IN THE COURT OF APPEALS OF IOWA

No. 3-273 / 12-1945
Filed April 24, 2013

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY d/b/a METLIFE AUTO & HOME,
Plaintiff-Appellant/Cross-Appellee,
vs.

DOUGLAS COWIE and JAMIE COWIE,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Warren County, Paul R. Huscher, Judge.

Metropolitan appeals denial of its motion for summary judgment, disclaiming its duty to defend and indemnify its insured, pursuant to a policy exclusion. Cowies cross-appeal, challenging the district court determination that Metropolitan's duty was limited to indemnifying its insured for damages resulting from non-vehicular causes. **AFFIRMED ON APPEAL; AFFIRMED WITH DIRECTIONS ON CROSS-APPEAL.**

Michael S. Jones of Patterson Law Firm, L.L.P., Des Moines, for appellant.

John P. Dougherty of Lawyer, Dougherty, Palmer & Flansburg, P.L.C., West Des Moines, for appellees.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

This is an appeal from a ruling on the parties' motions for summary judgment concerning the applicability of an exclusion in a homeowner's insurance policy. John McCarty attempted to free a tractor, which was stuck in the mud in his backyard, by attaching a chain and towing it with his truck. The tractor overturned, injuring his neighbor, Douglas Cowie. Cowie filed a personal injury action against the McCartys, who assigned their right to recover from their homeowner's insurance policy to the Cowies. Metropolitan Property and Casualty Insurance Company (Metropolitan) disclaims a duty to defend and indemnify its insured, John and Leesa McCarty, pursuant to a motor-vehicle exclusion in the policy. Because both claims of non-vehicular negligence and vehicular negligence exist, the district court correctly denied Metropolitan's motion for summary judgment. However, to the extent that the district court ruling could be interpreted to limit Metropolitan's liability to indemnify its insured for only those damages proximately caused by non-vehicle negligence, we require Metropolitan to both defend and indemnify for all damages caused by the insured's negligence unless the vehicle-related negligence is the sole proximate cause of Cowies' injuries.

I. Background Facts and Proceedings.

Douglas Cowie was helping his neighbors, John and Leesa McCarty, landscape their property when Cowie's tractor got stuck in mud. John McCarty attached a chain between his pickup and the front-end scoop of Cowie's tractor, and attempted to pull the tractor from the left side, at roughly a ninety-degree

angle. The tractor tipped over and fell on top of Cowie, at which point gasoline ignited and resulted in burns to more than fifty percent of Cowie's body.

Cowie and his wife filed a negligence action against the McCartys, alleging three claims of negligence. First, they claimed McCarty "pulled with such force and in such a direction" as to cause the tractor to tip over. Next, they allege that while "attaching the chain to the tractor defendant, John McCarty, failed to use ordinary care." Finally, Cowies assert that while "utilizing the truck to pull the tractor Defendant, John McCarty, failed to use ordinary care."

The McCartys submitted a claim to their homeowner's insurer, Metropolitan Property and Casualty Insurance Company (Metropolitan), demanding that it defend and indemnify them for any liability arising from the Cowies' suit. The McCarty's subsequently assigned to the Cowies their right to proceed against Metropolitan for the homeowner's coverage. Metropolitan filed a petition for declaratory judgment seeking a determination that coverage for the accident was precluded under the policy's motorized land vehicle exclusion.

The parties do not dispute that the pickup used by McCarty was a motorized land vehicle. The question presented is whether the use was of a nature excluded by the policy. The exclusion provision reads, in pertinent part: "Motorized Land Vehicles. We do not cover bodily injury or property damage arising out of . . . the ownership, maintenance, occupancy, operation, use, loading or unloading of a motorized land vehicle or trailer owned or operated by or rented or loaned to you."

In its ruling on the parties' cross motions for summary judgment, the district court found that claims of negligence arising out of the use or operation of the vehicle would be excluded from coverage under the homeowner's policy, but that claims based on non-vehicle negligence, such as negligence in the manner of attaching the chain to the tractor or in the direction or angle of the pull, would be covered. The court ruled that Metropolitan had a duty to defend, "but its liability to indemnify extends only to those damages proximately caused by the non-vehicle negligence, if any" and the extent of its liability would be determined by the fact-finder in the Cowies' underlying tort action.

On appeal, Metropolitan contends a pickup truck towing a tractor is a "use" of a motor vehicle and is excluded from coverage under the policy's motorized land vehicle exclusion. It claims the velocity which caused the tractor to tip over came from the pickup truck; therefore, the alleged negligence is solely vehicle related. It asserts that the manner of attaching the chain from the hitch of the pickup to the tractor is also part of the "use" of the pickup. Metropolitan further claims the act of connecting the chain to the tractor is inextricably linked with the operation of the pickup such that there is no independent act of non-vehicle negligence.

In their cross-appeal the Cowies contend Metropolitan has a duty to defend and to indemnify for the entirety of its insured's negligence unless the sole proximate cause of the injury was motor vehicle related. They argue the district court erred in suggesting the fact-finder in the tort action would need to

apportion damages between those caused by the negligent operation of a motor vehicle and those caused by non-vehicle negligence.

