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COURT OF APPEALS

STATE OF NEW YORK

DRYDEN MUTUAL INSURANCE CO.,

Appellant,

-against-

No. 79

GOESSL,

Respondent.

20 Eagle Street
Albany, New York 12207
April 28, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

PETER W. KNYCH, ESQ.
KNYCH & WHRITENOUR, LLC
Attorneys for Appellant
300 South State Street
Suite 404
Syracuse, NY 13202

JESSICA L. FOSCOLO, ESQ.
KENNEY SHELTON LIPTAK NOWAK LLP
Attorneys for Respondent
233 Franklin Street
Buffalo, NY 14202

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good
2 afternoon, everyone.

3 The first matter on today's calendar is
4 number 79, Dryden Mutual Insurance Company v.
5 Goessl.

6 MR. KNYCH: Chief Judge, I would request
7 two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 MR. KNYCH: May it please the court. My
10 name is Peter Knych and I represent Dryden Mutual
11 Insurance Company.

12 This court, when faced with determining coverage
13 under an insurance policy, has consistently followed the
14 principle and been guided by the principle that what
15 controls is the reasonable expectation of the ordinary
16 business person and the insurance company entering into an
17 insurance contract. In this case, Main Street, the
18 insurer for Daino, issued a policy with the reasonable
19 expectation that if a fire or damage occurred as a result
20 of the negligence of Daino, or Daino employees doing a
21 Daino job, Main Street - - - Main Street would cover that.

22 JUDGE RIVERA: What - - - what's the
23 relationship between Goessl and APD, is it consistent
24 throughout the entire time of the employment?

25 MR. KNYCH: It is, Your Honor. For

1 practically nine years it was consistent. Dryden's
2 expectation was that if - - -

3 JUDGE RIVERA: Didn't he have - - - didn't
4 Mr. Goessl have other clients that sort of dwindled
5 out till only AP - - - APD was the sole form of - - -

6 MR. KNYCH: Correct.

7 JUDGE RIVERA: - - - employment and - - -

8 MR. KNYCH: The last three years, AP Daino
9 was his sole income. And Dryden's expectation in
10 insuring Mr. Goessl was that, as a sole proprietor of
11 his own business, if his negligence caused damage or
12 injury, they would compensate and respond to that.

13 JUDGE STEIN: Is there any way for - - -
14 you know, I know we're talk - - - we're looking at -
15 - - are we interpreting the contract and the reasons
16 why expectations of - - - of the insured and the
17 insurer, or are we looking at some other factor
18 determination. But is there any way under your
19 proposed way to determine this, that - - - not to
20 consider the facts of the relationship between Goessl
21 and Daino?

22 MR. KNYCH: Well, actually, Judge, that's
23 what the Appellate Division did. The Appellate
24 Division basically said, we are not going consider
25 the actual - - - we're not going to conduct a

1 Appellate Division then did, in terms of who
2 qualifies as an employee under the terms of the
3 contract?

4 MR. KNYCH: No, the Appellate Division
5 majority did not conduct a judicial assessment of the
6 actual relationship. They said to Dryden, the fact
7 that this business arrangement occurred makes - - -
8 in our opinion makes Goessl a subcontractor. And
9 that agreement, in and of itself, now subjects Dryden
10 to liability for Goessl's negligence.

11 The Appellate Division, if you read that
12 decision, did not even consider what this court, in
13 repeated decisions, has said is the most important
14 factor in determining, as the judge said, whether or
15 not Goessl was in fact an employee or an independent
16 contractor. And that key factor is the control over
17 the method and the manner of the work. The Appel - -
18 -

19 JUDGE GARCIA: But they did go through
20 factors as to the relationship between Goessl and AP
21 Daino to determine whether or not he qualified as an
22 employee under the contract, right?

23 MR. KNYCH: The Appellate Division majority
24 didn't do it, Judge. All they did is basically say,
25 look, there is a sp - - - they had this agreement,

1 the agreement allowed Daino to pay him based on a
2 bill that Goessl gave him, he 1099'd him.

3 The Appellate Division majority did not
4 cite to the twenty to thirty factors that the trial
5 judge found that went to the actual relationship, a
6 judicial analysis of the actual relationship. The
7 dissenting judge, however, recognized that it's
8 improper for the - - - and unprecedented for the
9 Appellate Division to rely solely on this agreement
10 of which Dryden Mutual was not a party.

