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SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

FREMONT INDEMNITY COMPANY,	)	
	)	
Plaintiff,	)	Civil No. 1-01-CV-10008
	)	
vs.	)	
	)	
KEN TOLTON, BEVERLY GINTHER, JED BENGARD, Individually and as Injured Parent of TIMOTHY and AMY BENGARD, and BRENDA BENGARD,	)	ORDER
	)	
Defendant.	)	

Before the Court is plaintiff's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), filed June 18, 2001. Defendants Jed Bengard, individually and as injured parent of Timothy and Amy Bengard, along with Jed's wife, Brenda Bengard (collectively, "the Bengards"), filed a resistance on July 23. The other defendants, Ken Tolton and Beverly Ginther, filed a response in opposition to the motion on August 1. Plaintiff then filed a reply on August 2. The Court held a telephone hearing on November 15.[1] The matter is fully submitted.

I. BACKGROUND

This case addresses the issue of whether Fremont Indemnity Company ("Fremont") has a duty to defend Ken Tolton and Beverly Ginther in a petition brought against them in Iowa state court by the Bengards. Below the Court will outline the factual history leading up to the pending

[1] The hearing addressed whether Skyjack Equipment, Inc. should be joined under Federal Rule of Civil Procedure 19.

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state court litigation, along with the insurance policy that is directly associated with the case now before this Court.

Jed Bengard began employment with Skyjack Equipment, Inc. ("Skyjack") in Atlantic, Iowa in 1995 in the research and development division Bengard's job was to perform final testing on Skyjack boom work platforms. The platforms are large transportation devices used to raise personnel and tools to overhead work areas. Skyjack's plant manger was Ken Tolton, and its safety director was Beverly Ginther. On February 19, 1999, Jed Bengard was seriously injured when his body was caught underneath the tires of a platform as he was testing the brakes of that platform.

The Bengards filed suit against Tolton and Ginther in the Iowa District Court for Cass County on February 2, 2001. *See* Complaint for Declaratory Judgment (petition attached). The Bengards allege these co-employees committed gross negligence that led to Jed's injury. Claims for spousal and parental consortium are included in the petition.[2] Tolton and Ginther then tendered to Fremont, Skyjack's workers compensation and employers liability insurance carrier, their defense in this action.

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[2] The Bengards are able to bring this action in an Iowa state district court alleging a common law tort as a result of a workplace injury, outside of the state's workers compensation system, because of the exception set up by Iowa Code section 85.20. "Although an employer is always immune from common law tort liability, an injured worker may maintain a common law tort action against a coemployee to recover for injuries *only* if the employee can establish that his or her injuries were caused by the coemployee's 'gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.'" *See Walker v. Mlakar*, 489 N.W.2d 401, 403 (Iowa 1992) (en banc) (quoting IOWA CODE § 85.20). The necessary elements of such a claim against a co-employee were set up by the Iowa Supreme Court in *Thompson v. Bohlken*, 312 N.W.2d 501 (Iowa 1981), and the tort has been commonly described as "a stringent one because undesirable consequences could result from improvidently holding a co-employee liable to a fellow employee." *See Walker*, 489 N.W.2d at 404 (quoting *Taylor v. Peck*, 382 N.W.2d 123, 126 n.2 (Iowa 1986) (citations omitted))

Fremont brought the complaint now before this Court on March 8, 2001, alleging that it does not have a duty to defend Tolton and Ginther as a result of the employers liability insurance contract it held with Skyjack.[3]

Fremont maintained a workers compensation and employers liability insurance policy with Skyjack for the period of March 31, 1998 to March 31 1999. *See* Complaint for Declaratory Judgment (policy number W-014192-01, attached to the Complaint). The issue of "Who is Insured" by the policy is addressed on the first page of the contract. *Id.* at "General Section," section B. It states, "You are insured if you are an employer named in Item 1 of the Information Page." *Id.* The Information Page of the policy lists Skyjack in item 1 as the insured. *Id.* at Information Page.

