

WATCHING YOUR NEIGHBOR'S CHILD: IS BABYSITTING REALLY A BUSINESS PURSUIT? A COMMENT ON *DWELLO V. AMERICAN RELIANCE INSURANCE COMPANY*

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Patti Kenyon was caring for Stefanie Dwello, the child of her neighbor, when Stefanie was attacked by the Kenyons' dog, severely injuring her face, head, and eye. American Reliance Insurance Company, the Kenyons' homeowners¹ insurance carrier, refused to defend or indemnify the Kenyons, basing its argument on the business pursuits exclusion in the Kenyons' homeowners insurance policy. Following a one-day bench trial in *Dwello v. American Reliance Ins. Co.*,² the district court granted the American Reliance petition for declaratory relief. Dwello appealed, and the Supreme Court of Nevada affirmed the lower court decision, finding the language of the business pursuits exclusion to be "clear and unambiguous" in excluding coverage.³

Courts of many jurisdictions have struggled to interpret the business pursuits exclusion in a homeowners insurance policy. In *Dwello*, its first review of the issue, the Supreme Court of Nevada probably should have struggled more before it affirmed a trial court decision that denied liability insurance coverage for injuries sustained by a child while she was being cared for by a neighbor. The *Dwello* court may have too quickly glossed over the difficulties of other courts in interpreting the business pursuits exclusion.

This Comment considers whether either the business pursuits exclusion or its exception ought to have been applied in *Dwello*. First is a brief review of

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¹ There is considerable variation in word usage in various treatises, law review articles, and court opinions. Except as these expressions appear in quotations, certain conventions are followed throughout this paper: "homeowners", as it is used to describe a type of insurance policy, is a single word, without an apostrophe; "business pursuits" will appear without quotations; "nonbusiness" is treated as a single word, without a hyphen; "child care" is two words; and, "babysit" or its derivatives is one word.

² 990 P.2d 190 (1999) (per curiam).

³ *Id.* at 191.

some of the legal principles underlying insurance policy construction.⁴ Next is an examination of the background of homeowners insurance, with emphasis on the varying interpretations of the business pursuits exclusion in other jurisdictions,⁵ the exception to the exclusion,⁶ and the various analytical approaches that have been employed by other courts.⁷ Then, the *Dwello* decision is presented,⁸ followed by an analysis and critique of the *Dwello* opinion, along with the introduction of a seven-factor test for determining the applicability of the exclusion.⁹ Finally, this Comment concludes that *Dwello* was poorly decided, and that the Supreme Court of Nevada should have taken the opportunity presented by *Dwello* to more thoroughly analyze and articulate the business pursuits exclusion as it should be applied in Nevada.¹⁰

I. LEGAL PRINCIPLES UNDERLYING INSURANCE POLICY CONSTRUCTION

Insurance contracts are unique and are severed from normal contract law by most jurisdictions.¹¹ The severance is needed primarily because of the disparate bargaining positions in an insurance transaction.¹² Modern insurance policies are contracts of adhesion;¹³ the insurance company generally offers the policy on a "take it or leave it" basis.¹⁴ Consequently, when a court determines that a clause in an insurance policy is ambiguous,¹⁵ it construes the clause most

⁴ See *infra* Part I.

⁵ See *infra* Part II and Part II.A.

⁶ See *infra* Part II.B.

⁷ See *infra* Part II.B.1-3.

⁸ See *infra* Part III.A.

⁹ See *infra* Part III.B.

¹⁰ See *infra* Conclusion.

¹¹ Jeffrey R. Pawelski, Note, *SOUTH DAKOTA SUPREME COURT: Insurers Don't Need the Court to "Babysit" Them: An Argument for Reasonable Expectations in American Family Insurance Co. v. Elliot*, 41 S.D. L. REV. 375 (1996), citing Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1463-64 (1989).

¹² *Id.* citing Joseph E. Minnock, Comment, *Protecting the Insured from an Adhesion Insurance Policy: The Doctrine of Reasonable Expectations in Utah*, 1991 UTAH L. REV. 837, 839.

¹³ JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.06[a], at 4-35 (2d ed., 1999), stating "... contract doctrine and theory involves so-called contracts of adhesion, so named because the party with less bargaining power must adhere to the terms dictated by the party with more bargaining power if the contract is to be made at all."

¹⁴ *Id.* "In a sense, the typical insurance contract is one of 'super-adhesion' in that the contract is completely standardized and not even reviewed prior to contract formation." *Id.* § 4.06[b], at 4-37.

¹⁵ BARRY R. OSTRAGER AND THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES §1.02, 9 (10th ed. 2000). ("An ambiguity exists when a word or phrase is reasonably susceptible to more than one construction."). See also STEMPEL, *supra* note 13, § 4.08[b], at 4-72 ("A term is ambiguous when it is reasonably susceptible of more than one construction. In making this assessment, courts . . . apply a plain and ordinary meaning analysis to the matter from the perspective of a lay person.")

strongly against the insurer.¹⁶ Contra-insurer rules of construction especially apply when there is ambiguity in an exclusionary term or clause.¹⁷ "Exclusions are generally construed narrowly, while exceptions to exclusions are generally construed broadly to find coverage."¹⁸ If a contract provision is found to be ambiguous, "invocation of the doctrine [*contra proferentem* or contra-insurer] becomes a nearly automatic finding" in favor of the insured.¹⁹

Construing ambiguous policy language in favor of the insured is justified by the doctrine of reasonable expectations,²⁰ which allows a court to decide whether an insured's expectation of coverage is reasonable under the circumstances unique to the insurance transaction.²¹ If an insured has a reasonable expectation of insurance coverage in a given circumstance, a court will generally find coverage if it has also found the policy language ambiguous.²²

¹⁶ OSTRAGER, *supra* note 15 § 1.03[b], at 14; *See also* STEMPEL, *supra* note 13, § 4.04, at 4-23-24 (characterizing *contra proferentem* ("against the author") as "the most important Latin phrase in insurance contracting, and perhaps in contract interpretation generally. The maxim provides that ambiguous contract language is to be construed against the person that drafted the contract. The theory underlying the rule is that the drafter was the person in the best position to avoid the ambiguity. In insurance law, since the insurer is nearly always the drafter as well, it is often referred to as the contra-insurer doctrine.")

¹⁷ OSTRAGER, *supra* note 15, § 1.03[b], at 15, stating "Exclusionary clauses 'never grant coverage, but rather limit the scope of the basic protection statement,'" citing *Fresard v. Michigan Millers Mut. Ins. Co.*, Mich. 327 N.W.2d 286, 290 (Mich. 1982).

¹⁸ OSTRAGER, *supra* note 15, § 1.03[b], at 16. *See also* STEMPEL, *supra* note 13, § 4.06[d], at 4-49, stating, "Courts also operate under the maxim that doubts about a term are to be resolved in favor of coverage in order to promote the basic purpose of the insurance policy." Stempel also states that courts are unlikely to exclude "boilerplate" from an insurance contract, but may be likely to interpret a standardized term or phrase "narrowly or in accord with the policyholder's viewpoint in order to maximize coverage." *Id.*

¹⁹ STEMPEL, *supra* note 13, 4.08, at 4-60.

²⁰ *See generally*, ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 25D (2d ed. 1996). (The emergence and growth of the doctrine of reasonable expectations has come to require some ambiguity in policy language for the doctrine to be applicable.) *See also* OSTRAGER, *supra* note 15, at § 1.03[b][2][A], 20, stating, "The 'reasonable expectations' doctrine is a principle by which policy language is construed in accordance with the objectively reasonable expectations of the insured."

²¹ Pawelski, *supra* note 11, at 375.