11 JUDGE GARCIA: But here is the Appellate
12 Division, "AP Daino did not provide Goessl with
13 health insurance or other employee benefits, did not
14 withhold taxes, or social security, or unemployment
15 taxes. Goessl determined his own hourly rates,
16 admitted invoices on behalf of - - - to Daino behalf
17 of S&K Plumbing, received a 1099." All of these
18 things they go through, but you're saying, no, it's
19 only the 1099.

20 MR. KNYCH: But all those factors go to
21 this business arrangement, where they basically
22 mislabeled Goessl - - -

23 JUDGE GARCIA: It goes to whether he is an
24 employee under the contract of insurance; that's how
25 they are analyzing it.

1 MR. KNYCH: Well, I think, Judge, that the
2 - - - that the majority of the precedent doesn't look
3 and place heavy weight on those factors. It looks to
4 the actual work, not whether or not how it was billed
5 or whether taxes are withheld. Those are factors,
6 you are correct, Judge.

7 JUDGE GARCIA: But isn't that then going to
8 a place I think Judge Stein may have been getting at,
9 where, you know, these are factual determinations and
10 inferences, and the Appellate Division is uniquely
11 authorized to look at, particularly in respect to a
12 bench trial, which is I think what happened here?

13 MR. KNYCH: Yes, but there was clearly a
14 fair interpretation of the evidence by the trial
15 court, and, Your Honor, that the Appellate Division
16 is ignoring the key factors. The key factor that
17 this case said in Fung, which is direction in
18 control, the Appellate Division majority doesn't
19 mention it. And it doesn't mention it, because it's
20 relying heavily on this agreement that Dryden Mutual
21 was not a party to.

22 This court has been presented with three
23 cases where courts have - - - where the parties have
24 said to the court, please, we do not want a judicial
25 assessment. We want the - - - the liability to be

1 determined on an agreement or on a statute which
2 defines employee status.

3 JUDGE RIVERA: So we go to - - -

4 JUDGE GARCIA: So they set into the party,
5 so they examine this relationship, and this is the
6 insurance policy between Daino and their insurer, and
7 yours with your insured, Dryden's, which is your
8 subcontractor, he's doing this as his firm, he's
9 acting as a subcontractor; he is styling himself as a
10 subcontractor. So what's the harm to your insurance
11 company over that? I - - - You know, you're insuring
12 him for doing exactly what he's doing.

13 MR. KNYCH: But it's a risk, Judge, that as
14 the dissenting judge said, we never undertook.

15 JUDGE GARCIA: Why not?

16 MR. KNYCH: Because he is supervising
17 employees of Daino, he's operating the Daino
18 business. And within - - - within the concept of
19 owning your own business, is the opportunity to
20 direct and control the manner of your work. Implicit
21 in Goessl and his relationship with Daino, he was - -
22 - it's undisputed, he was under the direction and
23 control of Mr. Daino.

24 Mr. Daino told him where to go when he had
25 to work, Mr. Daino provided him with tools and

1 equipment, Mr. Daino set - - - basically - - -

2 JUDGE STEIN: But - - - but you would agree
3 that there are some factors supporting both
4 arguments.

5 MR. KNYCH: Yes. But the vast majority of
6 the factors, if you do a judicial assessment of the
7 actual work relationship, falls squarely on the side
8 that he - - - he is - - -

9 JUDGE STEIN: So are you asking us to then
10 say that the Appellate Division put the weight on the
11 wrong factors?

12 MR. KNYCH: We're saying that the Appellate
13 Division, first and foremost, misapplied the law in
14 relying heavily on this agreement. That is a clear
15 misapplication of the law. The Appellate Division
16 then, did only a very cursory analysis of the actual
17 business relationship, focusing on what happens when
18 you mislabel a contractor as an independent
19 contractor, which is you give him a 1099, you don't
20 pay him health insurance benefits.

21 Those are their public policy
22 considerations that the dissenting judge recognized,
23 which - - - which are intended to not allow for this
24 misidentification or mislabeling.

25 JUDGE GARCIA: But those cases, where we

1 have the misidentification analysis, it seems to me
2 those are primarily in, is this a work, you know,
3 does he get workers' comp or disability, or whatever
4 the case may be, which is a much different analysis
5 because you are looking at exploitation of the
6 worker, right? So if without this finding, and
7 you're really hiding - - - you're denying a benefit
8 to the empl - - - who - - - someone who really is an
9 employee.