Part One of the insurance policy issued by Fremont addresses workers compensation insurance, while Part Two addresses employers liability insurance. Part Two of the contract states that it covers "bodily injury by accident or bodily injury by disease." *Id.* at Part Two, section A. The term "bodily injury" is further defined such that it "must arise out of and in the course of the injured employee's employment by you." *Id.* at Part Two, section A(1). Part Two of the contract goes on to state that Fremont will pay damages to the insured if it is "liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee . . . ." *Id.* at Part Two, section B(1). The contract lists several exclusions from the employers liability policy coverage,

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[3] This Court has jurisdiction pursuant to diversity of citizenship, 28 U.S.C. § 1332. Fremont is a California insurance company, while all named defendants in this action are citizens of the state of Iowa. The governing substantive law in this case is that of the state of Iowa. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and *Clark v. Kellogg Co.*, 205 F.2d 1079, 1082 (8th Cir. 2000).

including "any obligation imposed by a workers compensation [system] ." *Id.* at Part Two, section C(4).

II. APPLICABLE LAW & DISCUSSION

Motions for declaratory judgment under Federal Rule of Civil Procedure 12(c) are governed by the same standard as motions to dismiss under Rule 12(b)(6).[4] The Court is to "accept as true all facts alleged by the non-moving party in its pleadings and grant all reasonable inferences arising therefrom in that party's favor." *See Montgomery v. Indep. Sch. Dist. No. 709*, 109 F.Supp.2d 1081, 1086 (D.Minn. 2000) (citing *Lion Oil Co. v. Tosco Corp.*, 90 F.3d 268, 270 (8th Cir. 1996)). Judgment at this stage will only be appropriate if Fremont can establish that no material issues of fact remain to be resolved and judgment can be issued as a matter of law. *Id.*

As stated previously, the issue in this case is whether Fremont has a duty to defend Tolton and Ginther, as a result of the employers liability policy, in the action brought against them in state court by the Bengards. "An insurer has a duty to defend whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case." *First National Bank of Missouri Valley v. Fidelity and Deposit Co. of Maryland*, 545 N.W.2d 332, 335 (Iowa Ct. App. 1996) (citing *First Newton Nat'l Bank v. General Cas. Co.*

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[4] Under Rule 12(c), a motion for declaratory judgment may be converted to a motion for summary judgment if matters outside the pleadings are presented to and not excluded by the court. In this case, both parties submitted matters outside the pleadings and the Bengards have requested this be treated as a motion for summary judgment and that they be given a reasonable opportunity under Rule 12(c) to present all material pertinent to the motion following a period of discovery. The Court has considered the insurance policy and the state court petition, both attached to the complaint in this case, and no other matters outside the pleadings. Those things outside of the pleadings are excluded, as this motion is properly ruled upon at this stage under the above-stated standard governing motions to dismiss.

426 N.W.2d 618, 623 (Iowa 1988)). The duty to defend is broader than the duty to indemnify. *Employers Mutual Cas. Co. v. Cedar Rapids Television Co.*, 552 N.W.2d 639, 642 (Iowa 1996) (en banc). In determining whether there is a duty to defend, Iowa Courts look to "the petition and determine whether the *facts* alleged 'bring the claim within the liability covered by the policy.'" *Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co.*, 591 N.W.2d 17, 18 (Iowa 1999) (emphasis in original) (quoting *Chipokas v. Travelers Indem. Co.*, 267 N.W.2d 393, 395 (Iowa 1978)). In order for Fremont to have such a duty to defend Tolton and Ginther in the underlying action brought by the Bengards, the insurance contract itself must include Tolton and Ginther as insured parties to the contract or otherwise create such a duty on behalf of Fremont.

State Auto. and Cas. Underwriters by Auto. Underwriters v. Hartford Accident and Indem. Co., 166 N.W.2d 761 (Iowa 1969) addresses the issue of whether an employee was an insured under an employer's liability policy. Underlying this question was an automobile accident between two employees of Lee and Johnson, Inc. during the course of their employment. One insurance company, State Auto, the plaintiff, maintained an automobile liability policy with the employee who caused the accident, Charles King. After it had made payment pursuant to its obligation under the policy, it sought contribution from another insurance company, the defendant ("Hartford"). *Id.* at 762; *see generally Price v. King*, 146 N.W.2d 328 (Iowa 1966) (involving separate and previous litigation over the same automobile accident). Hartford maintained both a workers compensation and employers liability insurance policy with Lee and Johnson. State Auto argued that Charles King was insured within the terms of the defendant's policy as an employee of Lee and Johnson. *See State Auto.*, 166 N.W.2d at 764. The Iowa Supreme Court found this claim "untenable" as all of the language governing the

employers liability insurance portion of the policy related to the employer, Lee and Johnson, as the insured party, and not the employee, King. *Id.* "Nowhere in the policy do we find language to the effect an employee is to be considered an employer for the purpose of becoming an 'insured' under the employer's liability coverage." *Id.* The Iowa Supreme Court went on to find the obvious purpose of the employers liability coverage was "*to protect the employer*, Lee and Johnson, Inc., from common law liability because of injuries sustained by an employee who does not come within the workmen's compensation law." *Id.* at 765 (emphasis added).

