IN THE COURT OF APPEALS OF IOWA

No. 9-459 / 08-1880
Filed July 22, 2009

COUNTRY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee,

vs.

PAMELA MCNELLY and SHAWN MCNELLY,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendants appeal the district court's grant of summary judgment to plaintiff, and denial of their motion for summary judgment, in this action seeking a declaratory judgment concerning uninsured motorist coverage. **AFFIRMED.**

Gail E. Boliver of Boliver & Bidwell Law Firm, Marshalltown, for appellants.

Wendy D. Boka and Barbara A. Hering of Hopkins & Huebner, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ROBINSON, S.J.

I. Background Facts & Proceedings

Pamela McNelly, a resident of Iowa, insured a motorcycle through Country Mutual Insurance Company. The headquarters for Country Mutual are in Illinois. The insurance policy was issued by an Iowa agent. The decision to approve Pamela's application was made by an insurance agent in Iowa. Country Mutual insures drivers in Iowa and Colorado, as well as other states.

On September 1, 2006, in El Paso County, Colorado, Pamela permitted Shawn McNelly to drive the motorcycle. She was the passenger. The McNellys claim that another driver made a sharp and erratic lane change in front of them, and this caused them to lose control of the motorcycle and suffer injuries. The other driver was never identified, and they characterize this as a "miss and run" accident.

The McNellys sought coverage for their injuries under the uninsured motorist provisions of the Country Mutual policy. They rely on a provision which states the company "will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident." The company denied coverage based on a policy provision stating an uninsured motor vehicle "is a hit and run vehicle" which *hits* the insured or the insured's vehicle.

On December 6, 2007, Country Mutual filed a petition for declaratory judgment, claiming there was no coverage under Iowa law because there was no

physical contact between the McNellys' motorcycle and the other vehicle.[1] On May 2, 2008, the district court determined Iowa law should apply in this case. The court found Iowa had the most significant relationship to the transaction in dispute. The court stated, "Iowa, as the place of contracting and negotiation, has a significant interest in regulating the agreed upon exchange between the parties, and in protecting their justified expectations under the contract." The court found the parties had agreed, under the terms of the contract, that physical contact was necessary to invoke the provisions of the uninsured motorist coverage.[2]

The McNellys filed a motion for summary judgment, claiming "a denial of coverage based on an accident involving a miss-and-run instead of a required hit-and-run is contrary to public policy." They cited cases from several other states, including Colorado, which had found that uninsured motorist coverage could be available based on a "miss and run" accident. *See e.g., Farmers Ins. Exch. v. McDermott*, 527 P.2d 918, 920 (Colo. Ct. App. 1976) (holding "the physical contact restriction in the policy is an impermissible restriction upon the broad coverage required under the uninsured motorist statute"). Country Mutual resisted the McNellys' motion for summary judgment, and filed its own motion for summary judgment. Country Mutual asserted that under Iowa law, and based on the terms of the policy, it had no obligation to the McNellys. The McNellys resisted Country Mutual's motion for summary judgment.

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[1] The McNellys filed an action on the same matter in Colorado on December 12, 2007, claiming Colorado law should apply. The district court denied the McNellys' motion to dismiss the Iowa petition.

[2] The McNellys appealed the May 2, 2008 decision. The Iowa Supreme Court dismissed the appeal as interlocutory. *See* Iowa R. App. P. 6.2(1).

The district court granted Country Mutual's motion for summary judgment, and denied the McNellys' motion. The court found that under Iowa law, as stated in *Claude v. Guarantee National Insurance Co.*, 679 N.W.2d 659, 666 (Iowa 2004), physical contact is required for recovery of uninsured motorist benefits. The court rejected the McNellys' public policy arguments. The court concluded Country Mutual had no obligation to the McNellys' under the insurance policy for the accident that occurred in Colorado on September 1, 2006. The McNellys appealed the district court's decision.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for the corrections of errors at law. *See* Iowa R. App. P. 6.4. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). In determining whether there is a genuine issue of material fact, the court affords the non-moving party every legitimate inference the record will bear. *Id*.

III. Merits

A. The McNellys contend the district court should have applied the case of *Hall v. Allied Mutual Insurance. Co.*, 261 Iowa 1258, 158 N.W.2d 107 (1968). In *Hall*, the parties agreed there was uninsured motorist coverage for Iowa plaintiffs who had been injured by a Texas driver in Oklahoma. *Hall*, 261

Iowa at 1261, 158 N.W.2d at 109. The only question before the court was the extent of that coverage. Since recoverable damages were different in Iowa and Oklahoma, the court had to determine which law applied. *Id.* at 1262, 158 N.W.2d at 109. The Iowa Supreme Court concluded that in a tort action, the law of the place of the tort must be used to determine the rights of the parties, and this was Oklahoma law. *Id.* at 1263, 158 N.W.2d at 110.

The district court noted that *Hall* involved questions of tort law, while "the question as to the effect to be given to a coverage provision or definition within an insurance contract is an altogether different question" that involved contract law. The court specifically rejected the McNellys' assertion that *Hall* was dispositive to this case. The court stated:

> In the present case, Defendants' entitlement to underinsured motorist benefits is not contingent upon any theory of tort liability, nor does the question presented in Plaintiff's action for declaratory judgment concern an issue relating to the proper measure or award of damages as determined by an applicable state's tort laws. The present dispute concerns only a question of whether coverage for an accident is mandated by the express terms of the parties' contract, a question incidentally affected by both Iowa and Colorado law pertaining to insurance contracts, not tort actions. This is a question of contract law.

