task without direct evidence. *See* Alliance Life Ins. Co. v. Ulysses Vol. Fire. Relief Assn., supra at 178. What was occurring in the aircraft at the time of the crash will always remain a mystery.

To find that there was sufficient evidence for the jury to consider whether Spindler was receiving instruction at the time of the crash would leave the area of evidence and inferences and enter the realm of speculation. Trial court erred in not sustaining plaintiff's motion for directed verdict.

II. Defendants' cross-appeal.

Defendants' have cross-appealed from trial court's evidentiary ruling which denied admissibility to insurers' proffered evidence that Klinner told several persons the fatal flight was for instruction. Given our resolution of their problem in meeting their burden of proof, any error in the exclusion of this evidence was harmless since it would add nothing to what their evidence had already shown.

Trial court's judgment is reversed and remanded with directions to enter judgment for plaintiff.

SNELL, J., concurs; OXBERGER, J., specially concurs; DONIELSON and CARTER, JJ., each dissent.

Oxberger, J. (specially concurring)

I agree that the trial court should have sustained the plaintiff's motion for directed verdict on defendant's exclusionary clause. However, I do not believe that the phrase, "while participating in aviation training" connotes action. A trainee may learn by observing, listening and hearing. I agree with the trial court that training does not involve a physical act. Participation refers to the physical act of enrolling and engaging in an educational program. It does not require a physical act in the program. Further, I disagree that the evidence produced at trial created an issue that a purpose of the flight was instruction.

I do not believe the fact Klinner and the deceased had flown together on 21 previous occasions as trainer and trainee proves that they were so engaged in this flight. The deceased was on a business trip at the time of the fatal crash. He planned to remain in Fort Dodge for business that day and then to drive home to Mason City that evening. He requested that his business associates drive his car to Fort Dodge from Mason City. He planned to drive his car home after the business meeting. He had not checked the plane out for the day. Therefore he needed to return the plane immediately rather than later in the day. He needed a pilot to return the plane. It was natural that he ask his instructor to serve as the ferry pilot.

Defendants claim since Aero Flight Service Inc. was not licensed for charter that the fatal flight must have been for instructional purposes. However, the charter license only permits the flight service to receive a profit on the pilot services. The lack of a charter license does not prevent the flight company from leasing to a customer the airplane and the customer providing his own pilot and expenses.

Rule 344(f)(16), Iowa Rules of Civil Procedure, requires circumstantial evidence of causation to be more probable than any other theory based on such evidence. I cannot conclude that given the fact the flight was for a business purpose that the pilot was serving as an instructor. I believe it is just as feasible to conclude that the pilot was serving as a ferry pilot to return the plane to Mason City before the normal rental day began.

DONIELSON, J. (dissenting)

I dissent for the following reasons. 1. The issue relied on by the majority was not raised in the original appellate pleadings contrary to rule 344, Rules of Civil Procedure. 2. There is no ambiguity in the insurance contract requiring judicial interpretation. 3. The decision of the majority in adopting Alliance Life Ins. Co. v. Ulysses Vol. Fire Relief Assn., 215 Kan. 937, 529 P.2d 171, 176-180 (1974) using the *"at the time of the crash"* theory results in a strained and unreasonable ruling relating to the burden of proof. 4. The burden of proof established by the majority is detrimental to both the theory of circumstantial evidence and the fundamental role of a jury as a trier of facts. 5. *Alliance Life* is factually inapposite to the instant case.

I

No Assignment of Error

Appellant's failure to comply with rule 344, R.C.P., (Form and Contents of Briefs) as prescribed, results in an extra burden on this court and a hardship and unfairness to the opposing parties.

The appellant raises two issues in this appeal pursuant to his original appellant's brief filed May 2, 1975; they are:

1. Argument

> Plaintiff was entitled to a directed verdict in her favor as a matter of law.

2. Second Issue Presented for Review

> The Court erred in overruling plaintiff's objections to instructions and in refusing to give plaintiff's requested instructions.

No argument is made at any juncture in the briefs that approaches the theory in *Alliance Life* which now the majority

adopts. The *Alliance Life* theory was presented in the appellant's supplemental brief filed sometime after January 7, 1977. The last formal pleading in this appeal was filed July 22, 1975. This particular issue was developed one and half years after the final appellate pleadings. Propositions not assigned under rule 344, R.C.P., should not be considered on appeal. Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 563 (Iowa 1972). I envision that permission to file Supplemental briefs prior to oral argument to be a convenience to counsel and to the court. It is not an opportunity to create a new theory of the case. *Alliance Life* was decided in December, 1974, prior to the final appellant's pleading.

II

Ambiguity

The exclusionary clauses present no ambiguity or lack of clarity necessitating any interpretation by the court.

Penn Mutual Life's exclusionary clause was:

> "... provided, however, that the Double Indemnity Benefit shall not be payable if death results directly or indirectly from ... (5) travel, flight or descent in or from any kind of aircraft while the Insured is a pilot, officer or member of the crew of such aircraft or is giving or receiving any kind of training or instruction while in such aircraft or has duty aboard such aircraft or requiring descent therefrom ... "

New York Life's exclusionary clause read:

> "... no Double Indemnity Benefit will be payable on account of the death of any person which ... results from ... travel or flight in any kind of aircraft (including falling or otherwise descending from or with such aircarft in flight) while such person is participating in aviation training in such aircraft ... "

The words themselves are what an insured as a reasonable person would understand the policy to mean. See Central Bearings Co. v. Wolverine Insurance Co., 179 N.W.2d 443, 445 (Iowa 1970). Intention of the parties should control, and as an insurance policy is a contract, it should be construed to give meaning that it neither extends nor restricts the coverage beyond that actually provided. The contract should be construed as a whole, and the clear and unambiguous language should be given its plain meaning. See Bjork v. Dairyland Insurance Co., 174 N.W.2d 379, 383 (Iowa 1970).

