JOHN F. BECKMAN AND FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANTS, V. FEDERATED MUTUAL INSURANCE COMPANY, ALSO KNOWN AS AND DOING BUSINESS AS FEDERATED INSURANCE, ET AL., APPELLEES.

814 N.W.2d 763

Filed March 27, 2012. No. A-11-307.

1. **Judgments: Appeal and Error.** The interpretation of a statute is a question of law, and when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Insurance: Declaratory Judgments: Attorney Fees.** Attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 2010) are available for an insured who wins a declaratory judgment action against an insurer.
3. **Insurance: Contracts: Liability.** An adjustment of liability priorities between two insurers is not an action upon the insurance policy.

Appeal from the District Court for Washington County: JOHN E. SAMSON, Judge. Affirmed.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Michael G. Mullin and Amy L. Van Horne, of Kutak Rock, L.L.P., for appellees Federated Mutual Insurance Company and Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

This is the second appearance of this matter in this court. We now address whether under the factual pattern and decision outlined in *Beckman v. Federated Mut. Ins. Co.*, 18 Neb. App. 513, 788 N.W.2d 806 (2010) (*Beckman I*), attorney fees are allowable under Neb. Rev. Stat. § 44-359 (Reissue 2010). We agree with the trial court's decision to deny the requested fees.

FACTUAL BACKGROUND

It is most efficient to simply repeat the key facts of the case as we related such in *Beckman I*. Thus, we quote from our earlier opinion:

> On July 31, 2006, John F. Beckman took his stepdaughter's vehicle to Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc.[,] . . . to have repairs performed on the vehicle. Sid Dillon provided Beckman with a substitute vehicle, a 2005 Chevrolet Malibu owned by Sid Dillon, and gave him permission to operate the vehicle. On that same day, Beckman was involved in an accident with a bicyclist, Clinton R. Sedivy, while operating the Malibu.
>
> At the time of the accident, Beckman was insured by Farmers Mutual Insurance Company of Nebraska . . . . At that time, Sid Dillon and the Malibu were insured by Federated Mutual Insurance Company . . . .

Beckman I, 18 Neb. App. at 514-15, 788 N.W.2d at 808.

In *Beckman I*, we set forth various provisions of the Farmers Mutual Insurance Company of Nebraska (Farmers Mutual) and Federated Mutual Insurance Company (Federated) insurance policies, which we need not repeat in this opinion. In *Beckman I*, we described that appeal as "an insurance coverage dispute arising out of an accident in which the driver was operating a temporary substitute vehicle provided by a car dealership." 18 Neb. App. at 514, 788 N.W.2d at 808. We further said that "[t]he question before this court is whether the Farmers Mutual insurance policy or the Federated insurance policy provided primary coverage." *Id.* at 517, 788 N.W.2d at 810. Our conclusion in *Beckman I* was that the Farmers Mutual policy and the Federated policy contained mutually repugnant language and that Nebraska law requires that in such circumstance, the insurer for the vehicle's owner, in this case Federated on behalf of Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. (Sid Dillon), had the primary coverage for the claims of the bicyclist with whom Beckman collided while driving Sid Dillon's car. Therefore, we held that Federated provided primary coverage and that the Farmers Mutual policy which provided personal insurance for the driver, Beckman, was excess coverage. Consequently, we reversed the district court's grant of summary judgment to Federated and remanded the matter with directions to enter summary judgment in favor of Beckman and Farmers Mutual consistent with our decision

that the Farmers Mutual policy was only excess to the primary coverage of Federated.

Thereafter, Beckman and Farmers Mutual filed a motion for taxation of attorney fees in the district court for Washington County, Nebraska, seeking an award for the attorney fees incurred by Farmers Mutual in defending the underlying case filed by the bicyclist against Beckman and Sid Dillon. Additionally, Beckman and Farmers Mutual sought an award of attorney fees for pursuing the case we have described as *Beckman I* and summarized herein. The district court entered its order on March 29, 2011, granting attorney fees to Farmers Mutual for the defense of the underlying personal injury lawsuit, as Federated conceded its responsibility for such fees. The district court, citing *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), found that *Beckman I* "involved an adjustment of liability priorities between two insurance companies [and] the attorney's fees incurred by [Beckman and Farmers Mutual] in regard to the primary coverage issue, are not authorized under [§] 44-359."