²² JERRY, *supra* note 20. However, *see, e.g.*, STEMPEL, *supra* note 13, § 4.09. The reasonable expectations doctrine is by no means universally interpreted or applied by courts of different states. "Reasonable expectations analysis takes several forms ranging on a continuum from use only as a near last-resort means of resolving ambiguous contract language (the version of the approach normally least helpful to policyholders) to use as a principle of insurance law that overrides clear and obvious policy language (the version of the approach that is normally most helpful to policyholders)." *Id.* § 4.09[d], at 4-147. Thus, the lowest common denominator among the various applications of the doctrine appears to be "ambiguity." "Even where equities seem to favor the policyholder, most courts, even those not completely hostile to the [reasonable expectations] doctrine, are reluctant to use expectations analysis unless the policy text at issue is ambiguous, hidden, or surprising." *Id.* § 4.09[d], at 4-130-31.

Stempel proposes "that courts adopt the following role for expectations analysis in coverage disputes: the objectively reasonable expectations of both the policyholder and the insurer

The Supreme Court of Nevada has acknowledged these principles. In *Farmers Ins. Group v. Stonik*,²³ the court observed, "an insurance policy is a contract of adhesion and should be interpreted broadly, affording the greatest possible coverage to the insured."²⁴ In *Farmers Ins. Exch. v. Young*,²⁵ the court stated, "When an ambiguity is found, the policy should be construed to effectuate the reasonable expectations of the insured."²⁶ Both *Stonik* and *Young* involved lower court rulings in favor of the insureds, reflecting ambiguities in automobile policy language. In both cases, however, the Supreme Court reversed, after finding the insurance policy provisions to be "clear and unambiguous."²⁷

Because there is significant standardization and uniformity in insurance policies, it is not surprising that courts from various jurisdictions have struggled with the interpretations of the same or similar policy provisions, and often have found similar ambiguities. One such provision is the "business pursuits exclusion" from liability coverage in homeowners insurance policies, the issue in *Dwello v. American Reliance Ins. Co.*,²⁸ and the subject of this Comment.

II. BACKGROUND OF THE HOMEOWNERS POLICY

In the late 1950's, insurers created a single insurance policy, called "homeowners", which incorporated protection against various types of risks, such as fire, theft, and personal liability, which formerly could only be covered under separate insurance policies.²⁹ These new policies included coverage for the insured's dwelling and contents, additional living expenses necessitated by damage to the dwelling, and personal liability coverage.³⁰ Although some homeowners policies provide limited coverage or are restricted to named perils, the

(and beneficiaries and other interested parties such as a lender or guarantor) should routinely be consulted in order to provide the background context . . . for determining the meaning of a disputed policy term." *Id.* § 4.09[d], at 4-157. Further, "it is a mistake to relegate expectations analysis to use only when the text at issue is so facially unclear as to be ambiguous as a matter of law. . . . Rather than creating this hurdle of ambiguity as a prerequisite to use of expectations analysis, courts should be willing to utilize expectations analysis to assist the court in determining whether language is ambiguous and finding the meaning of a disputed term." *Id.* § 4.09[d], at 4-158.

²³ 110 Nev. 64, 867 P.2d 389 (1994).

²⁴ *Id.* at 67.

²⁵ 108 Nev. 328, 832 P.2d 376 (1992).

²⁶ *Young*, 832 P.2d at 379 n.3, quoting *Nat'l Fire Union Ins. Co. v. Caesars Palace*, 106 Nev. 330, 792 P.2d 1129, 1130 (Nev. 1990).

²⁷ *Stonik*, 867 P.2d at 391; *Young*, 832 P.2d at 379. The Court does not always find in favor of the insurance carrier. For example, in *Powers v. United Services Automobile Ass'n*, 979 P.2d 1286, 1999 Nev. LEXIS 13, the Court held that a misstatement by the insured during the insurance investigation was not material and that the insurance carrier was liable for insurance coverage.

²⁸ 990 P.2d 190 (1999) (per curiam), 1999 Nev. LEXIS 76.

²⁹ ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW § 60B[b] at 341-43 (2d ed. 1996).

³⁰ *Id.*

more common policies provide coverage against all perils unless excluded from coverage under the policy.³¹

Several types of personal liability insurance policies, and the liability sections of virtually all homeowners insurance policies, contain a business pursuit exclusion.³² Commonly, the business pursuits provision is fairly broad,³³ stating that personal liability and medical payments to others do not apply to bodily injury or property damage "arising out of business pursuits of any insured . . ."³⁴ Often, the exclusion carries with it an exception almost equally broad, which states that the exclusion does not apply to "activities which are ordinarily incident to non-business pursuits . . ."³⁵

This section explores the struggle of courts in various jurisdictions to interpret and balance the exclusion and its exception, particularly as the provisions apply to child care in the home, and how many courts have interpreted the divergent viewpoints to find that the provisions are ambiguous.³⁶ Some have found its lack of clarity so difficult to apply that questions of its application are "resolvable only in specific factual contexts."³⁷

A. The Business Pursuits Exclusion

"The business pursuits exclusion is intended to apply to all activities that are involved in furtherance of any business, trade, occupation or profession."³⁸ The business need not be one's sole full-time occupation. Part-time business activities also are often excluded, because many courts have held that the business pursuit must be continuous, regular activity and must constitute the insured's principal occupation or means of livelihood.³⁹

³¹ *Id.* For example, a dwelling would be insured against damage by fire, but deliberate arson by the homeowner would be excluded. Most policies have deductibles and policy limits, so that homeowners often purchase floaters or endorsements to provide extraordinary coverage for art, antiques, or jewelry, for example. Further, people often purchase personal umbrella policies to provide liability coverage beyond the limits of their homeowners policies.

³² APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4501.10 at 271 (Berdal ed. 1979).

³³ DAVID J. MARCHITELLI, *CONSTRUCTION AND APPLICATION OF "BUSINESS PURSUITS" EXCLUSION PROVISION IN GENERAL LIABILITY POLICY*, 35 A.L.R. 5th 375.

³⁴ EMERIC FISCHER AND PETER NASH SWISHER, *PRINCIPLES OF INSURANCE LAW*, app. B, B-16 (2d ed. 1994).

³⁵ *Id.*

³⁶ *See, e.g., State Farm Fire & Casualty Co. v. Reed*, 873 S.W. 2d 698 (Tex. 1993). Ambiguity, of course, usually works to the advantage of the insured, because, generally, when a court determines that a clause in an insurance contract is ambiguous, it construes the clause "most strongly against the insurer." *See* 43 AM. JUR. 2D *INSURANCE* § 283, at 357 (1982).

³⁷ MARCHITELLI, *supra* note 33, at 410, *citing* *State Mut. Cyclone Ins. Co. v. Abbott*, 216 N.W.2d 606 (Mich. 1974).

³⁸ APPLEMAN, *supra* note 32, at 276-77; *See also* *Home Insurance Co. v. Aurigemma*, 257 N.Y.S. 2d 980 (N.Y. Sup. Ct. Spec. Term 1965) (examining various insurance policy and dictionary definitions of "business", "trade", "occupation", and "profession.").

³⁹ APPLEMAN, *supra* note 32, at 271-72; MARCHITELLI, *supra* note 33, at 448; 48 A.L.R.3d

The business pursuits exclusion is interpreted to apply to activities that are regular or continuous, and are conducted for the primary purpose of earning income or profit.⁴⁰ Courts employ a two-part test requiring that the elements of "continuity" and "profit motive" be established in order to characterize an activity as a business pursuit. In this two-part test, first articulated in *Home Ins. Co. v. Aurigemma*,⁴¹ "continuity" is defined as a customary activity or stated occupation, and "profit motive" requires a showing that the activity is a means of livelihood, gainful employment, gaining subsistence or profit, or earning a living.