II. Standard of Review.

Although this action was filed in equity, interpretation of an insurance policy is a matter of law to be resolved by the court when, as here, neither party offers extrinsic evidence about the meaning of the policy's language. *Kalell v. Mut. Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 866-67 (Iowa 1991). If ambiguous, policy exclusions are strictly construed against the insurer. *Id.* at 867. The insurer has the burden to prove applicability of the exclusion. *Id.* We construe coverage exclusions narrowly. *Id.* at 867. Moreover, we review the district court's ruling on summary judgment for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). Summary judgment is proper if, when evidence is viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III. Discussion.

A. Metropolitan's Appeal.

Metropolitan contends all allegations of negligence asserted in Cowies' petition are a "use" or inextricably linked to a "use" of a motor vehicle and are therefore excluded from coverage under the policy's motorized land vehicle exclusion. They challenge the district court's finding that non-vehicle negligence was a possible independent or concurrent cause of the Cowies' damages.

As noted by the district court,

> In *Kalell*, the plaintiff was injured when a tree limb was pulled from the tree by a rope attached to the homeowner's pickup. The court found that the exclusion for injuries or damages arising out of the operation or use of a motor vehicle did not relieve the homeowners carrier from its duty to defend the insured. In doing so, the court stated that, "If neighbors had been called in to provide the necessary pulling force, and Kalell was injured, the homeowners policy would clearly apply." . . . One of the claims in the *Kalell* case was that the use of a rope to pull on the tree limb was in and of itself negligent. Because that claim did not depend upon what force was applied to the rope, the court found that the exclusion in the policy did not relieve the homeowners carrier from liability for injuries and damages which were proximately caused by that negligence.

Cowies allege the accident arose out of one or more concurrent non-vehicle related acts, including the method of attaching the chain to the tractor and the direction of the pull.[1] Like the claim alleging negligence for use of a rope in *Kalell*, Cowies' claim of negligence in the method of attachment of the chain to

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[1] During oral arguments Metropolitan contended that THAT Cowies did not support their resistance with sufficient facts to support their claim of non-vehicular negligence. However, we note that Metropolitan's petition averred that the Cowies' lawsuit alleges that "while attaching the chain to the tractor Defendant, John McCarty, failed to use ordinary care." This fact was also acknowledged by Metropolitan in its Statement of Undisputed Facts.

Moreover, any claim by Metropolitan alleging there are insufficient facts to support such non-vehicular negligence was not addressed by the district court. Cowies' motion required the court to determine if the insurance coverage exclusions applied in light of the negligence claims and if Metropolitan was required to defend and indemnify the claim. In its' ruling on the motions, the district court referenced Cowies' motion for summary judgment and Metropolitan's motion for summary judgment and stated, "[a]lthough the Plaintiff's Motion has not been set for hearing, it raises the converse argument to that of the Defendants, and both may be resolved."

In consideration of this statement and our review of the ruling, we conclude the issue of whether there was a genuine issue of material fact to support the claim of non-vehicular negligence was not determined by the district court. Rather, the district court stated, "[b]ased on the record in this case, there are claims of such non-vehicular negligence sufficient to find that Metropolitan does have a duty to defend." Thus, the district court only concluded that the non-vehicle negligence claims were not excluded from coverage and Metropolitan was obligated to defend and indemnify. Because an issue not resolved by the district court on a motion for summary judgment is not properly preserved, we decline to decide it on appeal. *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984).

the tractor does not depend on the source of the force applied to the chain. Also, unlike *North Star Mutual Insurance Company v*. *Holty*, 402 N.W.2d 452 (Iowa 1987), the chain was not an integral part of the truck encompassed in the policy's definition of motor vehicle.[2] Moreover, like *Grinnell Mutual Reinsurance Company v*. *Employers Mutual Casualty Company*, 494 N.W.2d 690, 691-94 (Iowa 1993) (finding student's injuries were not solely caused by vehicle-related negligence and insurer could be liable despite motor vehicle exclusion clause), the Cowies allege independent acts of non-vehicle related negligence.

In *Grinnell Mutual*, the Iowa Supreme Court recognized a split of authorities in other jurisdictions with regard to application of the motor vehicle exclusion where the "accident is alleged to have resulted from more than one cause, one of which is nonvehicle-related." 494 N.W.2d at 693. The court then reviewed Iowa jurisprudence, noting "when two independent acts of negligence are alleged, one vehicle-related and one not vehicle-related, coverage is still provided under the homeowners policy unless the vehicle-related negligence is the sole proximate cause of the injury." *Id.* (quoting *Kalell*, 471 N.W.2d at 868). The court also observed, "[i]f one act of negligence concurs or combines with another, and if each meets the proximate cause test, then the resulting concurrent negligence renders each act jointly and severally liable for the

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[2] In *Holty*, an accident was deemed motor vehicle related for purposes of a policy exclusion because the auger causing the accident was permanently attached to the truck, and thus, was included in the policy's definition of a motor vehicle. 402 N.W.2d at 455. Although a general failure to tie down the auger was alleged, the court found that act could not render Holty liable without his use of the vehicle on a public road, noting that the auger was not a hazard independent of the truck's velocity. *See Kallel*, 471 N.W.2d at 868-69 (distinguishing *Holty*).

resulting injury." *Grinnell Mut.,* 494 N.W.2d at 693 (citing *Davis v. Crook*, 261 N.W.2d 500, 506 (Iowa 1978)). Thus, in order to establish applicability of the exclusion, it is incumbent upon Metropolitan to prove that the sole proximate cause of Cowie's injuries was vehicle-related negligence.