Beckman and Farmers Mutual have appealed the denial of their requests for fees incurred in the pursuit of the declaratory judgment action, including fees and costs in their successful appeal to this court in *Beckman I*.

ASSIGNMENT OF ERROR

The single assignment of error is simply that the trial court erred in denying attorney fees for the costs incurred in pursuing the declaratory judgment action, *Beckman I*.

STANDARD OF REVIEW

[1] The parties are in agreement on the correct standard of review for this court. The standard is that the interpretation of a statute is a question of law, and when reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

ANALYSIS

Section 44-359 provides, in part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance

> policy except workers' compensation insurance, or upon any certificate issued by a fraternal benefit society, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

This statute also provides that in the event of an appeal, the appellate court shall likewise allow reasonable attorney fees.

Beckman and Farmers Mutual argue:

> This was not a situation in which two insurance companies disputed who was primary and who was excess; rather, Federated took the position that Beckman was not an insured under the policy. This declaratory action was, therefore, "an action upon" the policy to prove that Beckman met the definition of an insured.

Brief for appellants at 7.

Beckman and Farmers Mutual argue that the fact that costs were incurred to establish Federated's liability does not allow Federated to avoid its obligation for the costs of such determination under § 44-359. On the other hand, Federated adopted the district court's position. Citing *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), Federated and Sid Dillon argue that attorney fees are not recoverable when the action involves merely an adjustment of liability priorities between insurers rather than an action upon the policy.

We turn our attention to *Dairyland Ins. Co. v. Kammerer, supra*, where the court held that attorney fees are not recoverable by one insurer from another insurer in an action to adjust the priorities of liability between the insurers. In *Beckman I*, it seems clear that the adjustment of priorities of liability between Farmers Mutual and Federated was the core issue and, in fact, we stated in our opinion that such was the nature of the case. Our decision in *Beckman I* did not relieve either insurance company of liability, but established priority by its holding that the Federated policy for the vehicle's owner provided "primary" coverage while the driver's personal policy through

Farmers Mutual was merely "excess." 18 Neb. App. at 514, 788 N.W.2d at 808.

In *Dairyland Ins. Co. v. Kammerer, supra*, the suit was instituted by Dairyland Insurance Company (Dairyland) seeking a declaration that a policy issued by Auto-Owners Insurance Company (Auto-Owners) provided primary coverage for an automobile accident on March 27, 1980. The evidence was that on March 5, Auto-Owners issued a binder to Judith C. Popish covering a 1974 MGB convertible which she owned. On March 27, Richard A. Wrich, with Popish's permission, was operating her insured MGB and was involved in an accident with another automobile, allegedly injuring Diana K. Kammerer. On April 10, Auto-Owners sent Popish a notice of cancellation, advising her that the Auto-Owners policy would be canceled effective April 22, which would have been nearly a month after the accident. The reason stated for the cancellation was that Popish had not disclosed that Wrich was a member of her household at the time of the issuance of the Auto-Owners policy. Auto-Owners returned only the portion of the premium paid by Popish attributable to the timeframe after the date of the cancellation. While the court's opinion does not articulate whom Dairyland insured, we believe it is a safe assumption that Dairyland was Wrich's personal auto insurer. The court found that on the date of the accident, Wrich operated Popish's motor vehicle with her permission, that Wrich was an insured under the Auto-Owners policy, and that the policy provided coverage for both Popish and Wrich (unless on March 27 the policy was not in effect at all). The court explained that upon learning of the alleged fraud at the time of the issuance of its policy, Auto-Owners had two choices: (1) it could cancel the policy from its inception and return the entire premium on the theory that the policy never came into existence or (2) it could waive the alleged fraud, keep the premium earned to the date of cancellation, and accept responsibility under the policy. Since Auto-Owners canceled the policy effective a month after the accident, the Auto-Owners policy was in effect at the time of the accident and provided coverage for Wrich.

