IN THE COURT OF APPEALS OF IOWA

No. 2-229 / 11-1027
Filed July 25, 2012

PAUL CRAIG JEFFRIES and GERALD JEFFRIES as Administrators/Executors of the Estate of Fanchon B. Jeffries,
Plaintiffs-Appellants,

vs.

JACK AHROLD AGENCY, INC., JACK AHROLD AGENCY, INC. d/b/a AHROLD-FAY & CO., JOHN W. AHROLD, JOHN W. AHROLD d/b/a AHROLD-FAY & CO., JOHN R. FAY; JOHN R. FAY d/b/a AHROLD-FAY & CO.,
Defendants-Appellants,

and

HERITAGE MUTUAL INSURANCE COMPANY n/k/a ACUITY MUTUAL INSURANCE COMPANY; ACUITY MUTUAL INSURANCE COMPANY; HERITAGE INSURANCE and HERITAGE INSURANCE COMPANIES,
Defendants-Appellees.

Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

The plaintiffs and defendant Ahrold-Fay appeal the district court's grant of summary judgment in favor of defendant Heritage Mutual Insurance Company.

AFFIRMED.

David J. Dutton and Erin Patrick Lyons of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, and Jerry Wieslander and Frank G. Wieslander, Altoona, for Jeffries appellants.

Randall H. Stefani and Jason M. Craig of Ahlers & Cooney, P.C., Des Moines, for Jack Ahrold Agency appellants.

Kimberly S. Bartosh of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

BOWER, J.

The district court granted summary judgment in favor of defendant Heritage Mutual Insurance Company after finding the commercial insurance policy Heritage issued to Reed Construction did not provide coverage for a fatal accident caused by Orval Kopp, an employee of Larry Reinier, where Reed Construction hired Reinier to deliver a truckload of asphalt. The question before us is whether coverage exists under the Heritage policy where the policy requires that Kopp was using, with Reed Construction's "permission," a vehicle Reed Construction "owned, hired, or borrowed."

Upon our review, we find the vehicle at issue in this case was not owned, hired, or borrowed by Reed Construction; rather, Reed Construction hired Reinier to provide the service of delivering asphalt and Reinier retained the right to control the vehicle. In addition, Reed Construction did not give Kopp, Reinier's employee, permission to use Reinier's vehicle. We further find no error in the district court's denial of the motion to compel the parties' settlement agreement. Accordingly, we affirm.

I. Background Facts and Proceedings.

In August 1998, Reed Construction was a subcontractor on a road-construction project being performed in Centerville by Jasper Construction Services. Reed Construction was hired to perform the asphalt work. On August 25, 1998, Reed Construction needed to haul more asphalt than it had trucks and drivers for. Owner Robert Reed contacted Larry Reinier, who operated a business delivering product from Norris Asphalt, and asked if his dump truck

could deliver the asphalt. Reinier agreed and sent his employee, Orval Kopp, to deliver the asphalt.

Kopp delivered the asphalt and was returning to Norris Asphalt when the truck collided with a vehicle being operated by Boyd Wright. Wright was killed. His passenger, Fanchon Jeffries, suffered severe injuries from the accident and later died as a result of those injuries. Before her death, Ms. Jeffries' conservator initiated a lawsuit against Kopp, Reinier, and others. On December 1, 2005, Kopp and Reinier confessed judgment in the amount of $2,450,000, plus 6.2% interest and costs, and agreed to assign any right they had to recover against the contractors, their insurers, and their insurance agents. In exchange, the conservatorship agreed it would not execute judgment upon Kopp and Reinier, but would only seek to satisfy the judgment by taking action against the contractors, insurers, and insurance agents.

On October 18, 2007, the plaintiffs filed this action against Heritage Mutual Insurance Company (which issued Reed Construction's insurance policy) and the agency issuing the policy, among others. The plaintiffs alleged Heritage's business-auto policy provided coverage for Kopp. Heritage filed a motion for summary judgment alleging Kopp was excluded from coverage under the policy. In its December 30, 2008 ruling, the district court held Kopp was an insured under Heritage's policy, but that a question of fact remained regarding the contractual liability exclusion in the policy. In an amended ruling, the court held the contractual liability exclusion did not bar coverage as a matter of law and Kopp was covered under the commercial insurance policy. The court reaffirmed

its ruling following a motion to reconsider. The court subsequently severed the claims against Heritage from the plaintiffs' claims against other defendants.

An April 2010 trial was scheduled to determine the sole issue of the reasonableness of the settlement of the original lawsuit. Prior to the start of trial, the parties informed the district court they had resolved the issues to be tried through stipulation. When the stipulation was not filed for the court's approval by January 19, 2011, as agreed, the court ordered the parties to file the stipulation by February 25, 2011. The court stated that if the parties failed to do so, it would reconsider Heritage's motion for summary judgment.