But even the *Aurigemma* two-part test has added little clarity as to whether an activity is a business pursuit for purposes of the exclusion. As reviewed in the following discussion, activities that were for either an indefinite or definite period, temporary or permanent, or conducted over a long or a very brief period of time have been characterized as "continuous", and findings of "profit motive" have ranged from token remuneration to substantial, primary income.

The business pursuits exclusion in a homeowners policy applies to any activity involving the insured's employment, trade or profession. With the proliferation of home-based businesses, full-time and part-time, whether an activity may be characterized as a business pursuit is not usually a matter of definition. Rather, it is "almost always a factual question presented for the determination by a court."⁴² In the specific area of home child care, courts often have looked to the presence of additional factors to make that determination.⁴³

There appears to be a level of home child care service that courts will not consider a business pursuit even when the activity meets the *Aurigemma* two-part test. In West Virginia, the Supreme Court decided that a grandmother who was being paid eighty dollars per month by the State to watch her grandson was not engaged in a business pursuit, because she was not licensed and did not advertise her services.⁴⁴ To assist them in determining continuity or profit motive, courts have considered such other factors as the period of time that the in-

1096, 1100 (1973); See, e.g., *Moncivais v. Farm Bureau Mut. Ins. Co.*, 430 N.W.2d 438, 440 (Iowa 1988); *Virginia Mut. Ins. Co. v. Hagy*, 232 Va. 472, 475, 352 S.E.2d 316, 318 (1987); *Camden Fire Ins. Ass'n v. Johnson*, 294 S.E.2d 116, 118 (W.Va. 1982).

⁴⁰ MARCHITELLI, *supra* note 33, at 411.

⁴¹ 257 N.Y.S. 2d 980 (N.Y. Sup. Ct. Spec. Term 1965). After reviewing the key words in the policy language, Webster's Third New International Dictionary Unabridged, and the Oxford Universal Dictionary (3^d Rev. Ed.), the *Aurigemma* court concluded that "...two elements are present in almost every definition, either expressly or by implication: *first, continuity and secondly, the profit motive.*" *Id.* at 985. The court held that "...defendant Aurigemma, in performing the electrical work for his friend . . . was not engaged in any business activity or in the pursuit of any business within the contemplation or purview of the exclusionary clause in the plaintiff's policy." *Id.* at 987.

⁴² APPLEMAN, *supra* note 32, at 273.

⁴³ Deborah Kravitz, *et al*, *Survey: Developments in Maryland Law*, 1988-89, 49 MD. L. REV. 509, 816-18 (1990).

⁴⁴ *Camden Fire Ins. Ass'n v. Johnson*, 294 S.E.2d 116, 120-21 (W.Va. 1982). (The court observed that the same department that paid Ms. Johnson also issued day care licenses.)

sured cared for children;⁴⁵ the number of children cared for;⁴⁶ whether the insured expected substantial remuneration;⁴⁷ whether the insured was licensed or registered with the state as a child care provider;⁴⁸ or whether the insured advertised services as a child care provider.⁴⁹

The presence of any one of these factors could establish a business pursuit, whether or not the court applies the *Aurigemma* standards of continuity and profit motive. If any of these factors are present, the child care provider may need to provide other evidence showing the absence of a profit motive or continuity of service.⁵⁰

If it is concluded that an injury arose out of the business pursuits of the insured, the inquiry is not finished. Most policies contain an exception to the exclusion.⁵¹ If the activity that resulted in the injury was "ordinarily incident to nonbusiness pursuits," the business pursuits exclusion may not be invoked.

B. *The Exception to the Exclusion: "Ordinarily Incident to Nonbusiness Pursuits"*

When an activity such as horseplay, or a purely social amenity such as preparing coffee, has lost its work-related identification, it becomes an activity "incidental to non-business pursuits."⁵² It is not clear whether child care or babysitting in the home for which some remuneration is received is excluded or is considered to be incident to nonbusiness pursuits.⁵³

Interpreting the exclusion and its exception has proven to be difficult even within the same jurisdiction. In *State Farm Fire & Casualty v. Reed*,⁵⁴ for example, the Texas Supreme Court held that the business pursuits exclusion was ambiguous and did not apply to the *Reed* suit, and further determined that the maintenance of a fence around a swimming pool was ordinarily incident to a nonbusiness pursuit.⁵⁵ Yet, only five years later, in *State Farm Fire & Casu-*

⁴⁵ *Burt v. Aetna Cas. and Sur. Co.*, 720 F.Supp. 82, 85 (N.D. Tex. 1989). (The provider cared for the child for a set time period daily for three months prior to the injury); *Allstate Ins. Co. v. Kelsey*, 678 P.2d 748, 750 (Or. Ct. App. 1984) *cert. denied*, 683 P.2d 91 (1984); *Haley v. Allstate Ins. Co.*, 529 A.2d 394, 396 (N.H. 1987) (per curiam).

⁴⁶ *State Farm Fire & Cas. Co. v. Moore*, 430 N.E.2d 641, 643 (Ill. App. 2d 1981).

⁴⁷ *Virginia Mut. Ins. Co. v. Hagy*, 352 S.E.2d 316, 319 (Va. 1987); *Moore*, 430 N.E.2d at 643; *Kelsey*, 678 P.2d at 750. *See also infra* Part IV²A.1.b.

⁴⁸ *Republic Ins. Co. v. Piper*, 517 F.Supp. 1103, 1106 (D.Colo. 1981); *Moore*, 430 N.E.2d at 643; *Hagy*, 352 S.E.2d at 318-19; *Haley*, 529 A.2d at 396.

⁴⁹ *Moore*, 430 N.E.2d at 643; *Hagy*, 352 S.E.2d at 318; *Kelsey*, 678 P.2d at 750.

⁵⁰ *Kravitz*, *supra* note 43, at 818.

⁵¹ *FISCHER*, *supra* note 34.

⁵² *APPLEMAN*, *supra* note 32, § 4501.11, 279.

⁵³ *Id.* at 280.

⁵⁴ 873 S.W.2d 698 (Tex. 1993). (In *Reed*, a child being cared for crawled through a fence that separated a play area from the swimming pool and drowned in a puddle of water on a tarp covering the pool.)

⁵⁵ H. Michelle Caldwell, *Insurance Law*, 52 SMU L. REV. 1283, 1306 (1999), *citing Reed*,

alty v. Vaughan,⁵⁶ the same court cited the *Reed* decision when it noted "not every difference in interpretation of a contract or an insurance policy amounts to an ambiguity."⁵⁷ The *Vaughan* court rejected the court of appeals' conclusion that *Reed* invariably stands for the proposition that the business pursuits exclusion and its exception are ambiguous in the context of home child care.⁵⁸ In *Reed*, the child crawled through a fence and drowned in a puddle on a covered swimming pool; in *Vaughan*, the care-giver buckled the infant in a car seat, covered him in a blanket, and left him in a closet, resulting in a criminal conviction for child endangerment. The *Vaughan* court concluded that the business pursuits exclusion in Solis' homeowner policy was not ambiguous when viewed in light of the child-endangering activity for which Solis was convicted.⁵⁹

The seemingly disparate holdings of the Texas Supreme Court in *Reed* and *Vaughan* are illustrative. Courts generally have found it difficult to reconcile the business pursuits exclusion and its exception. Three dominant lines of analysis of the exception have emerged.⁶⁰

Following *Crane v. State Farm Fire and Casualty Co.*,⁶¹ the first line of analysis suggests that child care is generally incident to nonbusiness pursuits so long as the insured would ordinarily care for her own children even if she were not caring for other children for compensation. A second line of analysis, originating with *Stanley v. American Fire and Casualty Co.*,⁶² suggests that the activity that resulted in injury to the child was negligent supervision, and thus is ordinarily incident to the business duties of caring for children for pay. Third, under *Gulf Ins. Co. v. Tilley*,⁶³ the specific activity that resulted in the injury is examined to determine whether that specific activity was incident to business pursuits or to nonbusiness pursuits.⁶⁴

873 S.W.2d at 701, n.7.

⁵⁶ 968 S.W.2d 931 (Tex. 1998). (The *Vaughan*'s infant son was in the care of Solis, who buckled him into a car seat, threw a blanket over his head and left him in a closet. Solis was convicted of child endangerment after law enforcement officers discovered the *Vaughan* boy and other unattended children. State Farm refused to defend Solis on the basis of the business pursuits exclusion.)

