IN THE COURT OF APPEALS OF IOWA

No. 0-821 / 10-0907
Filed December 22, 2010

SHANE TAYLOR,
Plaintiff-Appellant/Cross-Appellee,

vs.

PEKIN INSURANCE COMPANY,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

In an action seeking the recovery of uninsured motorist benefits, Shane Taylor appeals an order granting summary judgment in favor of Pekin Insurance Company. **AFFIRMED.**

Thomas W. Lipps of Peterson & Lipps, Algona, for appellant.

Kermit B. Anderson of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

MANSFIELD, P.J.

I. Introduction.

This case tests the proposition of whether an individual who receives a demonstration vehicle from his employer on the express written condition that he will be the only driver, and who then allows a friend to drive him in that vehicle, is "using that vehicle without a reasonable belief that the person is entitled to do so." Because we agree with the district court that the quoted language applies in this case, and that it bars the plaintiff from any insurance recovery, we affirm the court's grant of summary judgment to the insurer.

II. Facts and Procedural Background.

The facts of this case may be simply stated. Plaintiff Shane Taylor worked at Clear Lake Ford, L.L.C., a car dealership, as its business manager. Clear Lake had assigned a 2005 Chevy Trailblazer to Taylor as a "demonstration" vehicle. Under Clear Lake's written policies, which Taylor admitted he had received and signed, the vehicle was not to be driven by anyone other than Taylor.

On the evening of November 25-26, 2005, Taylor and a co-employee, Ryan Didio, met at Taylor's apartment. With Taylor driving the 2005 Blazer, and Didio riding as passenger, they proceeded to several bars where they consumed alcoholic beverages to the point of intoxication. At some point, Taylor announced he could no longer drive because he was too intoxicated to do so. He then permitted Didio to drive his demonstrator vehicle. As they were returning to Taylor's apartment, Didio drove the vehicle off the road and into a retaining wall,

resulting in injuries to Taylor. Didio was charged with and pled guilty to operating a vehicle while intoxicated.

Taylor sued Didio, Clear Lake, and Clear Lake's insurer, Pekin Insurance Company. Didio had no insurance. Clear Lake was granted summary judgment on the ground that the 2005 Blazer, at the time of the accident, was not being operated with the consent of the owner. *See* Iowa Code § 321.493 (2007) (imposing liability on the owner of a motor vehicle "driven with the consent of the owner"). This left the question of Pekin's potential liability.

Pekin's insurance policy contained typical uninsured motorist coverage provisions, as follows:

> A. COVERAGE
>
> 1. We will pay all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "uninsured motor vehicle." . . .
>
> . . . .
>
> B. WHO IS AN INSURED.
>
> 1. You.
>
> . . . .
>
> 3. Anyone else "occupying" a covered "auto" . . . .
>
> . . . .
>
> C. EXCLUSIONS
>
> This insurance does not apply to any of the following:
>
> . . . .
>
> 3. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.
>
> . . . .
>
> F. ADDITIONAL DEFINITIONS
>
> The following are added to the DEFINITIONS Section:
>
> . . . .
>
> 3. "Uninsured motor vehicle" means a land motor vehicle or trailer:
>
> . . . .
>
> c. For which an insuring or bonding company denies coverage . . . .

Taylor argued that he was an "insured" because he was occupying the 2005 Blazer (*see* B.3 above), but that the Blazer was also an "uninsured motor vehicle" because Pekin had denied coverage for the vehicle as to the accident in question (*see* F.3.c above). In short, Taylor urged that the same vehicle could be both insured and uninsured for the purposes of the same policy.

Pekin responded that "uninsured motor vehicle" under an insurance policy cannot refer to a vehicle for which the same insurance policy provides coverage. It also maintained that, in any event, Taylor's uninsured motorist claim was barred by the exclusion in C.3, since on the night in question he had been "using" the car without a reasonable belief he was entitled to do so when he entered the car as a passenger and allowed Didio to drive.