The plaintiffs filed a stipulated judgment in the amount of $1.5 million with 6.2% interest from the date the 1998 petition was filed. Heritage filed a motion to strike the judgment entry, arguing multiple issues needed to be resolved before the stipulation could be entered. Heritage also filed a motion to reconsider the issue of whether Kopp was covered under its commercial policy. The court denied the motion to compel the stipulated judgment and granted the motion to reconsider. The court reversed its prior ruling and entered summary judgment in favor of Heritage, concluding Reinier's truck was not a borrowed or hired auto and, therefore, was not covered under the Heritage policy. The court subsequently denied motions to reconsider, enlarge, and a motion to compel the settlement agreement.

The plaintiffs and defendant Ahrold-Fay sought and were granted interlocutory appeal.

II. Scope and Standard of Review.

We review a district court's ruling on summary judgment for correction of errors at law. Iowa R. App. P. 6.907. We may uphold the ruling on any ground raised before the district court, even if that ground was not a basis for the court's decision. *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 636 (Iowa 1998). Upon a motion for summary judgment, the court must: "(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record." *McCormick v. Nikkel & Assocs., Inc.*, ___ N.W.2d ___, ___, 2012 WL 190013, at *3 (Iowa 2012). Summary judgment is appropriate if "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011).

III. Insurance Coverage.

Summary judgment is appropriate in this case. The underlying facts are undisputed, as are the terms of the written insurance contract. The only dispute is over the legal significance of those terms; namely, whether Kopp was covered under the Heritage insurance policy issued to Reed.

The Heritage policy includes the following pertinent language:

> 1. Who is an insured
> **The following are insureds:**
> a. You for any covered auto;
> b. Anyone else while using with your permission a covered auto you own, hire or borrow except:
> 1. The owner or anyone else from whom you hire or borrow a covered auto.

The policy allows coverage for any vehicle Reed owned, hired, or borrowed. It is clear the truck involved in the accident was not owned by Reed. We next turn to whether the truck was borrowed by Reed.

A. Borrowed Auto. The term "borrow" is not defined in the Heritage policy. Our supreme court has followed the ordinary meaning for "borrow" when the term was not defined by the insurance policy, and observed: "[A] vehicle is borrowed when someone other than the owner temporarily gains its use." *Andresen v. Emp'rs Mut. Cas. Co.*, 461 N.W.2d 181, 185 (Iowa 1990).

In *Andresen*, our supreme court analyzed a similar commercial insurance policy to the policy at issue here.[1] The plaintiff, Andresen, was an employee of First Bank of Davenport. *Id*. at 182. First Bank normally furnished a vehicle for Andresen to drive for his employment duties. *Id*. On February 10, 1988, however, First Bank did not have any vehicles available, so it directed Andresen to use his own vehicle. *Id*. While performing bank duties with his own vehicle, Andresen was seriously injured in a collision with another vehicle. *Id*. at 183. Andresen subsequently sought to recover from Employers Mutual Casualty Company under the underinsured motorist coverage of the commercial auto policy issued to First Bank. *Id*.

The issue for the *Andresen* court rested on control. As the court acknowledged, "Employers focuses on the fact that the auto never left Andresen's possession. Andresen counters by pointing out that he was acting in his capacity as a bank employee when the accident occurred." *Id.* at 184.

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[1] The Heritage policy, however, sets forth an additional term ("permission") the *Andresen* policy did not include which we will address later in this ruling.

Ultimately, the court determined Andresen drove the vehicle as a bank employee pursuant to his employment duties for First Bank; therefore, First Bank had control of the vehicle. *See id*. at 183. As the court explained, "First Bank temporarily gained the use of Andresen's vehicle as a substitute for its own vehicles, regardless of the fact that Andresen himself—as a bank employee—drove the car on the bank's business." *Id*. Accordingly, the court concluded Andresen's vehicle was borrowed by First Bank and was a covered auto under the Employers policy. *Id*. at 185.

We find *Andresen* offers guidance on the question of the circumstances that give rise to "borrowed" auto status under a policy similar to that at issue in this case. The facts here, however, are distinguishable from the facts of *Andresen*. Most importantly, unlike First Bank, Reed did not retain any control over Reinier's truck, nor did Reed have a right to control Reinier's truck. Instead, Reed hired Reinier to perform a specific task; Reinier performed the task with his own truck and his own employee under his control. The district court concluded: "[T]he facts of this case don't fit the 'borrowed' definition relied upon by the Court [in *Andresen*]. Reed did not gain the temporary use of Reinier's truck. He contracted with Reinier to provide a delivery by whatever method [Reinier] chose."

We agree with the district court that the truck was not borrowed by Reed. Finding no error on that issue, we next turn to whether the truck was hired by Reed.