[2] The secondary question in *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), dealt with the fact that

the appellants had jointly requested an award of attorney fees under the version of § 44-359 then in effect. After citing the provisions of the statute, the court said that the appellants included the beneficiaries of the policy, Popish and Wrich, and that the provisions of § 44-359 should be applied. The court held that "[a]ttorney fees under [this] statute are available for an insured who wins a declaratory judgment action against the insurer." *Id.* at 112, 327 N.W.2d at 621, citing *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979). But, the Supreme Court said that Dairyland "stands on different ground." *Id.* The court continued:

> Dairyland may be entitled to bring or join this declaratory judgment action because of the effect a judgment may have on its own liability to Wrich on a separate policy. But as between Dairyland and Auto-Owners, this suit is merely an adjustment of liability priorities and it cannot be seen as "an action upon" the policy issued by Auto-Owners to Popish. The appellants . . . Wrich and . . . Popish are therefore given 10 days from the date of the issuance of this opinion in which to make a showing to this court of whether they have incurred any expenses by way of attorney fees in connection with either the trial of this case in the District Court or its appeal in this court. . . . The appellees are given 5 days thereafter to make any countershowing. Upon the filing of such showings, the court will give further consideration to the request for attorney fees.

Dairyland Ins. Co. v. Kammerer, 213 Neb. at 112-13, 327 N.W.2d at 621.

As in *Dairyland Ins. Co. v. Kammerer, supra*, in the instant action, Beckman and Farmers Mutual brought the lawsuit tried in *Beckman I*, the resulting appeal, and then this appeal from the denial of a request for attorney fees. It is argued that Beckman was a beneficiary of the Federated policy "as an insured and Farmers Mutual was both a beneficiary and a person interested in the policy whose rights and obligations were dependent upon that policy." Brief for appellants at 8-9. It is then asserted that "the trial court was required to allow a reasonable sum as an attorney's fee to Beckman and Farmers Mutual." Brief for

appellants at 9. Federated asserts that the *Dairyland Ins. Co.* case was not an action on the policy, but, rather, involved a question of law regarding the effect of Auto-Owners' actions in attempting to void the policy. This is a misstatement in that Auto-Owners did not attempt to void the policy, but actually simply canceled it a month after the accident, and thus, the policy had been in effect and provided coverage to Popish, the owner of the involved vehicle, as well as to Wrich, the driver of Popish's vehicle.

Accordingly, following the lead of the Nebraska Supreme Court in *Dairyland Ins. Co. v. Kammerer, supra*, we find that as between Farmers Mutual and Federated, there can be no award of fees because Farmers Mutual is neither the policyholder nor an insured under the Federated policy. Admittedly, in *Beckman I*, we determined that Beckman was a beneficiary of the Federated policy because of the doctrine of mutual repugnancy, which meant that the insurance policy of the vehicle's owner, Sid Dillon, provided the primary coverage and Beckman's personal insurance was only excess. So, all that is left is the question of whether Beckman, personally, is entitled to an award of fees under the statute.

In the case before us, there is a stipulation regarding attorney fees to which an exhibit is attached and incorporated. The attached exhibit is entitled "Coverage Action Attorney Fees and Costs," which the stipulation says "reflects attorney fees, paralegal fees, and out-of-pocket expenses charged by Gross & Welch to Farmers Mutual." The stipulation further provides that such fees and costs were paid by Farmers Mutual to pursue and finalize the coverage action. Therefore, given the stipulation, the billing to Farmers Mutual, and the stipulation that Farmers Mutual has paid such fees, we need not take the step taken by the Nebraska Supreme Court in *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982), to give Beckman an opportunity to make a showing that he personally paid attorney fees in order to establish that he was a beneficiary under the Federated policy who is entitled to recover costs and fees under § 44-359. But, under *Dairyland Ins. Co. v. Kammerer, supra*, Farmers Mutual is not entitled to recover the

fees and costs it paid to adjust the liability coverage priorities between Farmers Mutual and Federated.

CONCLUSION

[3] Accordingly, as the district court found, the declaratory judgment action, *Beckman I*, was an adjustment of liability priorities between two insurers, Farmers Mutual and Federated, the former being found to have primary coverage and the latter only excess coverage. The express holding of *Dairyland Ins. Co. v. Kammerer, supra*, was that the dispute between Dairyland and Auto-Owners was "merely an adjustment of liability priorities and cannot be seen as 'an action upon' the policy issued by Auto-Owners to Popish." *Id.* at 113, 327 N.W.2d at 621. The same is true here as between Farmers Mutual and Federated. For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK A. HENSHAW, APPELLANT.

812 N.W.2d 913

Filed March 27, 2012. No. A-11-567.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2010) to determine the last day the defendant can be tried.
3. ____. Under Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2010), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to his or her absolute discharge.
4. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2010) exclude all time between the filing of a defendant's pretrial motions and their disposition, regardless of the promptness or reasonableness of the delay. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. Final disposition under § 29-1207(4)(a) occurs on the date the motion is granted or denied.