III & IV

Strained Construction, Burden of Proof

The adoption by the majority of the *"at the time of the crash"* theory suggested under *Alliance Life* creates a strained and unreasonable interpretation of the contract. The criteria to be used is set forth in State Automobile and Casualty Underwriters v. Hartford Accident and Indemnity Co., 166 N.W.2d 761, 764 (Iowa 1969) where it states:

> "We have often said the rules for resolving ambiguous policies do not come into play unless it can be fairly said there is a real ambiguity in the terms of the policy. (cites omitted)
>
> "A strained or unreasonable construction of the language used, where there is no real ambiguity, should not be indulged in. (cites omitted) The language may not be forced in order to create ambiguity or to render uncertain that which is plain. (cites omitted) And it is well settled that if there is no ambiguity in the contract there is no right or duty on the part of the court to write a new contract of insurance between the parties. (cites omitted)
>
> "The provisions in the policy issued by defendant must be read in connection with the policy as a whole and in light of the declarations attached to or made a part thereof. (cites omitted)"

See also Iowa-Des Moines National Bank v. Insurance Co. of North America, 459 F.2d 650, 653 (8 Cir. 1972).

This crash occurred one and half miles west of the Mason City Airport, 37 minutes before sunrise on December 15, 1969, pursuant to stipulation by the parties. The crash then obviously happened minutes after the take-off. The majority's decision makes it relatively impossible for the jury to operate effectively as the trier of facts unless there is a survivor and he is able to convey the information concerning the details at the time of the crash. The jury's role should not be diminished or narrowed, but should be kept in the broadest possible posture in any lawsuit.

The interpretation of all of our rules relating to directed verdicts, dismissal, judgment notwithstanding the verdict are all purposely designed and interpreted to encourage the submission of the cause to the jury. See Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 17 (Iowa 1975). See also rule 344(f), R.C.P., et sequence.

The trial judge properly submitted this to the jury on the theory of circumstantial evidence and to that end the second special verdict was dispositive of the case. This foreclosed the recovery by the plaintiff-appellant under the double indemnity provisions of the policy.

Number (2)

> Have defendants, New York Life Insurance Company and The Penn Mutual Insurance Company, established that Victor E. Spindler was receiving aviation training, as set forth in proposition (1) of Instruction No. 9?
>
> Answer "yes" or "no": yes

V

Alliance Life is factually inapposite

Alliance Life presents a factual situation quite distinguishable from the case before this court. That case involves the double indemnity section of an insurance policy with the exclusionary clause coming into effect where the insured was *"while piloting"* or *"while serving as a crew member"*. This is a good deal different than participating in aviation training in such aircraft.

It should be noted that the insured and the instructor had *flown only* for instructional purposes, and every minute in the air was properly logged as *"flight instruction"*. I am convinced that the activities of the total flight time was the issue and it should have been submitted to the jury as found by the trial court.

This record reflects that direct evidence was introduced to show that aviation training involves minutes and hours of training. The evidence consisted of the instructor's logbook and testimony by the owner of the aviation service that they teach by demonstrating and by word of mouth. The very basis for acquiring a prospective pilot's license was the total and cumulative minutes and hours of flight time.

Aviation instruction involves a *"cumulative total"* of time in the air, and is quite different than *"while piloting"* as used in the *Alliance Life* case. *Alliance Life* was a point in time situation where the exclusionary clause came into effect if the insured was piloting at the time of the crash. Participation in aviation training is a cumulative total situation. The two are not the same.

I would affirm the trial court.

CARTER, J. (dissenting)

I join in the dissent of Donielson, J., and make the following additional observations.

I. The plurality opinion concedes that a jury issue is generated "as to whether Spindler had the status of instructee on the flight." Under any reasonable construction of the two insurance contracts involved this should be sufficient to sustain the jury's verdict. I can not agree with the conclusion that the words "while participating in" require an active role on the part of the instructee at all times. As observed in the dissent of Donielson, J., the record in the present case contains credible competent testimony that would support a broad definition of "aviation training." If one is receiving aviation training he is participating therein under any reasonable interpretation of these words. Special reliance in the plurality opinion on the words "while participating in" goes far beyond the basis upon which this issue was tried and presented in the court below. This language is from the New York Life policy and is not even contained in the Penn Mutual policy, which requires only that the insured be "receiving any kind of training or instruction". No one claimed that the difference in language between the two policies was of any significance in the trial court and indeed the trial court's marshalling instruction (no. 9) was couched in terms of the Penn Mutual policy. Plaintiff did not object to the marshalling instruction on this basis.

II. Even if we assume that the insurers were required to establish that plaintiff was participating in aviation training "at or imminently near the time of the crash" as suggested in the plurality opinion, I believe the circumstantial evidence offered at the trial was such that the jury could have so found. There was substantial circumstantial evidence, including the past

relationship between Spindler and Klinner, to sustain a jury finding that this was a training flight and that the training extended throughout the shortlived but tragic journey.