New England Guaranty Ins. Co. v. Frederick Randall, et al., Docket No. 462-8-05 Wncv (Teachout, J., Aug. 2, 2007)

STATE OF VERMONT
WASHINGTON COUNTY

New England Guaranty Insurance Company, Plaintiff,	)	**Washington Superior Court Docket No. 462-8-05 Wncv**
v.	)	
Frederick Randall, et al., Defendants.	)	

DECISION
Plaintiff's Motion for Summary Judgment

Defendant Renee Simoneau's daughter was bitten by a dog at Defendant Denise Randall's home daycare business. Plaintiff New England Guaranty Insurance Company insures Denise Randall through a homeowners policy. New England initiated this declaratory judgment action to determine coverage for liability for the dog bite. New England has filed a summary judgment motion, arguing that the "business pursuits" exclusion bars coverage.[1]

Coverage provided by the policy does not extend to liability "[a]rising out of 'business' pursuits of an 'insured.'" Vermont Homeowners Endorsement § IV.A. The exclusion contains what is commonly referred to as the non-business pursuits exception: "This exclusion does not apply to activities which are usual to non-'business' pursuits." *Id*. A home daycare business is subject to the business pursuits exclusion. Home Day Care Business Endorsement (form HO 23 43 04 91). There is no dispute that Ms. Randall's daycare business is subject to the business-pursuits exclusion.

Defendants essentially concede that they were at the daycare when the bite occurred for a trial visit required by Ms. Randall as part of the enrollment process. They argue, however, that the non-business pursuits exception to the business pursuits exclusion applies in this case because, at the time of the dog bite, the visit had become a mere social visit, ostensibly a non-business pursuit. They claim that the length of the visit (about two hours) was indicative of a

[1] The Randalls, the defendant-insureds, are pro se and at some point in the history of this case evidently stopped participating. Ms. Randall was deposed, but otherwise the Randalls have ignored discovery requests and New England's summary judgment motion, which applies to all defendants. For ease of reference only, in this opinion, the court will refer to Ms. Simoneau and her injured daughter as "Defendants."

social visit, not a business purpose. They also argue that Ms. Randall must be deemed to have admitted that the visit was social in nature because she failed to respond to requests for admissions focusing on this issue. Lastly, Defendants argue that, as a matter of law, Ms. Randall could not have owed a duty to Ms. Simoneau's daughter bearing any relation to the business because the child was not enrolled at the time of the accident.

Generally, the non-business pursuits exception is intended to mark the distinction between the type of risks that ordinarily relate to a policyholder's personal life and the type of risks that ordinarily relate to the policyholder's business life. The former risks generally are covered because they are the anticipated subject of a homeowner's policy; not so the latter risks. *Rufener v. State Farm Fire & Casualty Co.*, 585 N.W.2d 696, 699 (Wis. Ct. App. 1998). If they choose to, "[b]usiness persons can obtain business liability insurance." *Luneau v. Peerless Ins. Co.*, 170 Vt. 442, 448 (2000).

The deposition testimony of Ms. Randall and Ms. Simoneau paint a clear picture. Ms. Simoneau and her daughters were at Ms. Randall's daycare for a test visit that is a usual part of the enrollment process required by Ms. Randall. The visit was ordinarily and appropriately friendly, and, as one would expect in such circumstances, not all conversation was limited strictly to daycare operations. Ms. Randall was acquainted with the family because she had provided daycare to them at some point in the past. They were not friends, however, who socialized in any appreciable way outside the daycare context. The evidence does not disclose that the length of the visit was unusual in any material way. This was not a "social visit" and it did not ripen into one in any way that affects the availability of coverage in Ms. Randall's homeowners policy.

Ms. Randall's Rule 36 admissions cannot change this fact. Admissions may be used at trial against the party who made them. As against another party, however, they are inadmissible hearsay. "It is only when the admission is offered against the party who made it that it comes within the exception to the hearsay rule for admissions of a party opponent." 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2264, at 571–72. In any event, it would be patently unjust to treat Ms. Randall's admissions as binding her insurer in the circumstances of this case.

Ms. Simoneau's daughter was on the premises at the time of the accident as an invitee of the business, regardless whether she already was enrolled for daycare or was only in the process of enrolling. Defendants' argument that there can be no duty owed to Ms. Simoneau's daughter because she had not yet enrolled finds little support in the law.

The "duty" of Ms. Randall was to provide a safe environment for those at the home because of the daycare business. The "risk" of a dog bite from a dog who is allowed to mingle routinely with the children at a daycare business is one related to the operation of the business, not the personal life of the daycare operator. The business pursuits exclusion applies. The non-business pursuits exception does not.

ORDER

For the foregoing reasons, New England's Summary Judgment motion is *granted*.

Dated at Montpelier, Vermont this 27th day of July 2007.

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Mary Miles Teachout
Superior Court Judge