If Metropolitan intended to exclude coverage of all incidents in any way involving a motor vehicle, it was incumbent on it to explicitly say so in its policy. "It is not a court's prerogative, under the guise of construction or interpretation, to insert coverage limitations the company could have, but did not, include." *John Deere Ins. Co. v. De Smet Ins. Co. of S. Dakota*, 650 N.W.2d 601, 607 (Iowa 2002). We therefore affirm the district court denial of Metropolitan's motion for summary judgment.

B. Cowies' Cross-Appeal.

On cross-appeal, Cowies contend the district court ruling provides that Metropolitan only has "a duty to defend or indemnify for losses occasioned by non-vehicle causes" and as a result, the district court overly restricted Metropolitan's duties. The district court ruling provides in part that Metropolitan has the following duties: "the obligation to defend, and the obligation to indemnify for injuries and damages not occasioned by the negligent operation of McCarty's motor vehicle."

The parties concede that an insurer has a duty to defend the entire action when it involves both covered and uncovered claims. *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 627 (Iowa 1991) ("If any claim alleged against the insured can rationally be said to fall within such coverage, the insurer

must defend the entire action. In case of doubt as to whether the petition alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured." (citation omitted)). However, the district court went on to find Metropolitan's "liability to indemnify extends only to those damages proximately caused by the non-vehicle negligence, if any." Cowies argue because damages resulted from multiple, concurrent negligent acts, Metropolitan has a duty to indemnify its insured for the total damage.

"The duty to defend is broader than the duty to indemnify . . . because it is impossible to determine the basis, if any, upon which the plaintiff will recover until the action is completed." *First Newton Nat. Bank v. General Cas. Co. of Wisconsin*, 426 N.W.2d 618, 630 (Iowa 1988). Metropolitan's duty to indemnify is excused only in the event it proves that the sole proximate cause of the injuries was motor vehicle related. *Kalell*, 471 N.W.2d at 868. If it fails to do so, it is liable to indemnify its insured for the damages arising from the combination of vehicle and non-vehicle related negligence. *Grinnell Mut.*, 494 N.W.2d at 693 ("If one act of negligence concurs or combines with another, and if each meets the proximate cause test, then the resulting concurrent negligence renders each act jointly and severally liable for the resulting injury.").

As noted by the district court, the facts in *Kalell* are similar to the facts in this case in that a rope was attached to a dead tree and pulled by the defendant's pickup truck injuring the plaintiff. The defendant's homeowner's policy excluded coverage arising out of use of a motor vehicle. The court in *Kalell* stated:

> We hold that, when two independent acts of negligence are alleged, one vehicle-related and one not vehicle-related, coverage is still provided under the homeowners policy unless the vehicle-related negligence is the sole proximate cause of the injury. Under Iowa law, of course, more than one proximate cause may exist. Liability which results from nonvehicular negligence is not excluded by the homeowners policy. As one court noted:
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> > If a proximate cause of an injury is within the included coverage of an insurance policy, the included coverage is not voided merely because an additional proximate cause of the injury is a cause which is excluded under the policy. Thus, in order for an injury to be excluded from coverage under an insurance policy, the injury must have been caused solely by a proximate cause which is excluded under the policy. The insurance carrier has the burden of proof as to whether the injury was caused solely by a proximate cause which is excluded under the policy.

471 N.W. at 868 (citations omitted). The sole proximate cause test announced in *Kalell* was reaffirmed in *American Family Mutual Ins. Co. v. Corrigan*, 697 N.W.2d 108, 114, n.1 (Iowa 2005). In light of this authority, we clarify the district court ruling to direct that Metropolitan is fully responsible for all damages caused by the insured's negligence unless the jury determines that the vehicle related negligence is the sole proximate cause of the injuries suffered by Cowies.

IV. Conclusion.

Whether Cowies' injuries were caused solely by negligent use of the vehicle is an issue for the trier of fact. Because a material issue of fact exists, the district court correctly denied Metropolitan's motion for summary judgment. Cowie alleges his injuries arose out of one or more concurrent non-vehicle-related acts. We therefore affirm the decision of the district court that when the motor vehicle exclusion is narrowly construed, it does not preclude Metropolitan's duty to defend and indemnify its insured. We further direct Metropolitan to

indemnify for all damages unless the vehicle-related negligence is the sole proximate cause of Cowies' injuries.

AFFIRMED ON APPEAL; AFFIRMED WITH DIRECTIONS ON CROSS-APPEAL.