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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1051**

Robert P. Nachtsheim, et al.,
Appellants,

Mary Angela Nachtsheim, et al.,
Plaintiffs,

vs.

Christine Hunt d/b/a Right Line Publishing, et al.,
Defendants,

Norman B. Wartnick,
Respondent,

Liberty Mutual Insurance Company,
Respondent.

**Filed March 11, 2019
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-14-7357

Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellants)

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

In this garnishment action, appellants challenge the summary-judgment dismissal of their claim against respondent liability insurer, arguing that the district court erred in determining that the business-pursuits exception applies and bars coverage under the insurance policy and that the *Miller-Shugart* settlement in the underlying defamation action was unreasonable as a matter of law. We affirm.

FACTS

On May 24, 1973, Robert Nachtsheim Sr. (Robert Sr.) was shot while working at his business, B and B Wholesale Florist (B&B). He died four days later. Before founding B&B, Robert Sr. worked at Midwest Floral Supply Company (Midwest Floral), which was owned by respondent Norman Wartnick and his brother, Jack Wartnick. While Robert Sr. was an employee of the company, Midwest Floral purchased a key-man life-insurance policy on Robert Sr. and named itself as beneficiary. In August 1972, Robert Sr. left Midwest Floral to open B&B. On May 11, 1973, Norman Wartnick renewed the key-man life insurance on Robert Sr., despite the fact that he had not worked for Midwest Floral for nine months. Following Robert Sr.'s death just weeks later, Midwest Floral received over \$100,000 as the beneficiary of the policy. The police never made any arrests in connection with Robert Sr.'s death.

In 1976, Betty Nachtsheim, Robert Sr.'s widow, sued Norman Wartnick for unjust enrichment based on the proceeds he received from the life-insurance policy. She later amended the complaint to add a count of wrongful death. In 1986, the jury in that civil case found that Norman Wartnick had either murdered or caused the murder of Robert Sr. and awarded his family \$2,350,000 in damages. Norman Wartnick later successfully sued his counsel for legal malpractice based on his representation during the wrongful-death action and was awarded \$4,045,616 in damages. Following the award, Norman Wartnick moved to vacate the judgment in the wrongful-death case. He ultimately entered into a settlement agreement in which he agreed to dismiss his motion to vacate and to “not attack, attempt to vacate, set aside, or nullify the verdict or judgment previously entered in this case.”

In 2007, Jack Wartnick decided to commission a book detailing Norman Wartnick's version of events surrounding Robert Sr.'s death and the subsequent wrongful-death and legal-malpractice lawsuits. He selected Christine Hunt as the author. In November 2008, the Wartnicks and Hunt formed Tried and True LLC to finance and market the book, titled *The Orchid Murder—Untangling a Web of Unsolved Murders and Legal Malpractice*. The bylaws provided that the three members would split any profits or losses equally. The Wartnicks each contributed \$4,000, and Norman Wartnick was named the initial vice president, chief financial manager, and treasurer. Hunt retained creative control. Jack Wartnick periodically gave input on the book, but Norman Wartnick never did.

In 2012, *The Orchid Murder* was published by Right Line Publishing, an unincorporated business owned by Hunt. The book was marketed as a true-crime novel

and presented appellant Robert P. Nachtsheim Jr. (Robert Jr.) as the actual murderer of Robert Sr. The book also suggested that Robert Jr. was involved in the death of L.S., a possible witness to Robert Sr.'s murder. On April 9, 2014, Robert Sr.'s children sued the Wartnicks, Hunt, and Tried and True for defamation based on statements made in *The Orchid Murder*. The district court dismissed the claim for defamation by implication and claims made by Robert Sr.'s daughters, Marie T. Ronnlof and Mary Angela Nachtsheim, but denied the motion to dismiss the claims made by Robert Jr. and appellant John G. Nachtsheim (the Nachtsheims).

Norman Wartnick maintained two insurance policies through respondent Liberty Mutual Insurance Company. Following the commencement of the defamation action, Liberty Mutual denied coverage under his homeowner's policy but appointed counsel to defend Norman Wartnick under his personal policy. Liberty Mutual defended under a reservation of rights because the policy contained exclusions for intentional acts and claims arising from business pursuits. After settling with Jack Wartnick and Hunt, the Nachtsheims indicated that they were willing to enter into a *Miller-Shugart* settlement with Norman Wartnick.¹ On February 10, 2016, Norman Wartnick signed the *Miller-Shugart* settlement, which contained a confession of judgment for \$695,000. On February 28, 2016, the Nachtsheims filed a "Stipulation for Entry of Judgment" against Norman Wartnick for

¹ "In a *Miller-Shugart* settlement, the insured, having been denied any coverage for a claim, agrees claimant may enter judgment against him for a sum collectible only from the insurance policy. To be binding on the insurer if policy coverage is found to exist, the settlement amount must be reasonable." *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 278 n.1 (Minn. 1990).