⁵⁷ Caldwell, *supra* note 55, quoting *Vaughan*, 968 S.W.2d at 934.

⁵⁸ *Vaughan*, 968 S.W.2d at 934.

⁵⁹ Caldwell, *supra* note 55, at 1307, citing to *Vaughan*, 968 S.W.2d at 934.

⁶⁰ Among the many sources reviewed, two have provided very clear reviews of the various approaches to the exception to the business pursuits exclusion. The author relies upon the organization of material in Kravitz, *supra* note 43, at 813, and in *Moncivais v. Farm Bureau Mutual Ins. Co.*, 430 N.W.2d 438 (Iowa 1988).

⁶¹ 485 P.2d 1129 (Cal. 1971) (en banc).

⁶² 361 So. 2d 1030 (Ala. 1978).

⁶³ 280 F.Supp. 60 (N.D. Ind. 1967) *aff'd*, 393 F.2d 119 (7th Cir. 1968) (per curiam).

⁶⁴ A fourth approach is also considered in *Moncivais*. The *Moncivais* court cited to *Foster v. Allstate Insurance Co.*, 637 S.W.2d 655 (Ky. Ct. App. 1981), which held that the language of the exception is ambiguous and must be interpreted in favor of the insured. Thus, this "fourth" approach is not to consider the exception at all.

1. *The Crane Analysis.*

Ms. Chamberlain had been providing child-care for Crane's two small children for about two months when Andrea Crane, two and one-half years old, suffered burns to her hand, wrist, and fingers. Chamberlain was a housewife with two young children whom she was caring for simultaneously with the Crane children. She had no business activities inside or outside her home, and was receiving \$25 per week (plus groceries) for her care of the Crane children. The defendant, State Farm Fire and Casualty Company, denied coverage, relying on the business pursuits exclusion.⁶⁵

The *Crane* court went straight to the exception without any direct consideration of whether the business pursuits exclusion should have applied,⁶⁶ and found that Chamberlain's care of the Crane children was incident to a nonbusiness pursuit. The California Supreme Court held that:

Assuming that the care of the child constituted a business pursuit, such duties under the circumstances presented here were clearly incident to Mrs. Chamberlain's nonbusiness regimen of maintaining a household and supervising her own children. Indeed, it is difficult to conceive of an activity more ordinarily incident to a noncommercial pursuit than home care of children.⁶⁷

Courts have subsequently criticized *Crane* because it seemed to suggest that a homeowner policy would cover any injury that occurred at day care so long as providers also cared for their own children.⁶⁸ Cases that followed the *Crane* approach have tended to do so without serious analysis; the courts merely quote the above passage, announce their approval, and choose the interpretation most favorable to the insured.⁶⁹

There has been little refinement of the *Crane* reasoning, and there is continuing criticism that it sweeps too broadly.⁷⁰ Since 1983, no court has followed the *Crane* approach, possibly due to its lack of a solid analytical foundation and its simple declaration that if providers are parents who care for their own children at home, any additional, compensated child care at that home automatically becomes incident to the nonbusiness pursuit of parenting.⁷¹

⁶⁵ *Crane*, at 1130.

⁶⁶ Since the *Crane* court found the exception to be applicable, any consideration of the exclusion itself would have been irrelevant.

⁶⁷ *Crane*, at 1131. The cited passage appears in whole or in part in nearly every court opinion in which the exception to the business pursuits exclusion is analyzed.

⁶⁸ Kravitz, *supra* note 43, at 820, citing *State Farm Fire & Casualty Co. v. Moore*, 430 N.E.2d 641, 645 (Ill. App. Ct. 1981).

⁶⁹ Kravitz, *supra* note 43, at 820. See, e.g., *Western Fire Ins. Co. v. Goodall*, 658 S.W.2d 32, 34-35 (Mo. Ct. App. 1983); *Nationwide Mut. Fire Ins. Co. v. Collins*, 222 S.E.2d 828, 830-31 (Ga. Ct. App. 1975); *Bankers Standard Ins. Co. v. Olwell*, 309 N.W.2d 799, 801-02 (Minn. 1981).

⁷⁰ Kravitz, *supra* note 43, at 820, citing *Moncivais v. Farm Bureau Mut. Ins. Co.*, 430 N.W.2d 438, 442 (Iowa 1988) (the "effect of this method . . . is to render the business pursuits exception meaningless in many commercial child care operations.").

⁷¹ Kravitz, *supra* note 43, at 820.

The Crane approach broadly defines all aspects of child care as being incident to the nonbusiness pursuit of raising children as long as the care is being provided by parents who are also caring for their own children. The problem with this approach is that it may render the exception without meaning in many commercial child care operations.⁷² A parent may choose not to work outside the home because of the income potential in caring for children in her own home. And, as states increasingly demand licensing and registration of home child care, it may increasingly look like a business whether or not the care is being provided by a parent who is also watching her or his own children.⁷³

2. The Stanley Analysis.

In *Stanley*, a one-year-old child fell into a bed of hot coals in a fireplace while her child care provider was in the kitchen preparing lunch for herself, her own children, and the other children she was caring for.⁷⁴ The Alabama Supreme Court did not identify the lunch preparation or the specific act of the child as the injury-causing activity, but rather held that the provider's failure to supervise was the activity that caused the injury.⁷⁵

Subsequent courts have focused on *Stanley's* conclusion that the provider's negligent supervision is responsible for injuries at day care.⁷⁶ The negligent supervision is viewed as incident to a business pursuit and thus falls outside the exception.⁷⁷ For example, in *Republic Insurance Co. v. Piper*,⁷⁸ the court stated, "... nothing could be more a part of the business of operating a day care home than supervision of the children under the licensee's care"⁷⁹

⁷² *Moncivais v. Farm Bureau Mutual Ins. Co.*, 430 N.W.2d 438, 442 (Iowa 1988).

⁷³ Kravitz, *supra* note 43, at 821.

⁷⁴ *Stanley*, 361 So. 2d at 1031.

⁷⁵ *Id.* at 1032. (The *Stanley* court appears to have misread *Crane* when it expressed its disagreement with *Crane's* conclusion that child care for pay is ordinarily a non-business pursuit. In fact, *Crane* had bypassed the question of whether child care in the home was a business pursuit. Rather, the *Crane* court went directly to the exception, and finding that the exception to the exclusion would apply, concluded that, whether or not the child care was a business pursuit, was irrelevant. See Kravitz, *supra* note 43, at 822.)

