IN THE COURT OF APPEALS OF IOWA

No. 9-624 / 89-688

FILED
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CLERK SUPREME COURT

KEVIN SPURGEON d/b/a SHOWTIME VIDEO,

Appellee,

vs.

OWNERS INSURANCE COMPANY,

Appellant.

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Appeal from the Iowa District Court for Davis County, Max R. Ruschmeyer, District Associate Judge.

Appellant seeks discretionary review of the district court's ruling affirming the small claims court's decision that a loss suffered by appellee was covered by a multi-peril policy issued by appellant. **REVERSED.**

Randall C. Stravers of Clements, Blomgren, Pothoven & Stravers, Oskaloosa, for the appellant.

Stephen A. Richardson, Bloomfield, for the appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J. 241

The sole issue before us on this appeal concerns whether a loss suffered by appellee is covered by a multi-peril policy issued to appellee by appellant Owners Insurance Company. The district court, small claims division, found the loss to be covered. This decision was affirmed on appeal to the district court. Appellant has obtained discretionary review of the district court's ruling. We reverse.

The facts of this case are undisputed. Appellee operated a video store whose business included the rental of video camcorders. On June 2, 1988, appellee rented a Magnavox video camcorder to an individual who identified herself as Lorna Kerns. This individual provided appellee with a false name, false telephone number, and false social security number in order to rent the video camcorder unit. Appellee became concerned when the video camcorder unit was not returned the following day as scheduled, and contacted the police.

Appellee filed a claim for the value of the lost video camcorder unit with his business insurer, appellant. He relied on a provision in his policy that insures against loss by theft. The theft provision is not in dispute.

However, the appellant in denying appellee's claim, relied on a specific exclusion provision in the policy which provides:

2. This policy does not insure under this form against loss caused by:

* * *

H. voluntary parting with title or possession of any property by the insured or others to whom the property may be entrusted if induced to do so by any fraudulent scheme, trick, device, or false pretense.

It is this provision that is in dispute.

Our review is on assigned errors of law. Iowa R. App. P. 4. In construction and application of a standardized insurance contract, we strive to effectuate the reasonable expectations of the average member of the public who expects it. See C & J Fertilizer Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975).

The exclusion quoted above clearly states where the insured voluntarily parts with possession of his property that the policy will not provide coverage if the loss is caused by fraudulent schemes. The undisputed facts here reveal that the appellee did voluntarily part with possession of the camcorder and that he was induced to do so by a fraudulent scheme. We must hold that the appellee's loss is excluded from the terms of the policy.

A perusal of the case law of other jurisdictions indicates that exclusions similar to the one involved in this matter have been upheld. See Bjorklund v. Aetna Casualty and Sur. Co., 306 N.W.2d 838, 839 (Minn. 1981); Bohnen Int'l, Inc. v. Liberty Mut. Ins. Co., 120 Ill. App.

3d 657, 458 N.E.2d 644, 648 (1983); Rolfsmeier v. Implement Dealers Mut. Ins. Co., 182 Neb. 150, 153 N.W.2d 367, 368 (1967).

The magistrate placed some reliance on Edwards v. State Farm Mutual Automobile Ins. Co., 296 N.W.2d 804 (Iowa 1980), in holding that there was coverage under the policy. The supreme court in Edwards held that there was coverage under the theft provisions of an insurance policy under circumstances where the plaintiff signed the title and gave the title to a third party along with possession of the car. The third party gave the plaintiff a check for $3400, which was returned marked "insufficient funds." But the insurance policy in Edwards did not contain an exclusionary provision as this policy does.

The supreme court in Edwards stated as follows:

> In the policy in question, theft is not defined. Lay persons cannot reasonably be expected to have a uniform understanding of how broadly the term will be applied when courts do not even agree on it . . . . When the insurance company drafting and furnishing the policy of insurance had an opportunity to adequately define theft, it ran the risk that a court would adopt from those alternatives available the one which is most favorable to the insured. Most lawyers, we assume, would discern a difference between the traditional concept of theft and obtaining money by fraudulent practices. Many would, perhaps, assume a loss through fraud would not be covered as a theft. But an average insured contemplating the loss of property through a fraudulent scheme could reasonably view this as a theft. If the insurance company had desired to avert such reasonable expectations, it should have said so clearly and understandably in the policy.

Id. at 806-07 (citations omitted and emphasis added).

The language used in the policy before us does avert any reasonable expectations of coverage. It clearly excludes property loss through fraud.

The exclusion applies to the appellee. The appellee gave possession of his property to a party who fraudulently induced him to do so by misrepresenting her name, phone number, address, social security number, and purpose. Although it can be seriously argued that the appellee was the victim of theft, the exclusionary provision of the policy precludes recovery.

The fact that appellee had no knowledge that a fraud was being perpetrated upon him is irrelevant. Fraud by its very nature is a species of theft wherein the defrauding party acts by deception. Cf. Iowa Code § 714.1(3) (person commits a theft when the individual obtains a transfer of possession or control of the property of another by deception).

The trial court found fraud and it is generally conceded that the camcorder was obtained by fraudulent means. Like in Edwards, 296 N.W.2d at 807, this matter may be resolved as a matter of law without the necessity of inquiring whether the requisite elements of a fraudulent act are established in the record. The decision of the district court is reversed.

REVERSED.