B. Hired Auto. The term "hire" is not defined in the Heritage policy. "Hired auto" provisions appear in many commercial insurance policies. Some policies define the term "hired auto" expressly, usually as vehicle "used under contract in behalf of" the named insurer. *Holmes v. Brethren Mut. Ins. Co.*, 868 A.2d 155, 157 (D.C. 2005); *see State Farm Mut. Auto. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 359 N.W.2d 673, 677 (Minn. Ct. App. 1984) ("A hired automobile is defined under Western's policy as "an automobile not owned by the named insured which is under contract on behalf of or, loaned to the named insured."); *see generally* David B. Harrison, Annotation, *When is Automobile "Used Under Contract in Behalf of, or Loaned to," Insured, Within Meaning of "Hired Automobile" Provision of Automobile Insurance Policy*, 5 A.L.R.4th 636 § 2 (1981). Where the term is not defined, as here, we are to give the term its ordinary meaning. *See Andresen*, 461 N.W.2d at 184 (giving the term "borrow" its ordinary meaning when not defined in the insurance policy). Accordingly, we find a vehicle is "hired" when someone other than the owner engages "the temporary use of [the vehicle] for a fixed sum." *Webster's Third New International Dictionary of the English Language* 1072 (unabridged 1993); *Black's Law Dictionary* 735 (7th ed. 1999). Commercial insurance policies which leave the term "hire" undefined, such as here, are recognized to connote a more narrow and restrictive interpretation than do those policies that define the term. *See Holmes*, 868 A.2d at 158-59.

Similar to the term "borrowed," the question as to whether a vehicle is "hired" focuses on the issue of control, or right to control, the vehicle. As the

district court noted, "To provide coverage for a hired vehicle, the insured must have control over the vehicle." Indeed, a leading commentator on this issue has observed, "The key inquiry regarding whether an automobile will fall within the hired automobiles provision of the policy is whether the insured exercised dominion, control or the right to direct the use of the vehicle." Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 118.46, at 118-74 (3d ed. 1997).

Specifically, in determining whether a particular vehicle qualifies as a "hired" vehicle, courts commonly consider whether the named insured was in physical control of the vehicle, or at least had a right of control over it, or whether the person rendering the service and the person employing him had entered into a formal lease agreement or contract with respect to the vehicle. *See, e.g., Holmes*, 868 A.2d at 159 ("[Courts] would require the exercise of, or the right to exercise, *at least some control* over an automobile by the named insured before concluding that the vehicle was covered by the policy."); *Toops v. Gulf Coast Marine Inc.*, 72 F.3d 483, 487 (5th Cir. 1996) ("The District Court failed to make this distinction between hiring a company that provides transportation and hiring a truck."); *Sprow v. Hartford Ins. Co.*, 594 F.2d 418, 422 (5th Cir. 1979) ("For a vehicle to constitute a hired automobile, there must be a separate contract by which the vehicle is hired or leased to the named insured for his exclusive use or control."); *Russom v. Insurance Co. of North America*, 421 F.2d 985, 993 (6th Cir. 1970) ("Where there is a separate contract for hiring or leasing a vehicle in addition to an agreement to haul a particular load, courts have held that the vehicle becomes a 'hired automobile.'"); *Chicago Ins. Co. v. Farm Bureau Mut.*

Ins. Co. of Arkansas, Inc., 929 F.2d 372, 374-75 (8th Cir. 1991) (observing a vehicle driven by an independent contractor "could not be a 'hired automobile' as a matter of law").

Upon our review of the undisputed facts of this case, we find Reed exercised only an indirect and limited supervisory control over the use of Reinier's truck: Reed told Reinier what material the vehicle would be transporting, where to pick the material up, and where to deliver it.[2] Reinier, however, chose which truck and driver (Kopp) to send to deliver the asphalt. Reinier maintained the truck, including carrying insurance on it. Kopp remained an employee of Reinier, and Reinier dictated Kopp's hours and directed his duties. There was no separate contract or lease agreement by which the truck was hired or leased to Reed Construction for its exclusive use or control. As the district court determined:

> The facts are not in dispute. Reinier was in control of the physical performance of the hauling and was not on Reed's payroll. Reinier provided the equipment and his own employee, Kopp, to perform the hauling of the asphalt. The services of Reinier and Kopp were utilized solely for the time period their services were necessary for the project. . . .
>
> The plaintiffs' interpretation of the [policy] language revolves around the verbs "hire" and "borrow" without reference to the object of the hiring. To do so is to take the word "hire" out of context. The "hiring" or "borrowing" must be of a "covered truck" to create an insured under the above language of the policy. That does not detract from or change the requirement that the auto must be "hired" or "borrowed." Instead Reinier was hired to do a specific task . . . and he performed the job with his own truck and his own employer under his control. It is only appropriate to interpret the work "hire" in the context of what or who was hired and the relationship the hiring created.