⁷⁶ Kravitz, *supra* note 43, at 822

⁷⁷ *Id.*

⁷⁸ 517 F. Supp. 1103 (D. Colo. 1981). The *Piper* court opted for a *Stanley*-type analysis, while acknowledging the arguments in *Crane* and *Tilley*. In *Piper*, a child being cared for by the insured burned her hands in scalding water, and "somehow received a bruise on her nose." Piper was licensed by the state to operate a day care facility, had joined a voluntary association of licensed day care operators which had arranged for a group liability policy, had declined to arrange for coverage under the group policy, and had declared her business as babysitting on tax returns. Moreover, the court found that the burns "were the result of an intentional act" and that Ms. Piper was the only person in the home "physically capable of performing that act." The court distinguished the facts in *Piper* from those in *Crane* and *Tilley*, and speculated that even the *Crane* and *Tilley* courts would find in favor of the insurer if presented with facts similar to *Piper*. *Id.*, at 1104-08.

⁷⁹ *Id.* at 1106.

Thus, a *Stanley* analysis is focused upon the first question, "Is it a business pursuit?" If the home child care is determined to be a business pursuit, the *Stanley* approach characterizes "lack of supervision" as an activity that is incident to the business pursuit of caring for children.⁸⁰ This interpretation tends to make the exception superfluous in the context of home child care.⁸¹ Because it can be argued that virtually any injury to a child at home child care is attributable to a lack of supervision, the exception to the business pursuits exclusion, as it applies to home child care, appears to have been eliminated entirely in a *Stanley* analysis.

3. The *Tilley* Analysis.

In *Gulf Ins. Co. v. Tilley*,⁸² the child care provider was preparing coffee for herself and a visiting friend. A child being cared for was injured when she pulled the cord of the coffee percolator, which overturned, spilling hot coffee over the child. The federal district judge concentrated on the preparation of coffee as the activity to be analyzed, and stated, "it is manifest that the preparation of hot coffee is an activity that is not ordinarily associated with a babysitter's functions and . . . clearly appears as an activity which was 'incident to non-business pursuits.'"⁸³

Tilley and its progeny define narrowly "the 'activity' that caused the injury, and then consider whether that particular activity is ordinarily incident to a business or nonbusiness pursuit."⁸⁴ The *Tilley* analysis is appealing because it requires a consideration of the facts of an injury before it "forecloses a decision on coverage in child-care cases."⁸⁵ A problem with the *Tilley* approach is that there appears to be no clear delineation between activities incident to business pursuits and activities incident to nonbusiness pursuits, and this lack of clarity "inevitably leads the courts to engage in formalistic hair-splitting only to arrive at conclusions that appear horribly contrived."⁸⁶

Thus, little uniformity exists across jurisdictions in the interpretation of the exception to the business pursuits exclusion of liability coverage for injuries

⁸⁰ *Moncivais*, 430 N.W.2d at 442.

⁸¹ *Kravitz*, *supra* note 43, at 822-23, stating "A *Stanley* analysis, therefore, seems to involve one question, 'Is it a business pursuit?' asked twice. The first answer is applied to the exclusion and the second to the exception. If the child-care operation is a business pursuit, it is excluded from coverage under the exclusion clause. And, if it is a business pursuit, it cannot be excepted from the exclusion because the negligent supervision of children is not 'ordinarily incident to a nonbusiness pursuit.'"

⁸² 280 F.Supp. 60 (N.D. Ind. 1967) *aff'd*, 393 F.2d 119 (7th Cir. 1968) (per curiam).

⁸³ *Id.* at 65.

⁸⁴ *Kravitz*, *supra* note 43, at 824, citing *State Farm Fire & Cas. Co. v. Moore*, 430 N.E.2d 641, 645 (Ill. App. 1981) (after a child was burned by spilling a pan of boiling water which the provider was boiling for herself, her own children, and her day care children, the activity was found to be incident to a nonbusiness pursuit.)

⁸⁵ *Id.*

⁸⁶ *Id.*

that occur in the context of home child care. Some courts find the exclusion and its exception ambiguous, and tend to rule in favor of the insured.⁸⁷ The *Tilley* approach focuses on the specific activity that resulted in injury to determine whether it was incident to business or nonbusiness pursuits. Although out of favor, the *Crane* approach takes a general view that the exception usually applies if providers are also caring for their own children. The *Stanley* approach takes a seemingly opposite general view that the exception almost never would apply in the context of child care, interpreting injury to a child as resulting from failure to supervise, clearly incident to the business pursuit of child care.

III. DWELLO RE-EXAMINED

A. Facts & Opinion

Alisa Dwello was a single working mother, whose daughter, Stefanie, was seven years old.⁸⁸ Dwello asked her neighbor, Patty Kenyon, to care for Stefanie while Dwello worked. Kenyon agreed, and watched Stefanie five days a week for approximately one month.⁸⁹ Dwello paid Kenyon \$50 per week, even though the Kenyons later testified that they would have watched Stephanie without compensation.⁹⁰ The Kenyons' dog attacked Stefanie in July 1995, severely injuring her face, head and eye.⁹¹ The next month, Dwello filed a complaint against Kenyon and her husband, alleging that the Kenyons failed to adequately protect Stefanie from their dog.⁹²

The Kenyons sought indemnity and defense from the carrier of their homeowners insurance, American Reliance Insurance Company.⁹³ American Reliance filed for declaratory relief in March 1996, "alleging that they had no duty to defend or indemnify the Kenyons."⁹⁴ In September of that year, the district court allowed Dwello to intervene in the action for declaratory judgment.⁹⁵

In a one-day bench trial in July 1997, American Reliance argued that "the 'business pursuits' provision in the homeowner's policy shielded American Reliance from liability."⁹⁶ The Kenyons argued that compensation was not a fac-

⁸⁷ See e.g., *Foster v. Allstate Insurance Co.*, 637 S.W.2d 655, 657 (Ky. Ct. App. 1981).

⁸⁸ Dwello, 990 P.2d 190, 191 (1999) (per curiam), 1999 Nev. LEXIS 76.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (Dwello alleged that Kenyons knew of the propensity of their dog to bite, and "that they failed to inform Dwello that the dog had bitten other children.")

⁹³ *Id.*

⁹⁴ *Id.* (The Kenyons then filed for Chapter Seven bankruptcy.)

⁹⁵ *Id.*

⁹⁶ *Id.* (The provision states: Comprehensive Personal Liability Coverage and Medical Payments to Others Coverage Does Not Pay for Bodily Injury or Property Damage: Arising out of your business pursuits. This also includes your occasional or part-time business pursuits.)

tor, because they would have watched Stefanie without compensation. Dwello argued that the exclusion was not applicable because Kenyon watched only one child, was not licensed, and did not advertise.⁹⁷ The district court found that Kenyon watched Stefanie from 6:00 a.m. to 4:00 p.m. for one month and that the compensation of \$50 per week was for services rendered, constituting (for that month) "approximately forty percent of Kenyon's total monthly salary." The district court concluded that Kenyon was engaged in a business pursuit within the meaning of the policy provision, and granted the petition of American Reliance for declaratory relief.⁹⁸ Dwello appealed.

The Supreme Court of Nevada affirmed the judgment of the district court, holding that "American Reliance had no duty to defend or indemnify the Kenyons under the homeowner's insurance policy pursuant to the business pursuit exclusion."⁹⁹ The court reasoned that whether the babysitting triggered the business pursuits exclusion is a question of fact for the trial court, and that "only when this finding is clearly erroneous will this court reverse."¹⁰⁰ Not surprisingly, the court found that the exclusion provision was clear and unambiguous,¹⁰¹ and that it was "for the trial court to determine whether the homeowner is engaged in a 'business pursuit.'"¹⁰²

Acknowledging that other courts are divided on the issue of whether the "business pursuits exception"¹⁰³ applies to babysitting,¹⁰⁴ the court agreed that the appropriate factors in considering whether babysitting constitutes a business pursuit are (1) continuity or customary engagement in the activity, and (2) profit motive.¹⁰⁵ The court found that those factors were considered by the trial court, and concluded, "there was substantial evidence to support the district court's findings."¹⁰⁶

The court also held that the exception to the business pursuit exclusion did not apply, commenting,

A babysitter's primary role is to maintain a safe, healthy environment and to keep the child out of harm's way. While the babysitter's services are engaged, the babysitter maintains a continuous duty to provide for the child.¹⁰⁷

Without citing *Stanley*, the court followed the *Stanley* approach in finding that

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 192.