10 But here, you have big insurance companies,
11 and an assumption of risk, and you have an allocation
12 of risk, you have this employer saying, I want to see
13 your insurance card, you know, as part of the
14 certification, I believe that you have - - - I saw he
15 has a million dollars worth of insurance; isn't that
16 a much different analysis then whether somebody is
17 going to get disability benefits?

18 MR. KNYCH: What you are hitting on is a
19 concept of fairness, Judge. And if - - - and if Mr.
20 Goessl and Daino - - - if Goessl had come to Dryden
21 and said, look, I'm going to be working for Daino,
22 I'm going to be basically under his direction and
23 control, supervising his employees, I want you to
24 insure me. He didn't do that.

25 There is an increase, there is a different

1 risk to an insurance company that's well recognized
2 if someone is an employee of another company, working
3 for them. Dryden insures thousands of
4 subcontractors, mechanics, plumbers, electricians.
5 Some of them work at Nine Mile 2, at the nuclear
6 plant.

7 JUDGE GARCIA: What if he had one other
8 client, would that have been enough?

9 MR. KNYCH: I don't think so, Judge,
10 because - - -

11 JUDGE GARCIA: Two?

12 MR. KNYCH: No, the work that he was doing
13 for Daino meets the vast majority of the criteria
14 which established that he was a Daino employee.

15 JUDGE GARCIA: So he could be - - -

16 JUDGE ABDUS-SALAAM: What would - - -

17 JUDGE GARCIA: I'm sorry, go ahead.

18 MR. KNYCH: He could've had - - - he could
19 have been doing on the side, he could have had two or
20 three. But that's - - - that is Goessl work, that's
21 not Daino work. And to say to Dryden, who's
22 reasonable expectation was to insure Goessl work,
23 that they must now insure a Daino fire, where - - -
24 where Goessl was under the direction and control of
25 Daino, is simply unfair.

1 JUDGE ABDUS-SALAAM: Counsel, you say - - -
2 I think in the answer to another question, you said
3 it was pretty close, and it did seem close to me,
4 just reading these - - - even - - - even on the
5 method and manner of the work, because a
6 subcontractor could be directed to do a certain
7 portion of the work.

8 Generally, that person would have his or
9 her own employees, and use his or her own tools, but
10 often on construction contract - - - construction
11 projects, the GC provides some of those tools and
12 some of the employees. So I - - - I don't know how
13 we would distinguish this particular situation from
14 some subcontracting situations.

15 MR. KNYCH: He was an official employee of
16 Daino for a year, and then he quit, and then he went
17 back. And his relationship was the same. He used
18 Daino company credit cards, he used the Daino
19 vehicle, he introduced himself as Stan from AP Daino,
20 he used Daino tools.

21 JUDGE ABDUS-SALAAM: When - - - when he was
22 an employee of Daino, did he have to get his own
23 insurance?

24 MR. KNYCH: He did not. But again, those
25 are all incidences that arise out of this mislabeling

1 him of an independent contractor. Of - - - the
2 factors that go to the - - - to the risk that
3 insurance companies insure, whether it's Main Street
4 or Dryden, all of those factors establish employment
5 status. These other - - -

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. KNYCH: Thank you.

8 CHIEF JUDGE DIFIORE: Counsel.

9 MS. FOSCOLO: Good afternoon, may it please
10 the court, my name is Jessica Foscolo, I represent
11 Main Street America Group.

12 This appeal presents a very straightforward
13 question on whether or not Dryden, who issued a policy
14 directly to Mr. Goessl, provides coverage for Mr. Goessl's
15 work.

16 All of the factors that Dryden has raised to
17 indicate that there was an employee-employer relationship
18 don't have any impact on that risk that was assumed by
19 Dryden. Boiled down to its basic element, Goessl was
20 performing his own plumbing work, there is allegations in
21 the underlying complaint that Goessl's work gave rise to
22 the fire; that is a risk that is in the insuring agreement
23 of the Dryden policy.

24 JUDGE STEIN: So - - - so the trial court
25 comes up with one analysis, and the Appellate

1 Division comes up with another analysis.

2 MS. FOSCOLO: Right, the - - -

3 JUDGE STEIN: You would agree that we have
4 to look at which analysis more closely comports with
5 the record; is that - - - do you agree with - - -
6 that that's our standard of review here?