\$695,000. Liberty Mutual moved to intervene, but the motion was denied. On October 17, 2016, the district court filed a notice of entry of judgment against Norman Wartnick.

On February 13, 2017, the Nachtsheims commenced this garnishment action against Liberty Mutual. Both parties moved for summary judgment. Following a motion hearing, the district court granted Liberty Mutual's motion for summary judgment and denied the Nachtsheims' motion. The district court determined that the business-pursuits exclusion in Norman Wartnick's personal policy applied and barred coverage and that the *Miller-Shugart* settlement was unreasonable as a matter of law. This appeal follows.

DECISION

I.

A *Miller-Shugart* settlement agreement may only be enforced if the policy at issue provides coverage. *Alton M. Johnson Co.*, 463 N.W.2d at 279. The interpretation of an insurance policy and whether it provides coverage under given circumstances are questions of law that we review de novo. *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013). Norman Wartnick's personal policy contains an exclusion for personal injury "arising out of business pursuits or the use of business property, unless the liability is covered by the underlying policy." The policy defines "business pursuits" as "any activities of a business, trade, occupation or profession." The district court determined that this exclusion applied and barred coverage in this case.

The business-pursuits exclusion is intended to "confine the [insured's] policy coverage to nonbusiness risks and to relegate business coverage to a commercial policy." *Metro. Prop. & Cas. Ins. Co. v. Jablonske*, 722 N.W.2d 319, 325 (Minn. App. 2006)

(quotation omitted). The exclusion generally applies when the injury arises from “a type of activity in which persons regularly engage for the purpose of earning a livelihood or for gain.” *Allied Mut. Cas. Co. v. Askerud*, 94 N.W.2d 534, 539-40 (Minn. 1959). But the business need not be the insured’s primary occupation for the exclusion to apply. *Smith v. State Farm Fire & Cas. Co.*, 656 N.W.2d 432, 436 (Minn. App. 2003).

The Nachtsheims argue that the district court erred in determining that the business-pursuits exclusion applies because Norman Wartnick did not regularly engage in publishing books to earn a living and his purpose in participating in the publication of the book was personal. They contend that this case is more analogous to those in which courts have found that the business-pursuits exclusion did not apply because the injuries arose from casual activities not intended for profit.

In *Askerud*, the insured and his friend decided to construct a home on land owned by the insured. 94 N.W.2d at 536. They agreed that, when the home was complete, the friend would purchase the home and that, if the friend could not obtain financing to purchase the home, the insured would move into the newly constructed home and sell his own home. *Id.* While assisting with construction of the home, the father of the insured was injured. *Id.* The insurance company denied coverage based on the business-pursuits exclusion, but the supreme court disagreed. *Id.* at 539-40. The supreme court noted that the insured had a full-time job unrelated to the construction of the home and that he had never attempted to construct a home before. *Id.* at 539. The supreme court determined that the conduct reflected the insured’s “spare time endeavors” rather than a business pursuit and therefore the exclusion did not apply. *Id.* at 539-40.

In *Reinsurance Ass’n of Minn. v. Patch*, the insured repaired bicycles in his spare time. 383 N.W.2d 708, 710 (Minn. App. 1986). An individual who was injured while riding a bicycle that had been repaired by the insured claimed that his injuries were the result of the negligent repair of the bicycle. *Id.* The insurance company determined that the business-pursuits exclusion applied and denied coverage. *Id.* This court disagreed, observing that the insured was employed full-time as a construction worker, only repaired bicycles in his spare time and out of his home, did not have any formal training, did not charge a standard rate or keep records, and would frequently repair bicycles for no charge. *Id.* at 712. We concluded that, based on these facts, the repair activities did not amount to a “commercial enterprise” that was intended to generate a profit or financial gain. *Id.* The business-pursuits exclusion therefore did not apply.

The Nachtsheims argue that Norman Wartnick’s conduct is analogous to that of the insureds in *Askerud* and *Patch*. They note that he is 77 years old and retired, and that he had never been involved with the publication of a book before. They argue that “[w]riting or publishing books has never been a part of Norm Wartnick’s business, trade or profession” and that his motivation in facilitating the publication of the book was not financial gain, but rather vindication. They assert that his primary motivation was to tell his side of the story and prove that he did not kill Robert Sr. Finally, they note that Norman Wartnick never received any compensation or profit from the publication of the book.