¹⁰⁰ *Id.* at 191, citing *Trident Construction v. West Electric*, 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989).

¹⁰¹ *Id.* at 191. See *supra* notes 9-12 and accompanying text.

¹⁰² *Id.*

¹⁰³ *Id.* at 192. The court used the term "exception" rather than "exclusion." The exception to the exclusion ("ordinarily incident to nonbusiness pursuits") is not considered until the final paragraph of the opinion.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* citing *Carroll v. Boyce*, 640 A.2d 298 (N.J. Super. Ct. App. Div. 1994).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

the dog bite was "related to negligent supervision, and was not 'incidental to non-business pursuits.'"¹⁰⁸

B. Analyzing The Court's Decision

In its very brief opinion in *Dwello*, the Supreme Court of Nevada disposed of an issue that has been troubling courts throughout the country for more than three decades.¹⁰⁹ After a cursory description of the facts of the case, the court correctly observed that other courts are divided on the issue of the business pursuits exclusion, used a few sentences to describe the approach used by one of those courts, and declared it appropriate. The court then made a passing reference to the exception to the exclusion, and held that it did not apply. The court's conclusion that the trial court had not made reversible error may have been a correct decision, but its brevity provides little guidance as to how the business pursuits exclusion may be viewed given varied fact patterns.

Since *Dwello* was apparently the first consideration by the court of the business pursuits exclusion in a homeowners insurance policy as it applied to home child care, the Court might have done a *de novo* review. Instead, it seemed merely to consider whether the trial court had made any reversible error, and concluded that it had not.

1. The Business Pursuits Exclusion

The court acknowledged that other courts are "divided on the issue of whether babysitting falls within the business pursuits exception."¹¹⁰ As a way to introduce the two-part test of *Aurigemma*,¹¹¹ the court cited *Carroll v. Boyce*,¹¹² but did not describe any facts in *Carroll*, or any other cases, to illustrate how the two-part test is applied. Nor did it describe the manner of applying the test here, or identify any of the many issues other courts have considered in determining whether the prongs of the test applied to their own cases. The court merely declared that the factors in the two-part test were the "appropriate factors to consider,"¹¹³ found that the district court had considered those

¹⁰⁸ *Id.*

¹⁰⁹ The two-part test was originated in 1965 in *Home Ins. Co. v. Aurigemma*. See *supra* note 41 and accompanying text.

¹¹⁰ *Dwello*, 990 P.2d at 192. (The court probably intended "exclusion" rather than "exception"). See *supra*, note 103.

¹¹¹ See *supra* note 41 and accompanying text. The Court did not mention *Aurigemma*.

¹¹² 640 A.2d 298 (N.J. Super. Ct. App. Div. 1994). The *Carroll* court acknowledged the two-part test of continuity and profit motive as described in *Sun Alliance Ins. Co. of Puerto Rico, Inc. v. Soto*, 836 F.2d 834, 836 (3rd Cir. 1988). In *Carroll*, Ms. Boyce cared for the Carroll infant (6-10 months old) for a six-month period for compensation of \$85 per week. This arrangement was to continue indefinitely. Mrs. Boyce also cared for another child for compensation during part of that period. *Id.* at 387. Thus, the facts of *Carroll* appear to be readily distinguishable from *Dwello* on both prongs of the two-part test.

¹¹³ *Dwello*, 990 P.2d at 192.

factors, and concluded that there was "substantial evidence to support the district court's findings."¹¹⁴

a. The Two-Part Test.

The factors in the *Aurigemma* two-part test are continuity and profit motive.¹¹⁵ To assist in determining whether continuity and profit motive are present, other courts have considered such factors as whether the provider advertised the child care service, was registered or licensed by the state, declared the child care services as a business for tax purposes, cared for children a substantial amount of time, cared for several children, or received substantial income from child care services.¹¹⁶

The two-part test, and each related issue, is a fact-based inquiry. While the district court and the Supreme Court presumably had access to additional information, the facts presented in the opinion are fairly sparse. Kenyon cared for Stefanie from 6 a.m. until 4 p.m., five days a week, for approximately one month.¹¹⁷ Evidence indicated that Kenyon only watched one child "not her own," that she was not licensed, and did not advertise.¹¹⁸ The court did not indicate whether Kenyon also watched her own children, had a history of watching other children, or intended to continue to watch children. There is no indication as to whether the arrangement between Dwello and Kenyon was for a specified time or whether it was expected to continue indefinitely into the future.¹¹⁹ Without any consideration of facts that would be pertinent to the inquiry, it is odd that the court would affirm based upon the trial court's fact-finding.

Continuity. Absent the discussion of any of these other factors, one must assume that the court reached its decision on the basis of the facts it presented. To this court, the care of Stefanie five days a week for a month was adequate to meet the "continuity" prong of the test. With similar facts, other courts have reached different conclusions.¹²⁰ In *Camden Fire Ins. Ass'n v. Johnson*,¹²¹ the state paid a grandmother eighty dollars a month to care for her grandson while his mother worked, but because she was not licensed and did not advertise her babysitting services, the court found that the child care was not a business pursuit. In *Haley v. Allstate Ins. Co.*,¹²² the court acknowledged that occasional

¹¹⁴ *Id.*

¹¹⁵ See *supra* Part II.A.

¹¹⁶ *Id.*

¹¹⁷ Dwello, 990 P.2d at 191.

¹¹⁸ *Id.*

¹¹⁹ Because Stefanie was seven years old, it is likely that Stefanie would be back in school only a few weeks later, and that Kenyons' care of her would have stopped, or changed significantly, when school started.

¹²⁰ See also *supra* Part II.A.

¹²¹ 294 S.E.2d 116, 117 (W.Va. 1982).

¹²² 529 A.2d 394 (N.H. 1987).

babysitting for a neighbor was not continuous, but that the exclusion must be considered where the child care occurred more than eight hours a day, five days per week for several months.¹²³

Most courts have found that regular child care as in *Dwello* meets the "continuity" prong of the test, but have looked to the presence of the other factors for confirmation. The absence of these other indicia of continuity in *Dwello* could as easily have resulted in a finding that the child care was not continuous.

Profit Motive. The court found that *Dwello* paid Kenyon \$50 per week, and found that the payment was for services rendered.¹²⁴ To the court, these facts alone were sufficient to meet the "profit motive" prong of the two-part test. The language of the court is revealing. Rather than simply stating that Kenyon was paid "\$50 per week for 4 weeks," the court found that the revenues for Stefanie's care accounted for "approximately forty percent of Kenyon's total monthly salary,"¹²⁵ implying a level of significance and continuity not present with the more straightforward wording.

The Kenyons argued that profit was not a motive, and that they "would have watched Stephanie [sic] without compensation."¹²⁶ Presumably, if *Dwello* had given Kenyon additional money for food or snacks, the court would have mentioned it, so it must be inferred that during the period from 6:00 a.m. to 4:00 p.m. Kenyon probably provided breakfast, lunch, and snacks. Thus, Kenyon watched and fed Stefanie for fifty hours a week for \$50, less the cost of food, supporting Kenyon's contention that profit was not a motive in her care of Stefanie.