7 MS. FOSCOLO: I do. And I think that the
8 bench trial looked at the factors - - - there is no
9 one controlling factor on whether or not there is an
10 employer or an employee relationship established.

11 The Court is to look at all of the factors
12 under the circumstances, and make a determination
13 based on the circumstances of that particular case.
14 What the trial court did, is look at it from the
15 context, similar to Judge Rivera point - - - Judge
16 Garcia pointed out, where we're looking at the public
17 policy considerations on whether someone is an
18 employee, and whether the employee is claiming an
19 employment relationship.

20 Here, we have a much different analysis to
21 look at, which is the financial relationship of the
22 parties. A large part of that financial relationship
23 was the procurement of this Dryden policy that was
24 procured specifically to provide coverage for Goessl
25 for his plumbing work.

1 The Appellate Division focused on that
2 financial relationship and how the parties self-
3 identified. There is ample evidence in the record -
4 - -

5 JUDGE RIVERA: Was your position - - -
6 because he got the insurance beforehand, right? He
7 had left, he had - - - comes up with this whole
8 proprietor business, and so he gets insurance so he
9 can have his own business, and then he goes back to
10 work for Daino, ADP, APD, whatever it's called. But
11 he keeps the insurance.

12 Is your argument that he is not only
13 keeping the insurance to maintain the business, which
14 of course dries out over time, but because Daino
15 says, you must, otherwise you cannot work for me?

16 MS. FOSCOLO: Just as if it were any other
17 subcontractor.

18 JUDGE RIVERA: No, but is that in the
19 record, you must or you cannot work for me?

20 MS. FOSCOLO: That it was required. The
21 record reflects that that insurance was required.

22 JUDGE RIVERA: That's what I'm asking.

23 MS. FOSCOLO: Yes.

24 JUDGE RIVERA: How is it required? Help me
25 here.

1 MS. FOSCOLO: That in - - - when the two
2 met again in 2000 - - - 2004, I believe, or just
3 before the accident, the loss occurred, there - - -
4 they had made a decision not to re-enter into an
5 employment arrangement as they had in the past, and
6 to remain independent from one another. And in
7 connection with that arrangement, there was a
8 requirement that a certificate of insurance be
9 produced reflecting that Goessl was insured.

10 JUDGE RIVERA: Um-hum. Could he be doing
11 both, could he have been - - - Goessl here, could he
12 have his own business and yet be an employee of
13 Daino; is that possible?

14 MS. FOSCOLO: He would have been, but we
15 would have seen dif - - - he could have been, but we
16 would see much different fact pattern if that were
17 the case.

18 JUDGE RIVERA: What - - - what would we
19 need to see?

20 MS. FOSCOLO: We would need to see an
21 intent by the parties to engage in such a
22 relationship. The Murray case, which was - - - is a
23 case from this court, reflects that parties need to
24 knowingly enter into an employment relationship.
25 There is a host of legal results and consequences

1 that arise from that employment contract.

2 We - - - it would be unfair to later look
3 at an arrangement that the parties deliberately setup
4 to be independent from one another, for all of the
5 financial reasons and others, to rewrite that
6 contract.

7 JUDGE RIVERA: If Goessl had - - - when he
8 no longer has any other clients, and he's working
9 full time for Daino, if he had stopped paying the
10 insurance - - -

11 MS. FOSCOLO: Stopped paying - - -

12 JUDGE RIVERA: - - - is he an independent
13 contractor or is he an employee at that point?

14 MS. FOSCOLO: If he - - - is the - - -

15 JUDGE RIVERA: If he had just stopped
16 paying the insurance.

17 MS. FOSCOLO: And the insurance is no
18 longer in effect?

19 JUDGE RIVERA: He didn't know, he says,
20 I've got this business but it's not going anywhere,
21 I'm making so little money off of this, I can't
22 afford it.

23 MS. FOSCOLO: Right. They still would need
24 some act or understanding in order to have - - -

25 JUDGE RIVERA: Who's - - - I'm sorry, who

1 is the they that?

2 MS. FOSCOLO: Sure. Goessl and AP Daino -
3 - - and Daino would need some understanding that they
4 were entering into an employment arrangement.

5 JUDGE STEIN: How does that affect the
6 interpretation of the insurance contract?

7 MS. FOSCOLO: I am glad you asked. The
8 policies provide - - - the Main Street policy
9 provides coverage for AP Daino's liability. The
10 Dryden policy provides coverage for Goessl's.