The district court overruled Pekin's first contention, but ultimately granted summary judgment to Pekin on the ground that Taylor was "using a vehicle without a reasonable belief that [he was] entitled to do so." Taylor now appeals.

III. Standard of Review.

We review a ruling on a motion for summary judgment for the correction of errors at law. *Nationwide Agri-Business Ins. Co. v. Goodwin*, 782 N.W.2d 465, 469 (Iowa 2010). In doing so, we view the record in the light most favorable to the party against whom the summary judgment was granted. *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 594 (Iowa 1996). "'To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law.'" *Goodwin*, 782 N.W.2d at 469 (quoting *Interstate Power Co. v. Ins. Co. of N. Am.*, 603 N.W.2d 751, 756 (Iowa 1999)).

IV. Analysis.

A. Can the same vehicle be both "insured" and "uninsured" under the same policy?

Typically, uninsured motorist coverage comes into play when *another* vehicle is involved in an accident with the insured's vehicle. Citing several cases from other jurisdictions, Pekin argues that when a single-vehicle accident occurs, a passenger in that vehicle cannot use the vehicle's uninsured motorist coverage as a way of getting around the limits on liability coverage within the same policy. Otherwise stated, the same vehicle cannot be a "covered 'auto'" and an "uninsured motor vehicle"—or both insured and uninsured—at the same time.

A number of out-of-state cases adumbrate this principle. *See, e.g., Jacobs v. Gulf Ins. Co*., 156 S.W.3d 737, 740 (Ark. Ct. App. 2004) ("[A]n insured motor vehicle is not transformed into an uninsured motor vehicle simply because certain policy exclusions bar a claimant's recovery."); *Seymour v. Lakewood Hills Ass'n*, 927 S.W.2d 405, 408 (Mo. Ct. App. 1996) (rejecting an uninsured motorist claim and holding, "An uninsured motor vehicle is one that is not insured. . . . [T]he garbage truck was at all times insured by a liability policy. Accordingly, the truck was an insured vehicle."); *see generally* 9 Steven Plitt et al., *Couch on Insurance* § 123:30, at 123-86 to -87 (3d ed. 2005) ("[I]nsured[s] involved in a one-car accident generally do not merit [uninsured motorist] coverage.") (citing cases) (hereafter *Couch*).

However, in Iowa, we believe the supreme court has rejected this point of view. In *Rodman v. State Farm Mutual Automobile Insurance Co*., 208 N.W.2d 903 (Iowa 1973), an individual who had been injured while riding as a passenger

in his own automobile due to his driver's negligence sought recovery under the uninsured motorist provisions of his policy. *Rodman*, 208 N.W.2d at 904. The supreme court held that a policy purporting to deny coverage in that situation violated Iowa Code section 516A.1, which requires motor vehicle insurers in Iowa to offer uninsured motorist coverage and does not exclude the vehicle covered by the policy from the statutory definition of "uninsured motor vehicle." *Id*. at 909-10 (noting that "[t]here is no reason to believe the legislature intended to deny the purchaser of uninsured motorist coverage the protection he purchased just because the liability coverage is abstractly applicable to someone else"); *see also Jones v. State Farm Mut. Auto. Ins. Co.*, 760 N.W.2d 186, 187 (Iowa 2008) (assuming that a child passenger in an insured car driven by her mother could recover as an "uninsured motorist" where a policy exclusion barred her from recovering under the basic liability coverage); *Classic Ins. Co. v. Reiger*, 497 S.E.2d 20, 20-21 (Ga. Ct. App. 1998) (applying Iowa law) (in a one-car accident case, holding that an individual who was a passenger in her own vehicle could recover on her uninsured motorist coverage based on the permissive driver's negligence). Thus, we do not find Taylor's claim barred by the "abstract" proposition that a vehicle cannot be both "insured and uninsured" at the same time.