Courts have generally found that the business pursuits exclusion does not affect coverage unless the activity has a purpose of earning a livelihood or subsistence.¹²⁷ If the compensation is a token amount, a court may find that the insured was not engaged in a business pursuit.¹²⁸ If, however, the amount of compensation was more substantial,¹²⁹ or if the child care would be terminated

¹²³ *Id.* at 396, referring to *Stanley v. American Fire and Casualty Co.* 361 So. 2d 1030 (Ala. 1978).

¹²⁴ *Dwello*, 990 P.2d at 191.

¹²⁵ *Id.* The court was careful to specify "her" monthly income, not the income of the family. Since the Kenyons had a homeowners insurance policy, it is likely that they owned their home. May it be inferred that Mr. Kenyon had the primary income in the family, or that the Kenyons had more substantial income sources? Even if the \$50 per week constituted 100% of her income, it may have had no discernable effect on the family income.

¹²⁶ *Id.*

¹²⁷ *Home Ins. Co. v. Aurigemma* (1965) 257 N.Y.S. 2d 980, 985 (N.Y. Sup. Ct. Spec. Term, 1965). See also *Appleman*, *supra* note 32, § 4501.10.

¹²⁸ *Nationwide Mut. Fire Ins. Co. v. Collins*, 222 S.E. 2d 828, 830 (Ga. App., 1975), (finding that a woman who received five dollars daily for the care and feeding of two children was not a business pursuit).

¹²⁹ *McClosky v. Republic Ins. Co.*, 559 A.2d 385, 387 (Md. Ct. Spec. App., 1989) (*cert. denied*), 566 A.2d 101 (1989), (finding that watching seven children for \$195 per week constituted substantial compensation).

if the parent did not pay the fee,¹³⁰ courts have often found that the provider was motivated by profit or income.

Whether the \$50 weekly compensation that Kenyon received from Dwello was "substantial" is a matter of interpretation and judgment. From the Kenyons testimony, the compensation was not expected or even necessary.¹³¹ Further, from their testimony it seems unlikely that Kenyon would have terminated the care if Dwello had gotten behind on her payment, or had been unable to pay.

The court's decision seems to have been made on the simple finding that if Kenyon received compensation, the "profit motive" prong of the two-part test was met. There is nothing in the opinion to indicate that the court's consideration went any deeper.

b. Was the Two-Part Test Met in Dwello?

The *Dwello* case resembles a neighborly accommodation more than a child care business with a purpose of income or profit. The court's analysis was superficial, without apparent consideration of the many issues and nuances that have troubled other courts.

Because the child care occurred daily for a month, the court found continuity without the presence of supporting factors such as licensing, advertising, or care of multiple children that other courts have found useful or necessary to determine continuity.¹³² Because the provider was compensated, the court found profit motive without considering whether the compensation was substantial, expected, or demanded.

The district court's conclusion that the two-part test (continuity and profit motive) could trigger the business pursuits exclusion was appropriate, but its finding that *Dwello* met both prongs of that test was superficial. Despite the absence of any other factors that other courts have found to be associated with "continuity,"¹³³ the court's finding that Kenyon's care of Stefanie was "continuous" was, perhaps, plausible. But the court's finding of a profit motive in *Dwello* is without foundation. Profit motive has usually required that the payment be substantial and required.¹³⁴ Here, it was neither. There was no evidence presented to suggest that Kenyon had ever relied on income from child care, and neither expected nor required payment; and, although Kenyon received some remuneration, the amount was insignificant.¹³⁵

The court's decision in *Dwello* that Kenyon's care of Stefanie was a busi-

¹³⁰ See, e.g., *Virginia Mut. Ins. Co. v. Hagy*, 352 S.E.2d 316, 317 (Va. 1987), (where the insured terminated child care contracts with parents who were unable to pay her fees).

¹³¹ *Dwello*, 990 P.2d at 191.

¹³² See *supra* notes 44-49 and accompanying text.

¹³³ See *supra* Part II.A.

¹³⁴ See *supra* notes 127-130 and accompanying text.

¹³⁵ *Dwello*, 990 P.2d at 191.

ness pursuit was ill-founded because the two-part standard applied by the court was not properly met. While the “continuity” prong of the test may have been plausible, there is no logic or precedent to support the court’s finding of a “profit motive” beyond the mere fact of the token payment.

In fact, the *Aurigemma* two-part test may not be adequate to distinguish between business and nonbusiness pursuits except in extreme cases. For most cases, findings of continuity and profit motive are largely discretionary. In the future, Nevada courts should employ a seven-factor test if “continuity” or “profit motive” are not clear. These factors should include:

- licensing or registration with the state or other regulatory authority,
- advertising, including flyers, posters and word-of-mouth,
- care of multiple children,
- the caregiver has cared for children over a prolonged period,
- expectation of meaningful aggregate remuneration from all child care activities,
- inclusion of child care income or expenses on the caregiver’s tax returns, and
- lack of any prior relationship between the caregiver and either the child or the parents. The presence of any one or a combination of these factors would tend to support a finding that the child care was a business pursuit, while the absence of any of these factors would mitigate against such a finding.

Based upon the information provided in the opinion, none of these seven indicia of a business pursuit was present in *Dwello*.

2. *The Exception to the Exclusion*

Even when an activity is found to be a business pursuit, the exclusion does not apply to injuries that are “ordinarily incident to nonbusiness pursuits.”¹³⁶ In a cursory reference to the exception, the court found that it did not apply.¹³⁷

Again, the facts in *Dwello* are sparse. Stefanie was attacked and injured by Kenyon’s dog, which had apparently bitten children before. There is no reference to the dog being restrained, whether the child provoked it, or whether the attack may have been foreseeable.¹³⁸

Three dominant approaches to the exception have been taken by other courts.¹³⁹ The *Crane* analysis has not been applied since 1983, and, in any event, requires knowledge of whether Kenyon was also caring for her own

¹³⁶ See *supra* Part II.B.

¹³⁷ There is no reference to any district court consideration or decision about the exception.

¹³⁸ The fact that Stefanie was not attacked until a month after Ms. Kenyon began babysitting her suggests that the dog may not have posed an ever-present danger, unlike, for example, a swimming pool or rickety staircase.

¹³⁹ See *supra* Part II.B.1-3.

child or children.¹⁴⁰ If Kenyon were also watching her own children, a *Crane* analysis would probably have resulted in a finding that Stefanie's injury was incident to a nonbusiness pursuit, as an exception to the business pursuits exclusion.

Without analysis or discussion, the *Dwello* court adopted the *Stanley* approach,¹⁴¹ which holds that supervision of Stefanie was the business pursuit, and that the injury resulted from Kenyon's failure to supervise, clearly incident to the business pursuit of supervision.¹⁴²

The court did not analyze the incident itself to determine whether that specific injury was incident to a business or nonbusiness pursuit. A *Tilley* analysis considers the specific activity to determine whether the exception applies.¹⁴³ In *Dwello*, the inquiry under the *Tilley* analysis would be whether the attack by the dog was incident to a business or nonbusiness pursuit. Even courts that follow the *Tilley* approach are divided. The exception has been held to apply when a child crawled through a fence and drowned in a puddle on a tarp covering the swimming pool¹⁴⁴ and when a child was burned when she overturned a coffee percolator.¹⁴⁵ Conversely, when a car in the driveway struck a child, a court ruled that the injury by a car driven by another day-care parent was incident to a business pursuit.¹⁴⁶ Yet another court, after a child was killed when she touched an exposed wire on a vacuum cleaner, observed that vacuuming may be incident to business pursuits in some instances and nonbusiness pursuits in others.¹⁴⁷

A *Tilley* analysis is driven by the facts of the case. In order to determine whether the dog attack was incident to business or nonbusiness pursuits, it may have been useful to determine whether playing with the dog was part of Stefanie's ordinary activity, or whether it was an isolated incident. It would have been useful to determine whether the dog was simply part of the environment, as the swimming pool was in *Reed*.¹⁴⁸ It may have been useful for the court to consider whether the injury came as a result of failing to supervise or restrain the dog, rather than the child. Under a *Tilley* analysis, it seems likely that the activity would be viewed as incident to a nonbusiness pursuit, thereby applying the exception to the business pursuits exclusion.

