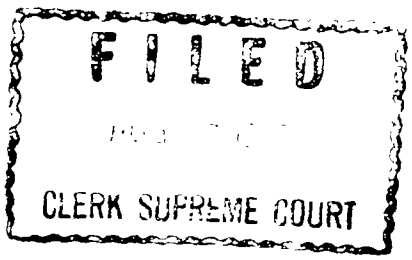
IN THE COURT OF APPEALS OF IOWA

No. 6-030 / 95-582



ROBERT E. TROPF, JR.,
Appellant,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Appellee.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

Robert Tropf, Jr., appeals the district court's ruling for judgment in favor of defendant-insurer American Family Mutual Insurance Company in his action for insurance coverage arising out of an automobile accident. **REVERSED.**

James J. Roth, Dubuque, for appellant.

Ted J. Wallace, Bettendorf, for appellee.

Considered by Cady, P.J., and Streit and Vogel, JJ.

STREIT, J.

Robert E. Tropf, Jr., appeals the district court's judgment on the parties' stipulation of facts and exhibits in favor of the defendant, American Family Mutual Insurance Company (American). We reverse.

On December 18, 1992, Tropf was operating a vehicle owned by Robert R. Farrell, with Farrell's express permission and consent. Due to icy roads, Tropf was involved in a minor automobile accident with Scott A. Donar. Donar looked at the vehicles and informed Tropf there was no damage. Tropf got out of the car to inspect for himself. While Tropf and Donar were searching for signs of damage, a third vehicle, driven by Eric Efferding, slid into the area where the Tropf and Donar vehicles had come to rest. Efferding's vehicle struck Donar's vehicle at a high rate of speed, which in turn struck Tropf's vehicle. Tropf was forced to leap out of the way to avoid being struck and was hurt. The parties agree that Tropf was not in physical contact with his vehicle at the time of the injury.

After American denied Tropf coverage under Farrell's policy, Tropf brought suit. The parties stipulated to facts and exhibits. American did not contest that Tropf, as a permitted driver, was an insured under the policy. As agreed by the parties, the "fighting issue was whether Tropf was occupying the vehicle, under the terms of the policy, when he was injured. The district court held in favor of American. Tropf

appeals. He argues that the district court erred in finding that he was not occupying the vehicle within the terms of the policy at the time of his injury. We agree.

The policy defines occupying as follows: "Occupying means in, on, getting into or out of, and in physical contact with." Tropf claims this language should be given a broad construction, and should include Tropf's position at the time of his injury. American, on the other hand, reads the clause as unambiguous: there can be no occupancy (and thus no coverage) unless the insured is in direct physical contact with the vehicle at the time of the injury.

The first issue we must decide is whether it is possible under the express terms of this policy for an insured to occupy a vehicle without maintaining physical contact with the vehicle at the time of injury. If an insured cannot occupy a vehicle without maintaining physical contact at the time of injury, the case at bar is resolved. If a vehicle may be occupied without physical contact, we must determine whether under the terms of the policy in this particular instance Tropf was occupying the car, as Iowa law is not settled in this area.

American's interpretation of the definition of occupying in its policy is not convincing. The only case American cites in support of its position is *Sorenson v. American Family Mut. Ins. Co.*, No. 90-0528-FT, 1990 WL 149253 (Wisc. App. Aug. 16, 1990). *Sorenson*, however, is inapposite. The issue was whether an insured who had no physical contact with the vehicle could recover through the clause "and in

physical contact with," not whether that phrase would bar recovery through another part of the definition. *Id.* at ***1. Although not put in these terms, American essentially argues that "and in physical contact" should be given a conjunctive meaning.[1] Although "and" is often used with conjunctive meaning, "it is a familiar rule of construction that the word 'and' is sometimes construed as a disjunctive such as 'or.'" *Koethe v. Johnson*, 328 N.W.2d 293, 299 (Iowa 1982) (construing provisions of the Iowa Consumer Credit Code). When the entire definition is examined in context, it appears likely that the intent was disjunctive; physical contact is merely one in a series of possible ways to occupy the car. The definition reads: "Occupying means in, on, getting into or out of, and in physical contact with." It would be absurd to construe the definition to require all four parts of the series. At best, the language was intended to prevent coverage when the insured had clearly left the car and ceased car-related activities or had not yet arrived at the car. At very least, the intended meaning is ambiguous. Because ambiguous policy provisions must be construed in the light most favorable to the insured, *IMT Insurance Co. v. Amundsen*, 376 N.W.2d 105, 107 (1988), we must find the policy does not automatically exclude from the definition of occupying one who is not in direct physical contact at the time of the injury.

