

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 25 1982

CLERK SUPREME COURT

GREGG MOSTAERT,)

Plaintiff-Appellant,)

vs.)

RICHARD TOERBER,)

Defendant.)

In re Garnishment of)
AMERICAN INTERINSURANCE)
EXCHANGE COMPANY,)

Garnishee-Appellee.)

Filed May 25, 1982

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2-143
2-66627

Appeal from Scott District Court - L. D. Carstensen, Judge.

Plaintiff appeals from adverse decision in garnishment proceedings which adjudged that garnishee, insurance company, was not required to satisfy plaintiff's judgment against defendant. AFFIRMED.

Michael J. McCarthy, of McCarthy & Hart, Davenport, for plaintiff-appellant.

Craig A. Levien, of Betty, Neuman, McMahon, Hellstrom & Bittner, Davenport, for garnishee-appellee.

Defendant is not participating in this appeal.

Submitted to Oxberger, C.J., and Snell, and Carter, JJ.

PER CURIAM

Plaintiff appeals from adverse decision in garnishment proceedings which adjudged that garnishee, insurance company, was not required to satisfy plaintiff's judgment against defendant. We affirm the trial court.

Plaintiff sued defendant, Richard Toerber, for damages arising out of an automobile collision. That action resulted in a default judgment in favor of the plaintiff. By garnishment proceedings, plaintiff seeks to require the garnishee, insurance company, to satisfy this judgment to the extent of the limits of a particular automobile liability policy which the garnishee had issued to Toerber. The policy in question insures Toerber against liability arising out of use of: (a) those automobiles owned by the insured which are identified in the policy, and, (b) certain non-owned automobiles.

At trial of the garnishment action, it was undisputed that the automobile which Toerber was operating when involved in the collision for which plaintiff recovered damages was not identified in the policy so as to be insured as an "owned" automobile. In addition, the trial court found that the plaintiff had failed to establish that the automobile was a non-owned automobile "within the meaning of the policy."

On appeal plaintiff urges two matters, neither of which is found to have merit. First, it is asserted that the legislation embraced in ch. 321A, The Code, requires the garnishee to extend coverage to liability of Toerber arising from all owned and non-owned vehicles. We have searched this legislation in vain for any such requirement. Secondly, plaintiff urges that the trial court's finding that he failed to establish that this was a non-owned automobile lacks evidentiary support. In this regard we interpret the critical findings of the trial court to be that plaintiff failed to establish that the automobile in question was a non-owned automobile as that term is defined in the applicable policy provision. This is

significant because the policy extends to only those non-owned automobiles which are not furnished for the regular use of the insured. The trial court correctly placed the burden of proof on the plaintiff to establish this element of coverage and found that plaintiff had failed to carry the burden of proof. We can reverse this conclusion only if plaintiff carried his burden of proof as a matter of law. Chown v. USM Corp., 297 N.W.2d 218, 220 (Iowa 1980). We find from the evidence that plaintiff did not establish as a matter of law that the automobile in question was a non-owned automobile within the applicable policy definition. We therefore affirm the trial court's decision.

AFFIRMED.