

**IN THE COURT OF APPEALS OF IOWA**

No. 6-545 / 05-1487  
Filed October 11, 2006

**PAUL UPDIKE, Individually and as  
Next Friend of HUNTER UPDIKE,**  
Plaintiff-Appellant,

**vs.**

**JACQUELYN S. DUNNING,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Polk County, Donna Paulsen,  
Judge.

Paul Updike appeals the district court's award of summary judgment.

**REVERSED AND REMANDED.**

Jeffrey Carter, Des Moines, for appellant.

Rene Lapierre, Sioux City, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

**HUITINK, P.J.**

***I. Background Facts and Proceedings***

Paul Updike was the driver and owner of a 1999 S-10 Chevy pickup involved in a two-vehicle collision on September 7, 2000, in Des Moines. Hunter Updike was a passenger in Updike's vehicle. Both sustained personal injuries, and Updike's pickup was extensively damaged. Jacquelyn Dunning was driving the other vehicle involved in the collision.

At the time of the accident Updike was insured by Progressive Insurance Company. Because he was unable to settle with Dunning's insurance company, USAA, Updike looked to Progressive for collision coverage on his vehicle. Progressive's claims representatives determined Updike's pickup was a total loss. Pursuant to the appraisal provisions of Updike's policy, Progressive determined that the fair market value of Updike's pickup was \$12,650. After reducing that amount by Updike's \$500 deductible and \$2900 salvage value for the pickup, Progressive paid Updike \$9250 on September 27, 2002. Updike retained the pickup. Although he was informed of Progressive's procedures to contest the appraisal of his pickup, Updike accepted Progressive's \$9250 offer without further contest. Progressive subsequently recovered \$9750 from Dunning's insurance company pursuant to an intercompany arbitration agreement.

On July 22, 2003, Updike sued Dunning for personal injury and property damages, alleging she was negligent and that her negligence was the cause of the September 7, 2000, accident and resulting damages. On October 15, 2004, Dunning moved for partial summary judgment, alleging:

The Plaintiffs' claim for property damage was paid by his insurance company, Progressive Preferred Ins. Co. USAA Insurance, the defendant's liability carrier, paid the property damage claim in full brought by Progressive pursuant to the mandatory terms and conditions of inter-company arbitration.

The court's December 16, 2004 ruling denying Dunning's motion for partial summary judgment states:

Upon review of the record, this Court is not convinced that the Plaintiff is bound by an arbitration agreement between the two insurance companies herein. The court has not been made privy to the language in the Plaintiff's own insurance contract that might address such an issue, nor has the Court been given any evidence that the acceptance of the check from his own insurance company somehow waives or releases any claims he might have against others for the property damage. Absent such evidence, the Court concludes Defendant's Motion for Partial Summary Judgment should be denied.

On June 6, 2005, Dunning filed an offer to confess judgment for \$500. The summary judgment record is unclear concerning Updike's reply to the offer to confess judgment.

In a renewed motion for summary judgment, filed June 20, 2005, Dunning argued:

According to [Updike's policy with Progressive], in the event of any payment under this policy we are entitled to all the rights of recovery that the insured person to whom payment was made has against another . . . .

The trial court's July 26, 2005 ruling on Dunning's motion states:

The court finds that the record contains no issues of material fact. Plaintiff is bound by the settlement he accepted for his property damage. Any claims he had against the Defendant Jacqueline S. Dunning for damage to his vehicle belonged to Progressive. Plaintiff has no further rights of recovery against the Defendant. The court further finds the Defendant is entitled to judgment as a matter of law.

Updike's case was dismissed, resulting in this appeal. On appeal, Updike argues the following:

- I. Paul was neither a party nor a third party beneficiary to the Intercompany Arbitration Agreement between Progressive Insurance Company and USAA Insurance Company, and, therefore, not bound by the agreement.
- II. Paul is not precluded from recovering additional damages through suit based upon the plain language of the insurance contract.
- III. All of the above issues are for a jury to decide and summary judgment was not appropriate.

## ***II. Standard of Review.***

We review a district court's ruling on a motion for summary judgment for correction of errors of law. *Financial Mktg. Servs., Inc. v. Hawkeye Bank & Trust*, 588 N.W.2d 450, 455 (Iowa 1999). Summary judgment will be upheld when the moving party shows there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. See Iowa R. Civ. P. 1.981(3). In reviewing a motion for summary judgment, we consider the evidence in a light most favorable to the party opposing the motion. *Smith v. Shagnasty's*, 688 N.W.2d 67, 71 (Iowa 2004).

## ***III. The Merits.***

The trial court's ruling on Dunning's motion for summary judgment was based on the court's interpretation of the following provision of Updike's insurance policy with Progressive:

In the event of any payment under this policy, we are entitled to all the rights of recovery that the insured person to whom payment was made has against another. That insured person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights, and do nothing after an accident or loss to prejudice our rights.

Under the trial court's interpretation, Updike assigned all of his rights to recover additional property damages from Dunning because Progressive paid him for the *total loss* of his vehicle, and he had no remaining unrecovered losses.

Absent any ambiguity, the interpretation of an insurance policy is a matter to be resolved by the court as a matter of law. *Kalell v. Mutual Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 866-67 (Iowa 1991). The district court's interpretation of the policy is not binding on appeal. *North Star Mut. Ins. Co. v. Holty*, 402 N.W.2d 452, 454 (Iowa 1987).

The insurance policy provision spells out Progressive's right as the insurer to be subrogated to Updike's rights against Dunning following payment of a covered loss. Although the provision refers to *any* payment and *all* of Updike's rights, it is generally understood that Updike, as the insured, retains the right to maintain his own action against Dunning to recover damages which were not covered by Progressive. See *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820, 828-29 (Iowa 2004) (defines rights of partially subrogated insurer).

As noted earlier, the trial court determined there was no factual dispute concerning Updike's receipt of payment from Progressive for the total loss of his vehicle. The summary judgment record, however, fails to support the trial court's conclusion. It is not at all clear whether Updike recovered his \$500 deductible. Both Progressive's appraisal statement and Updike's deposition testimony indicate that Updike's \$500 deductible was credited against his settlement with Progressive. Moreover, the record includes evidence from Progressive's claims representative indicating that the policy proceeds paid to Updike did not necessarily reflect the actual cash value of his vehicle. Contrary to the trial

court's conclusion, the summary judgment record includes material issues of fact concerning the amount of Updike's property damages. We accordingly reverse the judgment of the trial court and remand for further proceedings in conformity with our opinion.

**REVERSED AND REMANDED.**