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[1] In other words, American argues that the definition of occupying should be interpreted to read: Occupying means in, on, getting into or out of. In addition, you cannot be occupying the car if you are not in direct physical contact with the car at the time of injury.

We must now decide whether Tropf was occupying the car under the terms of the policy; whether he was "in, on, getting into or out of" the car. The most recent Iowa case to address this issue did so only in dicta. *Henderson v. Hawkeye-Security Ins. Co.*, 252 Iowa 97, 106 N.W.2d 86, 90 (1960). The court stated "[w]here one has alighted and is not in physical contact with the car, but is standing or walking away from it, many authorities reject claims under such provisions." *Id.* (citing cases). In light of the finding that Henderson was in physical contact with the car, the court did not examine the issue further. *Id.*

One line of cases holds there must be actual physical contact with the vehicle to occupy it within the terms of an insurance policy. *See, e.g., Green v. Farm Bureau Mut. Auto. Ins. Co.*, 80 S.E.2d 424 (W. Va. 1954). We reject that idea as impracticable and illustrate this with two examples. Under the physical contact test, one changing a tire at roadside would be covered until she reached for the next lug nut. If physical contact was then broken, there would be no coverage. Once the contact is resumed, as she tightens each lug nut, the coverage would be as well. Under American's interpretation, she would have five temporary moments of coverage as she tightened five lug nuts. Likewise, if an individual is leaning against his car and notes a car skidding toward him, he would have two choices under the physical contact test. He could remain leaning against the car, be crushed but retain coverage, or he could leap to safety and lose coverage for any injuries he may sustain at that point. In each of

these examples, the insured is clearly involved in vehicle-related activities, and the insurer bears no greater risk because of physical contact with the car or lack thereof.

We believe a more equitable and workable approach was outlined in *General Accident Ins. Co. of America v. Olivier*, 574 A.2d 1240 (R.I. 1990). The court adopted the following criteria in determining whether the insured was occupying the vehicle:

> 1. there is a causal relationship or connection between the injury and the use of the insured vehicle;
>
> 2. the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be touching it;
>
> 3. the person must be vehicle oriented rather than highway or sidewalk oriented at the time; and
>
> 4. the person must be engaged in a transaction essential to the use of the insured vehicle at the time.

Id. at 1241 (quoting *Utica Mut. Ins. Co. v. Contrisciane*, 473 A.2d 1005 (Pa. 1984)); *see also Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992) (applying same criteria in uninsured motorist case); 1 Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* 189-228 (1985) (claims will be sustained when in close proximity to vehicle or engaging in vehicle related acts).

Applying these criteria to the facts of this case, we find that Tropf was occupying the Farrell car under the terms of American's policy. There was clearly a causal relationship between the injury and the use of the insured vehicle. The reason

Tropf was on the roadside was to inspect the vehicle for damage sustained in an accident. Tropf was also in close geographical proximity to the vehicle; he was inspecting it for damage. Stopping to inspect a car after a collision is a vehicle-oriented action. It would indeed be awkward for an insurance company to argue that its insureds should not inspect their cars for damage after collisions. Inspecting a vehicle after an accident is clearly essential to the use of that vehicle. Thus, Tropf was occupying the vehicle within the terms of the policy at the time of his injury.

Although Tropf was not in direct physical contact with the vehicle at the time he was injured, his injury was causally related to the vehicle, he was in close geographical proximity to the vehicle, was vehicle-oriented, was engaged in a transaction essential to the use of the vehicle, and was in direct physical contact when the sequence of events leading to his injury began. We reverse the decision of the district court, and hold that Tropf was occupying the vehicle under the terms of the policy

REVERSED.