By selecting the *Stanley* approach, without consideration of any other analyses, the court side-stepped the need to examine the nature of the activity

¹⁴⁰ See *supra* notes 65-70 and accompanying text.

¹⁴¹ *Dwello*, 990 P.2d at 192.

¹⁴² See *supra* Part III.A.

¹⁴³ See *supra* notes 82-86 and accompanying text.

¹⁴⁴ *State Farm Fire & Casualty Co. v. Reed*, 873 SW 2d 698 (Tex. 1993).

¹⁴⁵ See *supra* note 83 and accompanying text.

¹⁴⁶ *Economy Fire & Cas. Co. v. Bassett*, 525 N.E.2d 539, 542 (Ill. App. 5d 1988).

¹⁴⁷ *Aetna Life and Cas. Co. v. Ashe*, 745 P.2d 800, 801 (Or. Ct. App. 1987), *review denied*, 750 P.2d 497 (1988).

¹⁴⁸ See *supra* notes 54-55 and accompanying text.

that led to Stefanie's injuries. With the court's unquestioned acceptance of *Stanley's* proposition that an injury to a child at child care is almost definitionally a result of failure to supervise, it is difficult to imagine any instance in which the exception to the business pursuits exclusion would apply in the context of child care in Nevada.

3. The Standard of Review

Before *Dwello*, the Supreme Court of Nevada had not previously considered the business pursuits exclusion to liability coverage in homeowners policies. The court reviewed the case to determine whether the decision of the district court was erroneous and whether the decision should be reversed.¹⁴⁹

The court stated, "whether the babysitting in this situation triggers the business pursuits exception . . . is a question of fact for the trial court."¹⁵⁰ The court further stated that a decision by the lower court would only be reversed if its findings were clearly erroneous.¹⁵¹ The court found that the district court had considered the relevant facts and affirmed its judgment.

Instead, the court might have done a de novo review. The question here was not merely whether the district court had considered the relevant facts in applying the law. *Dwello* posed mixed questions of law and fact. In a de novo review, the "linchpin issue is, of course, distinguishing fact from law."¹⁵² The trial court relied on *Carroll* in its consideration of the exclusion, and on the *Stanley* premise in its passing consideration of the exception to the exclusion,¹⁵³ even though the facts of both cases are easily distinguishable from *Dwello*.¹⁵⁴

In its brief opinion, there is no evidence that the court even considered alternative fact patterns of other cases which resulted in quite different findings, varying interpretations of the law by other courts, or how varying facts and legal interpretations might have affected the outcome of this case.

CONCLUSION

Dwello provided the Supreme Court of Nevada with a set of facts that afforded the court an opportunity to articulate the law in Nevada regarding the

¹⁴⁹ *Dwello*, 990 P.2d at 191, 192.

¹⁵⁰ *Id.* at 191.

¹⁵¹ *Id.*, citing *Trident*, 105 Nev. at 426, 776 P.2d at 1241. The *Trident* court also stated, "Where the trial court, sitting without a jury, makes a determination predicated upon conflicting evidence, that determination will not be disturbed on appeal where supported by substantial evidence." *Id.* at 1242, citing *Dickstein v. Williams*, 93 Nev. 605, 608, 571 P.2d 1169, 1171 (1977).

¹⁵² STEVEN ALAN CHILDRESS, A 1995 PRIMER ON STANDARDS OF REVIEW IN FEDERAL CIVIL APPEALS, 161 F.R.D. 123, 129.

¹⁵³ *Dwello*, 990 P.2d at 192.

¹⁵⁴ See *supra* note 112 and accompanying text for the facts of *Carroll*; See *supra* Part II.B.2 for discussion of *Stanley*.

application of the business pursuits exclusion from liability coverage in homeowners insurance policies, with particular reference to home child care. With the proliferation of home child care and many other types of home-based business activities, continuing challenges to the business pursuits exclusion in liability insurance policies can be expected. *Dwello* provides little insight or guidance as to what facts may trigger the exclusion or how the court may interpret the exclusion – or its exception – in the future. Curiously, although the court acknowledged divergence in the interpretations given to the business pursuits exclusion in other jurisdictions, it neither explained nor analyzed those varying interpretations.

Dwello was poorly decided. Contrary to the general approach of courts in interpreting insurance policy provisions, the *Dwello* court construed the business pursuits exclusion very broadly, and construed the exception very narrowly.¹⁵⁵ The sparse facts provided by the court do not support a finding that the child care at issue constituted a business pursuit, based upon the two-part test (continuity and profit motive) employed by the court, particularly since none of the seven indicia of a child care business were present here.¹⁵⁶ Further, the court simply eliminated the exception to the exclusion by asserting that the injury resulted from a failure to supervise, rather than first analyzing the specific activity that led to the injury, then deciding whether the exception should be applied.¹⁵⁷

The implications of *Dwello* are significant. Under its broad interpretation, virtually any babysitting services would appear to trigger the exclusion. Even the teenager who babysits for a variety of siblings, friends, or neighbors a few times a week for pocket money would appear to meet both the continuity and profit motive prongs of the business pursuits two-part test as interpreted by the court in *Dwello*. Moreover, with the *Dwello* court's unquestioned acceptance of the narrow *Stanley* approach to the exception to the exclusion, the babysitter appears to be responsible for any injury to a child under his or her care.¹⁵⁸

To consider the exception to the business pursuits exclusion, the court should have used the *Tilley* approach, rather than opting for the simplistic appeal of *Stanley*. Even if the court's judgment that Patti Kenyon's care of Stefanie Dwello constituted a business pursuit were correct, under a *Tilley* analysis the court would have looked to the particular circumstances of the injury to de-

¹⁵⁵ See *supra* notes 15-18 and accompanying text.

¹⁵⁶ See *supra* Part III.B.1.

¹⁵⁷ See *supra* Part III.B.2.

¹⁵⁸ The exposure of the babysitter, or the parents of a teenage babysitter, could be great. The author consulted with several insurance carriers. Evidently there is no rider commonly available to provide liability coverage for babysitting or child care services by a member of a covered family. Further, a liability policy specifically for child care services is available only to licensed child care enterprises. Finally, umbrella liability coverage is intended to supplement the liability coverage of the homeowners policy and would normally apply only after the homeowners policy limits are exhausted – thus, the umbrella coverage could extend the limits but likely would be subject to the same exclusions as the underlying policy.

termine whether it was really incidental to the business pursuit of child care. The court should also have considered the reasonable expectations of the insured, and followed the general practice of interpreting insurance policy exclusions narrowly and exceptions to those exclusions broadly.¹⁵⁹

With a more thorough analysis of the business pursuits exclusion and its exception, with some consideration of the reasonable expectations of the parties, and with application of the seven-factor test,¹⁶⁰ it seems likely that the court would have construed the policy language in favor of the Kenyons. But even if the court had ultimately ruled in favor of the insurance carrier anyway, a more thorough analysis would have provided far greater insight, confidence, and predictability in viewing future child care liability issues that inevitably will arise.

¹⁵⁹ See *supra* Part I.

¹⁶⁰ See *supra* Part III.B.1.