Liberty Mutual argues that Norman Wartnick’s motivation in facilitating the publication of the book does not render the business-pursuits exclusion inapplicable. It cites to *Zimmerman v. Safeco Ins. Co. of Am.*, for the proposition that the individual’s

conduct, rather than motivation, should be the focus of the inquiry into whether the exclusion applies. 605 N.W.2d 727, 728-29 (Minn. 2000). In *Zimmerman*, the insured was sued after he sexually harassed an employee and created a hostile work environment. *Id.* The insured argued that the business-pursuits exclusion did not apply because the conduct at issue was “a private and personal matter not solely referable to the conduct of the business.” *Id.* at 730. The supreme court disagreed and determined that the business-pursuits exclusion applied because liability-creating conduct, by definition, occurred in the workplace, and, because it could only occur in the workplace, fell within the business-pursuits exclusion. *Id.* at 731. Thus, the insured’s personal motivation for the underlying conduct was insufficient to bar application of the exclusion.

The district court determined that Norman Wartnick’s potential liability for the allegedly defamatory statements is based solely on his role with Tried and True, a business entity. The record supports this determination. Tried and True was organized as a for-profit entity with a stated business purpose. The bylaws indicate that the business of the company “shall include . . . the creation and publication of a specific work based upon the life of Norman B. Wartnick” and that the company “shall engage in the publication, marketing, and publicity” for the book. While the book did not ultimately turn a profit, the bylaws provided that the Wartnicks and Hunt would share any profits or losses equally. Norman Wartnick contributed \$4,000, was named the initial vice president and chief financial manager, and attended annual meetings for Tried and True. And although Norman Wartnick asserts that he was personally motivated to clear his name, he had very little involvement in the actual writing of the book. Hunt retained creative control and

Norman Wartnick did not provide feedback or suggestions. Indeed, he may not even have read the book. Thus, the liability-creating conduct is solely the result of his involvement with Tried and True.

Moreover, the business-pursuits exclusion in Norman Wartnick's policy is broader than the provisions addressed in previous caselaw. The Nachtsheims rely on *Askerud* and its progeny to assert that the business-pursuits exclusion "only applies to a type of activity which the insured regularly engages in for the purpose of earning a livelihood, or for gain." But in *Askerud*, the policy did not define the term "business pursuit" and the supreme court therefore had to interpret what type of conduct was contemplated by the provision. 94 N.W.2d at 539-40. Similarly, in *Smith*, the policy defined "business" as a "trade, profession or occupation" but did not define "business purposes." 656 N.W.2d at 436. Here, the policy explicitly defines "business pursuits" as "any activities of a business, trade, occupation or profession." Because this policy explicitly defines the term, a prior interpretation of what constitutes a business purpose or pursuit in those cases is not controlling. The policy's broad definition plainly encompasses the liability-creating conduct in this case.

On this record, the district court did not err in determining that the business-pursuits exclusion bars coverage. Unlike the insureds in *Askerud* and *Patch*, Norman Wartnick's potential liability is not the result of his spare-time endeavors or hobbies, but rather his role in the creation and financing of a for-profit entity with a stated business purpose. The business-pursuits exclusion therefore applies and bars coverage.

II.

A *Miller-Shugart* settlement agreement may only be enforced if it is reasonable. *Brownsdale Co-Op. Ass'n v. Home Ins. Co.*, 473 N.W.2d 339, 341 (Minn. App. 1991) (citing *Miller v. Shugart*, 316 N.W.2d 729, 732-33 (Minn. 1982)), *review denied* (Minn. Sept. 25, 1991). A *Miller-Shugart* settlement is reasonable if “a reasonably prudent person in the position of the defendant would have settled for [the agreed amount] on the merits of plaintiff’s claim.” *Miller*, 316 N.W.2d at 735. In determining if a settlement is reasonable, the court considers a variety of factors, including what the jury could have awarded, the injury, the insured’s risks at trial, expert testimony regarding the awards, damages, and liability, and the court’s experience with awards in similar cases. *Jorgensen v. Knutson*, 662 N.W.2d 893, 904-05 (Minn. 2003). The plaintiff bears the burden of demonstrating that the settlement is reasonable and prudent. *Id.* at 904. The district court may grant summary judgment when it determines that the settlement is unreasonable as a matter of law. *Alton M. Johnson Co.*, 463 N.W.2d at 279 n.3; *see also Burbach v. Armstrong Rigging & Erecting, Inc.*, 560 N.W.2d 107, 110-11 (Minn. App. 1997) (determining that the facts in the record established that the settlement agreement was “inherently unreasonable”), *review denied* (Minn. June 11, 1997).