11 While Main Street America policy
12 contemplates also providing coverage for employees,
13 that definition has to be given its plain and
14 ordinary meaning. And that's where we look at the
15 factors here, in contract interpretation on what does
16 that mean; what does it mean to be an employee.

17 It would - - - there is no party to this
18 employment contract, Goessl or Daino - - -

19 JUDGE RIVERA: Um-hum.

20 MS. FOSCOLO: - - - that say, we
21 considered ourselves in an employment relationship.

22 JUDGE STEIN: Does it matter what they
23 consider themselves if we're looking for the plain
24 and ordinary meaning?

25 MS. FOSCOLO: It would when you look at the

1 underwriting risks of a policy. So for example,
2 Dryden's application in the record reflects a
3 question involving how many subcontractors AP Daino
4 used, how many employees it had.

5 The reason for this is because the
6 insurance industry is looking at whether it has an
7 opportunity to transfer risk, i.e. through the
8 subcontractors and its insurance, and the insurance
9 for the subcontractors is required to be identified,
10 or whether it has added risk by insuring employees
11 and their negligent work.

12 So here, we have a Main Street America
13 policy that insures a contractor and its employees,
14 and also identifies, or seeks to identify risk
15 transfer opportunities through subcontractors and
16 their insurance. It would be unfair to require now,
17 after the fact, Main Street to take a risk transfer
18 opportunity in a subcontractor context, and instead
19 require it to provide coverage as an employee.

20 If the court were to adopt Dryden's
21 argument here, Dryden's policy would never have
22 provided coverage for anything; it would essentially
23 have collected premiums, and never pay out on any
24 risk.

25 JUDGE STEIN: Well, no, but what if Goessl

1 went in and did a side job or something.

2 MS. FOSCOLO: If he did the side job. But
3 the - - - if you look at the application, it ref - -
4 - his application reflects what his gross sales were,
5 and they are consistent with all his work for AP
6 Daino; they're consistent figures. So Dryden had
7 assumed the risk to insure Goessl for his plumbing
8 work at this degree of sales.

9 JUDGE ABDUS-SALAAM: In other words, he
10 could've been a perpetual subcontractor for AP Daino,
11 and never have any other employment.

12 MS. FOSCOLO: Precisely, yes. And I would
13 imagine this happens frequently in the industry where
14 party - - - where contractors engage in reoccurring
15 relationships based on trust and just - - -

16 JUDGE ABDUS-SALAAM: Counsel, do you agree
17 - - - your adversary said that the key factor here is
18 the method and manner of the work; do you agree with
19 that?

20 MS. FOSCOLO: I do not. I think the case
21 law reflects that all these factors can be considered
22 with equal import. And the court has the ability to
23 weigh those factors based on the circumstances. And
24 here, since the ultimate circumstance is which
25 insurance policy is going to be providing coverage

1 here, and not whether Mr. Goessl is entitled to some
2 employee benefit, the factor that should be most
3 paramount in this particular case, is the financial
4 arrangement of the parties, of which the procurement
5 of this insurance policy was a large part of that.

6 There is a risk transfer expectation that - - -

7 JUDGE STEIN: Well, so you're saying that
8 our - - - our review of these cases should be
9 different, depending upon the context in which they
10 arise. So any time it's a - - - it's an insurance
11 coverage question, then we just look to what - - -
12 how the parties styled their - - - their own
13 relationship. And if it's some other kind of
14 question, well, I guess they can't be insurance, but
15 workers' comp, or unemployment, you know, workers'
16 employ - - - workers' comp - - -

17 JUDGE GARCIA: Disability.

18 MS. FOSCOLO: Right. And the - - -

19 JUDGE STEIN: - - - disability, anything
20 like that, then it's a different analysis?

21 MS. FOSCOLO: Well, the public policy
22 considerations are different. So I do think, yes,
23 the factors that the court should weigh in any
24 particular case should be different, depending on
25 what the ultimate benefit is to that partic - - -

1 that particular purported employee.

2 Here, Mr. Goessl, the purported employee,
3 gets covered either way.

4 JUDGE PIGOTT: Well, he doesn't if he's
5 hurt - - - if - - - if he was hurt on the job, does
6 he get workers' comp?

7 MS. FOSCOLO: He was actually named on the
8 workers' compensation policy by Mr. Daino, based on
9 the mistake in belief that all subcontractors also
10 needed to be named on that policy. So in this case,
11 he would have been protected. Mr. Goessl would have
12 also been free to procure workers' comp policy for
13 himself.