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[2] Reed also compensated Reinier for gas expenses.

We agree with the district court the truck was not hired by Reed.[3] Finding no error, we affirm as to this issue.

C. Permission. Even assuming, *arguendo*, the vehicle was borrowed or hired by Reed, the Heritage policy includes another hurdle precluding coverage under the facts of this case. The policy requires that Reed give "permission" to the person using a covered auto. It is clear from these facts Reed did not give Kopp permission to use Reinier's truck. Rather, Reed hired Reinier to make a delivery of asphalt. Reinier selected an employee (Kopp) and a truck to perform the task. As Heritage correctly points out, "Kopp was an employee of Reinier . . . Reed could not, and did not, direct Kopp's activities in driving the dump truck." And as the district court observed:

> The above discussion is dispositive but to provide coverage under the [policy] language Reed would have had also to give Kopp permission to drive Reinier's truck. Reed had no control over Kopp or the truck . . . The December 2008 ruling implied Reed's permission for Kopp to use the truck by reason of the contract between Reed and Reinier. There is nothing the Court has seen in the record to give Reed the right to give Kopp permission to use Reinier's truck. . . . Reed had no right to grant or deny Kopp permission to operate Reinier's vehicle. The control was with Reinier.

We agree with the district court that Reed did not give permission to Kopp to use a covered vehicle. Finding no error, we affirm.

IV. Settlement Agreement.

Defendant Ahrold-Fay also contends the district court erred in refusing to enforce the parties' settlement agreement. It is generally recognized that courts

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[3] The district court determined an independent contractor relationship existed between Reed and Reinier. In light of our conclusion, we need not reach that issue. We do not insinuate, however, whether such relationship existed one way or the other.

have the authority to enforce settlement agreements made in pending cases. *Wende v. Orv Rocker Ford Lincoln Mercury, Inc.*, 530 N.W.2d 92, 94 (Iowa Ct. App. 1995). When important facts are not in dispute, the courts may summarily enforce the agreement on the motion of one of the parties, applying the same standard applicable to motions for summary judgment. *Id.* However, where material facts surrounding the settlement are disputed, the fact-finder must resolve the issue. *Id.*

Heritage argues the facts do not give rise to an enforceable settlement agreement. The district court agreed and denied the motion, finding

> there was never a binding agreement between the plaintiffs and Heritage as to the damages Heritage would be obligated to pay in the event that the Supreme Court affirmed the trial court's previous decisions as to the coverage provided by the policy in dispute. The plaintiffs tacitly admit in their May 19th motion there was a dispute over the interest calculation but that the Court should have determined the interest payable under the agreement in accordance with the law applicable to judgments. In this case the interest to be paid was a part of the settlement negotiations and had not been resolved by the parties. The Court had no authority to dictate the terms of an agreement which was never reached. The Court gave the parties from April 19, 2010, until February 25, 2011, to submit a stipulation and they were unable to do so. In any event, the proposed stipulation was only relevant if, in fact, the trial court's ruling that coverage existed was its final decision. It is not. The trial court has reconsidered the ruling that coverage existed and has ruled by granting Heritage's Motion for Summary Judgment that the policy did not afford coverage.

As with any binding agreement, a settlement agreement must be complete in itself and certain; an agreement to agree at some point in the future is not binding. *Linn Cnty. v. Kindred*, 373 N.W.2d 147, 150 (Iowa Ct. App. 1985). If the contract terms are sufficiently definite that the court can determine with reasonable certainty the duty of each party and the conditions relative to

performance, the agreement is binding. *Id*. In determining whether two parties have entered into a contract, we must consider

> the extent to which express agreement has been reached on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and whether either party takes any action in preparation for performance during the negotiations.

Horsfield Constr., Inc. v. Dubuque Cnty., 653 N.W.2d 563, 571 (Iowa 2002) (citations omitted).

Giving the deference required to the district court's factual findings, we conclude no settlement agreement was made. The parties were not of like mind as to all the essential terms of the agreement, such as the calculation of the interest rate. Accordingly, the district court properly denied Ahrold-Fay's motion to compel enforcement of the settlement agreement.

V. Conclusion.

Upon our review, we find the vehicle at issue in this case was not owned, hired, or borrowed by Reed Construction; rather, Reed Construction hired Reinier to provide the service of delivering asphalt and Reinier retained the right to control the vehicle. In addition, Reed Construction did not give Kopp, Reinier's employee, permission to use Reinier's vehicle. We further find no error in the district court's denial of the motion to compel enforcement of the parties' settlement agreement. Accordingly, we affirm.

AFFIRMED.