The issue in this case is not the extent of coverage, but whether there is coverage at all. To determine whether the uninsured motorist provisions of the policy apply requires the examination of the terms of the insurance policy. *Wetherbee v. Economy Fire & Cas. Co.*, 508 N.W.2d 657, 659 (Iowa 1993) ("[W]hen seeking uninsured motorist benefits the insured is not in fact suing the uninsured motorist but rather is seeking contract benefits under the insurance policy."). The issue in this case is therefore a question of contract law. *See id.*

(noting a claim for uninsured motorist benefits is a contract claim). We find no error in the district court's conclusion that *Hall*, which involved tort law, was not applicable in this case.

B. The McNellys claim the district court improperly applied a conflict of laws analysis for contracts. They assert that a conflict of laws analysis for torts should have been used. They claim that if the case is analyzed as a tort, the law of Colorado should be applied.

The distinction is important because in Iowa there must be physical contact before a party may recover under an uninsured motorist policy for a hit-and-run accident. Iowa Code § 516A.1 (2007); *Claude*, 679 N.W.2d at 666. In Colorado, however, the uninsured motorist statute contains no physical contact restriction. *Farmers Ins. Exch.*, 527 P.2d at 920. The Colorado Court of Appeals has concluded a physical contact requirement is not a reasonable restriction on uninsured motorist coverage. *Id.*

We have already determined the case should be considered as a contract dispute. *See Wetherbee*, 508 N.W.2d at 659. We conclude the district court properly analyzed the case under the rules for a conflict of laws in a contract case.

C. In an alternative argument, the McNellys assert that even if conflict of laws analysis for contract disputes is applied, the district court should have found that Colorado law, and not Iowa law should be applied in this case.

"We determine choice-of-law issues in insurance policy cases by the intent of the parties or the most significant relationship test." *Gabe's Constr. Co., Inc. v.*

United Capitol Ins. Co., 539 N.W.2d 144, 146 (Iowa 1995). The parties to a contract can determine the law which will control the contract. *Cole v. State Auto. & Cas. Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980) (citing Restatement (Second) of Conflict of Laws § 187, at 561 (1971)). If the contracting parties have not determined which state's laws will apply, the court applies the laws of the state with the "most significant relationship" to the dispute. *Id.* (citing Restatement (Second) of Conflict of Laws § 188, at 575).

The McNellys claim that two provisions of the insurance policy, read together, show that the parties agreed that the tort law of a state where an accident occurred would govern their contractual rights and duties. In the uninsured-underinsured motorists portion of the insurance policy it states "we will pay damages which an insured is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident." Also, the general liability portion of the policy provides:

> If you have liability insurance under this policy and if you are traveling in a state or province which has a compulsory insurance or similar law affecting nonresidents, we will automatically provide the required minimum amounts and types of coverage. However, the required coverage will be excess over any other collectible insurance.

We determine there is no explicit provision in the insurance contract that the terms of the insurance contract would be determined by the law of a state where an accident had occurred. The provisions highlighted by the McNellys do not amount to an agreement that the law of Colorado should apply in this case. The provision concerning out-of-state coverage applies to liability insurance and

not to uninsured motorist coverage. *See State Farm Mut. Auto. Ins. Co. v. Mendiola*, 865 P.2d 909, 911 (Colo. Ct. App. 1993) (finding the out-of-state coverage provision of a policy applied only to the liability section of the policy and not the uninsured/underinsured motorist section). Also, Colorado does not have a compulsory law requiring uninsured motorist coverage.[3] *See* Colo. Rev. Stat. § 10-4-609 (2007). Therefore, the McNellys have not shown Colorado has a "compulsory insurance or similar law affecting nonresidents" that would require the coverage sought in this case.

D. Finally, the McNellys assert that the "physical contact" requirement for uninsured motorist coverage in Iowa is inconsistent with public policy. They cite case law from several other states that have found uninsured motorist coverage for "miss and run" accidents comports with public policy.

This issue has already been addressed in Iowa in *Claude v. Guarantee National Insurance Co.*, 679 N.W.2d 659, 666 (Iowa 2004). The court found, "The provision at issue here does not violate public policy because it was specifically authorized by the general assembly in section 516A.1." *Claude*, 679 N.W.2d at 663. The court stated, "contrary to the plaintiff's contention, the physical-contact requirement reflects and is consistent with the public policy of this state." *Id.* The court concluded that the provision of the insurance policy requiring actual physical contact between an unknown motorist's vehicle and the insured's vehicle was enforceable. *Id*. at 666.

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[3] The Colorado law only requires insurers to offer uninsured motorist coverage. Colo. Rev. Stat. § 10-4-609(1)(a); *see also Cruz v. Farmers Ins. Exch.*, 12 P.3d 307, 312 (Colo. Ct. App. 2000) ("[U]ninsured motorist coverage is not mandatory, and individual insureds are free to decline such coverage.").

We decline the McNellys' invitation to reconsider this issue. The Iowa legislature and the Iowa Supreme Court have determined that in Iowa uninsured motorist coverage is not available in a hit-and-run accident unless the hit-and-run vehicle hits the insured or the insured's vehicle. *See* Iowa Code § 516A.1; *Claude*, 679 N.W.2d at 666.

After considering all of the issues raised by the parties we affirm the decision of the district court.

AFFIRMED.