B. Was Taylor using the vehicle without a reasonable belief he was entitled to do so?

We turn now to Pekin's second contention, which was the basis for the district court's grant of summary judgment. Pekin argued, and the district court found, that uninsured motorist coverage was unavailable due to the policy

exclusion in C.3 because Taylor was "using a vehicle without a reasonable belief that [he was] entitled to do so." As the district court put it, "Taylor had been expressly notified that he could not permit others to drive the vehicle."

Taylor believes this ruling was incorrect, because his own "use" of the vehicle (i.e., as a passenger) was not improper or, at most, there was a combination of proper and improper uses. We disagree. Riding in a vehicle as a passenger can constitute "using" it for purposes of this exclusion. *Lee v. Grinnell Mut. Reins. Co.*, 646 N.W.2d 403, 409 (Iowa 2002) (holding that an injured passenger was "using" a motor vehicle); *see also American Family Mut. Ins. Co. v. Peterson*, 679 N.W.2d 571, 582-83 (Iowa 2004) (finding a passenger who jumped out of a moving vehicle due to an assault to be "using" that vehicle); *Hawkeye-Sec. Ins. Co. v. Bunch*, ___ F. Supp. 2d ___, 2010 WL 3721491 (E.D. Mo. 2010) ("[B]ecause Mr. Bunch was a passenger in the Jeep Liberty at the time of the accident, he was 'using' the vehicle, and the permissive use exclusion would apply if Mr. Bunch did not have a reasonable belief that he was entitled to use the Jeep Liberty."); *Aetna Life & Cas. v. Bulaong*, 588 A.2d 138, 144-45 (Conn. 1991) (listing supporting authority); *Phillips v. S.W. Mech. Contractors, Inc.*, 561 S.E.2d 471, 475 (Ga. Ct. App. 2002); *Whitcomb v. Peerless Ins. Co.*, 679 A.2d 575, 577 (N.H. 1996). The term "use" is clearly broader than a term such as "operating." *Lee*, 646 N.W.2d at 409; 8 *Couch* § 111:31, at 111-56 - 57 (3d ed. 2005). Having found Taylor was "using" the vehicle in question, we now have to determine whether he was doing so without a reasonable belief he was entitled to do so. We find he was.

Taylor could only have been "using" the vehicle properly if he was *driving* it. The policies that he expressly agreed to so stated. He had no right to ride as a passenger in the demonstrator vehicle that had been loaned to him with someone else as the driver, especially someone who, like himself, had been on a drinking binge. *See* Clear Lake's Driving Policy ("Drivers may not use drugs or alcohol, or be under the influence of drugs or alcohol, while operating a vehicle owned by or used by the companies.").

The supreme court's decision in *Goodwin* is on point. There, Goodwin, after renting a car from Alamo Rent-A-Car, allowed his uncle to drive it in violation of the rental agreement. *Goodwin*, 782 N.W.2d at 471. The uncle struck two pedestrians with the vehicle, killing one of them. *Id.* Nationwide, Goodwin's carrier, sought a declaratory judgment that it had no duty to defend or indemnify Goodwin against the claims brought on behalf of the pedestrians. *Id.* The supreme court upheld Nationwide's position. *Id.* It found as a matter of law that Goodwin had used the vehicle without a reasonable belief he was entitled to do so. *Id.* In particular, the court reasoned that "whether an insured had a reasonable belief he was entitled to use a borrowed or rented vehicle in a particular way depends upon the scope of the permission given by the owner of the vehicle." *Id.* In that case, the rental agreement made it clear Goodwin "did not have Alamo's permission to loan [sic] the vehicle to an unauthorized driver," so his "use" of the vehicle exceeded what he would have reasonably believed he was entitled to do. *Id*. at 472-73.

Taylor's "use" of the car differs from Goodwin's "use" only slightly: Taylor did not just *lend* the vehicle to Didio contrary to his express written agreements; he got in the car and *rode* with Didio himself.