The insurance policy at issue in this case states at the very beginning of the policy that the insured party is Skyjack. *See* Complaint for Declaratory Judgment (policy number W-014192-01, attached) at General Section, section B and the Information Page. As in *State Auto*, nowhere does the policy before this Court indicate an employee will be insured by its provisions and it seems to have been formed to protect Skyjack from common law liability as a result of injuries that do not fall within Iowa's workers' compensation law. This Court finds that under the language of the employers liability insurance policy issued by Fremont to Skyjack, and under Iowa law, Fremont does not have a duty to defend Tolton and Ginther as insured parties to the insurance contract in the state court action for gross negligence brought by the Bengards. *See generally Monroe County v. Int'l Ins. Co.*, 609 N.W.2d 522, 525 (Iowa 2000) (citing *A.Y. McDonald Indus. v. INA*, 475 N.W.2d 607 (Iowa 1991) (stating that construction and interpretation of an insurance policy is a question of law for the court unless the language of the policy is ambiguous or extrinsic evidence is necessary).

The Court can reach this conclusion without joining Skyjack as a necessary party. While it would be feasible to join Skyjack, all that is being adjudicated in this case are Tolton and Ginther's rights against Fremont directly under the insurance policy. None of Skyjack's rights as the insured under the policy are being adjudicated. This Court makes no decision regarding whether Tolton and Ginther can seek indemnification from Skyjack if they are found grossly negligent in the state court action;[5] and if Skyjack is found to owe indemnification to Tolton and Ginther, this Court does not comment on Skyjack's ability to then seek coverage from Fremont under the agreement.[6]

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[5] The Iowa Supreme Court has recognized that the exception to the workers' compensation system for gross negligence by a co-employee may unreasonably shift responsibility for employee injuries "'from the employer, where the workers' compensation act places it, to a fellow employee, where the act does not place it.'" *Walker*, 489 N.W.2d at 404 (quoting *Taylor*, 382 N.W.2d at 126 n.2 (citations omitted)). The Iowa Supreme Court has also recognized that a co-employee who is grossly negligent may look to his employer for indemnification, and that "'such an employer could be burdened with common law damages beyond the employer's statutory workers' compensation liability or with the expense of carrying insurance to cover the personal liability of all supervisory personnel.'" *Id.* This Court will not comment on Skyjack's duty to indemnify Tolton and Ginther, and whether any acts of alleged gross negligence were within their scope of employment. *See Horrabin v. Des Moines*, 199 N.W. 988 (Iowa 1924) (addressing indemnification). Relevant to the case now before this Court, however, is the risk recognized by the Iowa Supreme Court that employers may be compelled to carry insurance to cover the personal liability of supervisory personnel because of the co-employee gross negligence exception to the workers' compensation system of Iowa Code Chapter 85. While the Iowa Supreme Court has recognized that employers may be forced to carry such insurance, the Court in this case simply finds that the insurance policy before it does not provide for such coverage to Tolton and Ginther directly.

[6] Part Two, Section B(1) of the employers liability insurance policy in this case states that Fremont will pay for damages for which the insured, Skyjack, is liable to a third party. *See* Complaint for Declaratory Judgment (policy number W-014192-01, attached) at Part Two, Section B(1). Section B goes on to state that Fremont will pay for such damages claimed by a third party, with certain limitations. *Id.* Tolton and Ginther could be potential third parties to the contract between Fremont and Skyjack, as they could make a claim against Skyjack that *might* constitute a third party claim for which Skyjack, and hence Fremont, would be liable.

III. CONCLUSION

Therefore, based on the employers liability insurance contract Skyjack had with Fremont and the Iowa Supreme Court's statement of the law in *State Auto.*, 166 N.W.2d 761, Fremont does not have a duty to defend Skyjack's employees, Tolton and Ginther, in the suit against them in state court by the Bengards for alleged gross negligence. The Clerk of Court shall enter judgment on the pleadings in favor of plaintiff.

IT IS SO ORDERED.

Dated this 29th day of November, 2001.

RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT