**IN THE COURT OF APPEALS OF IOWA**

No. 6-290 / 04-1093
Filed June 28, 2006

**HULDA SHURTLEFF, Personal Representative of the Estate of ROBERT SHURTLEFF, Deceased, and Assignee of the Estate of CLAIRE G. JUNE, Deceased,**
Plaintiff-Appellant/Cross-Appellee,

**vs.**

**GREAT AMERICAN INSURANCE COMPANY, a Foreign Corporation, and MICHIGAN MUTUAL INSURANCE COMPANY, a Michigan Corporation,**
Defendants-Appellees/Cross-Appellants.

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Appeal from the Iowa District Court for Polk County, Joel D. Novak (motions for summary judgment) and D. J. Stovall (motions to dismiss), Judges.

Plaintiff appeals from the district court's grant of defendants' motion for summary judgment and denial of plaintiff's motion for summary judgment. Defendants cross-appeal from the district court's denial of defendants' motions to dismiss. **AFFIRMED.**

Roxanne Barton Conlin of Roxanne Conlin & Associates, Des Moines, and Richard M. Goodman and Kathleen J. Kalahar of Goodman, Lister & Peters, P.C., Detroit, Michigan, for appellant.

Leonard B. Schwartz of Sommers, Schwartz, Silver & Schwartz, P.C., Southfield, Michigan, for appellee/cross-appellant Great American Insurance Company.

Kent A. Gummert and Frank A. Comito of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellees/cross-appellants Great American Insurance Company and Ohio Casualty Insurance Company.

John R. Monnich of John R. Monnich, P.C., Royal Oak, Minnesota, for appellee/cross-appellant Ohio Casualty Insurance Company.

Brian A. Stowe of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellee Michigan Mutual Insurance Company.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

**SACKETT, C.J.**

Plaintiff appeals from the district court's order in June of 2004, granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment. The appeal was transferred to our court in April of 2006. Defendants cross-appeal from the district court's denial of their motions to dismiss and from part of the ruling granting their motion for summary judgment. We affirm.

## I. BACKGROUND AND PROCEEDINGS.

Plaintiff's decedent, a Michigan resident, was killed in Michigan in a 1985 motor vehicle accident with a truck owned by Claire June, a Michigan resident. A wrongful death suit in Michigan against Claire June, his company June's Trucking, the truck driver Richard June, and the National Farmers Organization[1] ("NFO") resulted in judgment against Claire June and a jury verdict in favor of the NFO on the claims of negligence and that it was the employer of June or his company. Based on the judgment against Claire June, plaintiff issued a writ of garnishment, which was served on various insurance carriers. Plaintiff claimed Claire June was covered under insurance policies issued to the NFO by defendants.[2] At the garnishment trial in 1999, the jury found for defendant Great American Insurance Company ("Great American") on the claims of coverage of Claire June as user of a vehicle "hired" by or "owned" by the NFO. By stipulation of the parties, in October of 2000 the court dismissed without prejudice the claims that Claire June was covered as a stockholder and that the organization was estopped from denying coverage. In

[1] Claire June is a member of the National Farmers Organization. His trucking company hauls bulk milk for the organization. It was his milk truck that was involved in the accident.
[2] Great American Insurance Company and Ohio Casualty Insurance Company are Ohio corporations that conduct business in Iowa and Michigan. Great American issued a catastrophe liability policy to the National Farmers Organization.

September of 2000 the parties executed a "tolling agreement" that tolled the statute of limitations for one year from the court's order, "but only to the extent that the statute of limitations has not already expired."

In April of 2001 plaintiff filed suit in Iowa against defendants, claiming that Claire June was covered by Great American's policy issued to the NFO (1) as a stockholder, and (2) as owner of the truck being used "in the business of" the organization at the time of the accident. Great American unsuccessfully moved to dismiss based on *forum non conveniens* grounds. After discovery, Great American moved for summary judgment in July of 2003. Plaintiff filed a cross-motion for summary judgment in February of 2004. In June of 2004, the district court granted defendants' motion for summary judgment and denied plaintiff's cross motion. This appeal and cross-appeal ensued.

**II. SCOPE AND STANDARDS OF REVIEW.**

Review of summary judgment rulings is for correction of errors at law. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005); *see* Iowa R. App. P. 6.4. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981. It "is properly granted if the only controversy concerns the legal consequences flowing from undisputed facts." *Krause v. Krause*, 589 N.W.2d 721, 724 (Iowa 1999). We must determine whether, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law. *Galbraith v. Allied Mut. Ins. Co.*, 698 N.W.2d 325, 327 (Iowa 2005). When the facts are not in dispute, "[o]ur role is simply to decide whether we agree with the district court's application of the law to the undisputed facts before us." *Kennedy v. Zimmermann*, 601 N.W.2d 61, 64 (Iowa

1999) (quoting *Goodell v. Humboldt County*, 575 N.W.2d 486, 491 (Iowa 1998)). Fact findings by the district court are binding on appeal if supported by substantial evidence. Iowa R. App. P. 6.14(6)(*a*).

**III. Discussion.**

*Appeal.* The "only issue" in plaintiff's appeal is whether Claire June is an "insured" under the Great American catastrophe liability policy issued to the NFO, so that the policy provides coverage for liability imposed on him as a result of the motor vehicle accident in which plaintiff's decedent was killed. In its ruling on the motions for summary judgment, the district court analyzed the policy language at length, concluding Claire June was not an insured for purposes of coverage for the accident. The pertinent policy provisions of section III "Definition of Named Insured and Insured" are as follows:

> The unqualified word "Insured" includes the named insured and also:
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> (a) any officer, director, employee or stockholder of the named insured while acting within the scope of the person's duties as such;
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> . . . .
>
> (d) with respect to automobiles, any person while using any automobile owned by or hired for use by or on behalf of the named insured, including any person or organization legally responsible for such use, provided the use is within the scope of permission granted by the named insured and any officer, director, stockholder or partner of the named insured while using an automobile not owned by the named insured while such automobile is being used in the business of the named insured;
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> (e) except as respects the named insured, none of the following shall be an insured under paragraph (d)
>
> . . . .
>
> (2) the owner or lessor of a hired or non-owned automobile, or any agent or employee of such owner or lessor. This subdivision (2) shall not apply if it restricts the insurance under sub-division (i) below.
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> . . . .

> (i) any additional insured(s) included in the underlying insurance listed in Schedule A, but only to the extent that such insurance is provided for such additional insured(s) thereunder.

The NFO is the "named insured" under the policy. The policy definition of "automobile" includes "semi-trailer," such as the type of vehicle owned by Claire June. The "underlying insurance" listed in schedule A is a policy issued by Hartford Insurance Company ("Hartford") to the NFO. Hartford was one of the insurance companies served with the writ of garnishment. It settled with plaintiff for the limits of its coverage before trial on the garnishment.

Paragraph III(d) expands coverage beyond the named insured to include as "insured" certain classes of persons "with respect to automobiles." Paragraph III(e) restricts the scope and application of III(d). The applicability of subdivision III(e)(2) is qualified by paragraph III(i).

The district court found Claire June was not an insured in the underlying Hartford policy because he was not included explicitly as an "automatic insured" nor added via an endorsement as an "additional insured," either specifically or as part of a class. The court concluded, therefore, the reference to paragraph III(i) in subdivision III(e)(2) does not preclude the potential application of subdivision III(e)(2) to restrict paragraph III(d).

In analyzing subsection III(e)(2) the district court determined that "the owner of a non-owned automobile" "is enigmatic in effect because it expresses no clear and specific meaning" and it "lends itself to a certain degree of confusion." The policy excludes from coverage as an insured "the owner or lessor of a hired or non-owned automobile." We believe the problem with the district court's conclusion stems from the misquoting of the language to read "owner of a non-owned

automobile." While we agree with the district court that "owner of a non-owned automobile" is not clear, the policy language "owner or lessor of a hired or non-owned automobile" is not ambiguous or unclear as used in the policy.

The language excludes from coverage as an "insured" under paragraph III(d) the "owner or lessor of a hired or non-owned automobile." In context, "hired or non-owned" can only refer to an automobile the NFO hired or does not own. The truck involved in the accident was owned by Claire June or June Trucking, not the NFO. At the time of the accident, it was being used to haul milk from the producers to a dairy. The hauling was done under contract ("hired") with the NFO. Therefore, whether we view the truck as "not owned" by the NFO or as "hired" by the organization, it falls within the exception from coverage in paragraph III(e)(2). We agree with the district court that June is not covered by the Great American policy at issue, but for a different reason than the district court.

Having concluded June is excluded from being an insured by the language of subsection III(e)(2), we do not address the parties' arguments concerning coverage under paragraph III(d) as a "stockholder" or as a person "using" an automobile. We also affirm the district court's determination paragraph III(i) does not preclude the application of subsection III(e)(2) because June is not an insured in the underlying insurance policy issued by Hartford.

*Cross-appeal.* Defendants' contention the district court erred in finding June did not come within the exception language of subsection III(e)(2) is addressed in the previous section of this opinion. Defendants raise two issues on cross appeal, relating to the district court's denial of a motion to dismiss this action as barred by the statute of limitations and its denial of a motion to dismiss based on *forum non*

*conveniens* grounds. Having affirmed the district court's grant of summary judgment in favor of defendants, we need not address their claims raised on cross-appeal.

**AFFIRMED.**