14 JUDGE PIGOTT: He didn't. He assumed he
15 was being covered by you, right?

16 MS. FOSCOLO: Under the workers' comp he
17 was, but he wasn't aware of that until after the fire
18 occurred.

19 JUDGE PIGOTT: You guys - - - I mean, if he
20 got hurt and he made a comp claim, would you
21 disclaim?

22 MS. FOSCOLO: We don't have the comp
23 policy.

24 JUDGE PIGOTT: Well, would the comp - - -
25 would Daino (sic) disclaim saying we're not covering

1 him?

2 MS. FOSCOLO: Well, the worker's comp
3 policy that AP Daino procured in this particular
4 case, my understanding is that it did provide
5 coverage, or that it did name Mr. Goessl as an - - -
6 an entity entitled to that benefit.

7 JUDGE PIGOTT: As an employee.

8 CHIEF JUDGE DIFIORE: Thank you.

9 MS. FOSCOLO: As - - - Yes. Thank you.

10 MR. KNYCH: For those of us not in the
11 insurance industry, this doesn't seem like a big
12 deal. Two insurance companies, why not make Goessl
13 started the fire, why not make Dryden pay. But this
14 goes - - - this case goes to the fundamental ability
15 of an insurance company to evaluate risk, and to know
16 what it's charging a premium for.

17 JUDGE ABDUS-SALAAM: Counsel, I'm - - - I'm
18 confused by that about the risk. If he were a
19 subcontractor doing work on this project, and Daino
20 gave him the job, and he started the fire, you would
21 say, we're covering him, right?

22 MR. KNYCH: We would if he were - - -

23 JUDGE ABDUS-SALAAM: So what's the
24 difference who - - -

25 MR. KNYCH: - - - if he were there for a

1 short duration, and if he was not under the direction
2 and control of Daino. But Daino has what's called a
3 loss history, Judge. A loss history based on how
4 they train their employees, supervise them, the
5 quality of their materials and their tools; it's a
6 loss history. Dryden doesn't know of that. Dai - -
7 - Mr. Goessl is in there full time for nine years.
8 He is exposed to the risks, he is supervising Daino
9 employees, and Dryden has no knowledge whatsoever.

10 JUDGE ABDUS-SALAAM: Didn't Dryden rein - -
11 - I guess, reinstate his insurance every year; didn't
12 he have to renew his insurance with Dryden every
13 year?

14 MR. KNYCH: He did, but Dryden - - -

15 JUDGE ABDUS-SALAAM: What did it - - -

16 MR. KNYCH: - - - there is no mention of
17 the Daino roll. No mention of the Daino roll on that
18 premium.

19 JUDGE ABDUS-SALAAM: But what - - -

20 JUDGE RIVERA: But they had issued the
21 certificate.

22 MR. KNYCH: Excuse me.

23 JUDGE RIVERA: Didn't you issue a
24 certificate?

25 MR. KNYCH: The certificate is issued by

1 the agent, not - - -

2 JUDGE RIVERA: I see.

3 MR. KNYCH: - - - not by Dryden. So
4 Dryden doesn't know of this - - -

5 JUDGE ABDUS-SALAAM: But what does he have
6 to disclose every year when he renews his insurance?

7 MR. KNYCH: He's got to disclose, well, his
8 loss history, and - - - and et cetera. But Dryden -
9 - - he's working for Daino as an employee, and Dryden
10 doesn't know that, and that's unfair to the insurance
11 industry.

12 JUDGE RIVERA: So he doesn't reveal who - -
13 - who are his clients, is what you're saying.

14 MR. KNYCH: He doesn't. But Goessl did get
15 back - - -

16 JUDGE RIVERA: Not as the sole proprietor
17 of S&K.

18 MR. KNYCH: Yeah.

19 Another very quick point to make. Even though
20 he is not insured doing Daino work, he is insured for the
21 thousands of jobs that he did that were not Daino work.
22 So he got value out of that Dryden policy.