C. Does Iowa Code section 516A.1 prevent Pekin from enforcing this exclusion?

Taylor's final argument is that Iowa Code section 516A.1 mandates coverage here and the uninsured motorist provisions of the Pekin policy are invalid to the extent they state otherwise. This argument was not raised below and therefore may not be raised on appeal.[1] *Jackson v. Farm Bureau Mut. Ins. Co.*, 528 N.W.2d 516, 517 (Iowa 1995). Regardless, Taylor's contention is without merit.

Section 516A.1 does require every motor vehicle insurance policy in Iowa to provide coverage "for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle . . . ." But we do not read this statute as mandating exclusion-free coverage. Because section 516A.1 only requires protection of "persons insured under such policy," a person who would not have been "insured" under the liability portions of the policy may also be excluded from the UM/UIM coverage. *See Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 687 (Iowa 2008) (citing *Lopez v. Dairyland Ins. Co.*, 890 P.2d 192, 195 (Colo. Ct.

[1] Taylor claims he preserved error because his briefing in the district court quoted from and referred to section 516A.1. The problem is that Taylor did not argue below that section 516A.1 rendered the C.3 exclusion invalid—the argument he is now making on appeal. Moreover, the district court did not address section 516A.1 in its ruling, and Taylor did not file a motion to enlarge or amend under Iowa Rule of Civil Procedure 1.904(2). *See Meier v. Senecaut*, 641 N.W.2d 532, 540-41 (Iowa 2002).

App. 1994) for the proposition: "[P]ublic policy of UM statute not violated by exclusion of UM coverage for passenger of vehicle driven by excluded driver.").

For example, in *Thomas*, the insured purchased an automobile liability insurance policy from Progressive and specifically listed her husband as a driver excluded from coverage for any claims arising from his operation of the insured vehicle. *Thomas*, 749 N.W.2d at 687. The husband was then injured in an accident while driving the insured vehicle, and eventually sought underinsured motorist (UIM) coverage. *Id.* In finding that coverage should be denied, the supreme court determined that the named driver exclusion was unambiguous and excluded coverage for the husband. *Id*. at 682-86. The Thomases then argued that even if the policy excluded UIM coverage for the husband, the contract should not be enforced because it violated the public policy underlying section 516A.1. *Id.* In rejecting this claim, the court held the public policy of chapter 516A was not thwarted by the enforcement of the named driver exclusion because section 516A.1 only requires UIM coverage "for persons 'who are protected by the liability coverage.'" *Id*. (quoting *Hornick v. Owners Ins. Co.*, 511 N.W.2d 370, 373 (Iowa 1993)). The court further noted that exclusions can actually complement public policy because they "deter 'insured drivers from entrusting their vehicle to unsafe excluded drivers which [keeps] those unfit drivers off the road.'" *Thomas*, 749 N.W.2d at 687 (quoting *St. Paul Fire & Marine Ins. Co. v. Smith*, 787 N.E.2d 852, 858 (Ill. 2003)).

The same reasoning applies in this case. At the time of the accident, neither Taylor nor Didio were "insureds" for liability coverage purposes because they were not using the vehicle with Clear Lake's permission. *See* Section II,

Liability Coverage, 1.a(2) (definition of "insured"). In this respect, they are just like Mr. Thomas. As *Thomas* holds, nothing in section 516A.1 prevents an insurer from enforcing a UM or UIM exclusion against an individual where the individual would not have been entitled to liability coverage due to a comparable exclusion in the liability provisions.

If Didio had been involved in a *two-car* accident, and injured *another* driver, Pekin would have been able to deny liability coverage on the ground neither Didio nor Thomas had been using the vehicle with Clear Lake's permission. The General Assembly has not mandated that an insurer provide coverage for a claim brought by an individual who let his intoxicated friend drive him home in violation of the express contractual terms of use for the vehicle.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of Pekin.

AFFIRMED.