The Nachtsheims argue that the district court erred in determining that the *Miller-Shugart* agreement was not reasonable and prudent. The district court’s order contains a thorough analysis of the reasonableness of the agreement. The district court determined that there was undisputed injury that weighed in favor of the Nachtsheims, but that the other relevant factors rendered the settlement amount of \$695,000 unreasonable. The

district court noted that the Nachtsheims had previously offered to settle with Norman Wartnick for \$75,000 and that his minimal role in the publication of the book would be unlikely to result in a large jury verdict at trial. Finally, the district court observed that the circulation of the book containing the defamatory statements was limited and that, in the district court's experience, jury awards were based in large part on the scale of the communication of the defamatory statements.

The Nachtsheims assign several errors to the district court's analysis. First, they argue that the district court erred in disregarding the \$4 million jury award Norman Wartnick received from the malpractice lawsuit. They argue that the award was the result of "the emotional harm that resulted from being labeled a murderer" and therefore was representative of the harm they incurred from the book suggesting that Robert Jr. was the murderer. The Nachtsheims' argument mischaracterizes the damages awarded in the legal malpractice lawsuit. As the district court observed, the award is the result of almost 20 years of litigation involving highly publicized proceedings and a \$2.35 million judgment in the initial wrongful-death claim, which accrued interest for six years. The award was not, as the Nachtsheims contend, an award for the emotional harm incurred by Norman Wartnick, but rather the financial costs of the proceedings. Accordingly, the award is not representative of the harm claimed in this case.

The Nachtsheims also argue that the district court erred in concluding that the extent of circulation has any significant impact on jury awards. But the district court explicitly stated that this statement was based on its own experience, which is a proper consideration when evaluating reasonableness. *See Jorgensen*, 662 N.W.2d at 904. And as Liberty

Mutual points out, the Nachtsheims' injury claims were based in large part on reputational damages, which would be greater if the book had reached a wider audience. The district court noted that the record reflected the publication of the book resulted in "small sales and readership." The defamatory statements therefore did not reach a widespread audience. The district court properly compared the award to other defamation actions involving wider circulation of defamatory statements and determined that a jury would be unlikely to award the Nachtsheims the \$695,000 specified by the agreement. Contrary to the Nachtsheims' assertion, these are appropriate factors to consider when evaluating reasonableness. *See id.*

Next, the Nachtsheims argue that it was inappropriate for the district court to consider the initial settlement offer of \$75,000. The Nachtsheims argue that Minn. R. Evid. 408 precludes consideration of the prior settlement offer. Rule 408 establishes that prior settlement offers are not admissible to prove liability or invalidity of a claim or amount. The Nachtsheims contend that the district court violated rule 408 by considering the prior settlement offer when determining whether the *Miller-Shugart* settlement was reasonable. But the district court did not place a great emphasis on the prior offer. Rather, the district court noted that it could not determine that the difference between the prior offer and ultimate agreement rendered the agreement unreasonable because such an argument "charts dangerously close to the purpose prohibited by Rule 408." The district court ultimately reiterated that the focus was what a reasonable person in Norman Wartnick's position would have settled for and that the difference between the settlement amounts was merely one factor it may consider. *See Burbach*, 560 N.W.2d at 111 (stating that the court

was “struck by the lack of apparent reasonableness where [plaintiff] had offered to settle for approximately one-half of the final settlement amount”).

Finally, the Nachtsheims argue that the district court erred in determining that Norman Wartnick would not be subject to significant exposure at trial. They argue that his exposure was “substantial” because he would have been estopped from challenging the determination in the wrongful-death action that he had either murdered or caused the murder of Robert Sr. In the underlying defamation action, the district court determined that Norman Wartnick’s liability would rest on his “funding, marketing, publishing and distributing of [*The*] *Orchid Murder*” and his degree of editorial control. Thus, the jury’s determination in the wrongful-death action is unrelated to his liability for the statements in this case. None of the defamatory statements are attributed to Norman Wartnick, and it is undisputed that he played a minimal role in the development of the book. Hunt retained creative control, and Norman Wartnick did not provide any feedback. The record therefore supports the district court’s determination that Norman Wartnick’s exposure at trial would be limited.

On this record, the district court did not err in determining that the *Miller-Shugart* agreement was unreasonable. The district court thoroughly analyzed the relevant factors and appropriately determined that a reasonably prudent person would not agree to a settlement amount of \$695,000. Because the business-pursuits exclusion applies and bars coverage and because the settlement was unreasonable, the district court did not err in granting summary judgment in favor of Liberty Mutual.

Affirmed.