23 JUDGE GARCIA: But not for the years - - -
24 as many years as he's just working for AP Daino, and
25 he's paying you a premium - - -

1 MR. KNYCH: If - - -

2 JUDGE GARCIA: - - - then he's not covered.

3 MR. KNYCH: - - - if he sued while he is
4 working for AP Daino for a job that he did years
5 earlier, that then - - -

6 JUDGE GARCIA: That's all he's doing,
7 you're saying.

8 MR. KNYCH: He - - - he - - -

9 JUDGE GARCIA: So you are writing a policy
10 for him that essentially is worthless at that point.

11 MR. KNYCH: No, no, Judge. If he is - - -
12 if an accident occurs while he is working for Daino
13 that involved work that he had done two or three
14 years earlier as - - - as Goessl work, maybe a fire
15 that starts - - -

16 JUDGE GARCIA: How many years was he
17 working for AP Daino as an independent contractor?

18 MR. KNYCH: Nine years.

19 JUDGE GARCIA: So for those nine years
20 while you were collecting premiums for the majority -
21 - - for the work, I guess, almost for years he was
22 only working for Daino, you were writing a policy for
23 him which all of the work he is doing is not covered.

24 MR. KNYCH: For - - - for six of the years,
25 he was doing work for himself that we were covering.

1 But for, I believe, the last three, he was not. But
2 again, in terms of the reasonable expectations, it
3 seems unfair that he's paying the premium, but the
4 reasonable expectation of Dryden is to insure Goessl
5 for Goessl work.

6 JUDGE RIVERA: So - - - so if he had come
7 in and said, you know, that my S&K other clients have
8 dried up, if he had just told this to you, I
9 understand you say, it's not information you asked
10 for, it's not information you had in front of you
11 when you were deciding the policy terms, it said - -
12 - yeah, I really only work for this person.

13 MR. KNYCH: There's an affidavit in the
14 record on appeal from the Dryden underwriter that
15 says, we do not insure people who are employees of
16 other companies, because we can't - - - we are not
17 given the opportunity to evaluate - - -

18 JUDGE RIVERA: I'm saying, if - - - that
19 depends on what he would have said, would it not? If
20 he said, I - - - I am the employee, which he said he
21 was afraid to ask him to be the employee - - -

22 MR. KNYCH: Dryden, for - - -

23 JUDGE RIVERA: - - - but he said, this is
24 now my only client, would you still insure him if
25 he's got that one client?

1 MR. KNYCH: If he came in and said that he
2 was working for AP Daino full time, doing what Mr.
3 Daino - - - the jobs Mr. Daino told him, using Daino
4 equipment, identifying himself as Stan from AP Daino,
5 Dryden would not have insured him, because Dryden
6 would not have known the claims history of AP Daino.

7 And that's what fundamentaled the insurance
8 industry. And that's what's not being protected
9 here, if - - - if Dryden has to pay for a Daino fire.
10 Main Street America, however, has evaluated year by
11 year the Daino - - - the Daino risk.

12 JUDGE GARCIA: Does your policy, you know,
13 in the underwriting requirements, do you ask those
14 types of questions from somebody like this so that it
15 would be required to be disclosed?

16 MR. KNYCH: We don't ask them if - - - if
17 they are employed by another company, we don't ask
18 them that.

19 JUDGE GARCIA: So they would have to
20 voluntarily come in and think, I am now an employee
21 of another company and volunteer that information to
22 you - - -

23 MR. KNYCH: Correct.

24 JUDGE GARCIA: - - - to see if they
25 qualified under your policy.

1 in, and it should come in, and it should come in in
2 this case.

3 JUDGE GARCIA: But for the employees that
4 commit those types of acts that you're describing
5 here, if any - - - even if they are supervised, I
6 would imagine any plaintiff is going to go after
7 Daino as well. And they would be liable for the acts
8 of those employees, and to the extent, you're insured
9 as any liability your company would.

10 MR. KNYCH: But again, the point is that -
11 - - that the insurance company for the - - - Dryden
12 is having to insure Goessl for potentially
13 supervising a dozen Daino employees. And that's - -
14 - and that is not a risk that the insurance company
15 was - - -

16 JUDGE RIVERA: Well, is your point that
17 even if the employees were being supervised have some
18 claims against Daino, that there may be claims that
19 Goessl was negligent as an independent contractor
20 supervising those employees, as part of his
21 arrangement with Daino?

22 MR. KNYCH: Not - - - not properly - - -
23 not properly training them, but again, he's - - -
24 he's their supervisor - - - that - - - that's one of
25 the elements of employee status; he's given

1 supervisory responsibility.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. KNYCH: Thank you.

4 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Dryden Mutual Insurance Co. v. Goessl, No. 79 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: May 3, 2016