IN THE COURT OF APPEALS OF IOWA

No. 1-824 / 11-0371
Filed December 7, 2011

JAMES CUNNINGHAM,
Plaintiff-Appellant,

vs.

AVIVA LIFE AND ANNUITY COMPANY f/k/a AMERUS LIFE INSURANCE COMPANY,
Defendant-Appellee.

AVIVA LIFE AND ANNUITY COMPANY,
Defendant-Counterclaimant,

vs.

JAMES CUNNINGHAM, Individually and d/b/a FAMILY FINANCIAL SOLUTIONS,
Plaintiff-Counterclaim Defendant.

Appeal from the Iowa District Court for Polk County, Scott Rosenberg, Judge.

The counterclaim defendant appeals from the district court order granting summary judgment in favor of the counterclaimant. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Joseph A. Cacciatore of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellant.

John T. Clendenin, Stephanie G. Techau and Matthew R. Eslick of Neymaster, Goode, West, Hansell & O'Brien, Des Moines, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

James Cunningham appeals from the district court order granting summary judgment in favor of Aviva Life and Annuity Company (Aviva). Cunningham argues the district court erred in granting summary judgment on Aviva's breach of contract and indemnification claims, as well as awarding attorney fees. We hold that the entry of summary judgment on Aviva's breach of contract claim was proper. However, there was a genuine issue of material fact regarding Aviva's indemnification claim, namely whether the underlying claim that resulted in the loss to Aviva was due at least in part to its own wrongful actions. Additionally, attorney fees were awarded pursuant to the indemnification provision. Therefore, we reverse the entry of summary judgment on Aviva's indemnification and attorney fees claims, and remand.

I. Background Facts and Proceedings.

This case concerns a contractual dispute between Aviva and Cunningham. On January 6, 2004, Cunningham entered into a contract with Aviva,[1] entitled "Personal Producing General Agent Contract." Under the agreement, Cunningham was authorized to sell insurance products for Aviva and would receive commission for his sales. The contract had two provisions relevant to the current proceedings. Under the first, Cunningham was to return commissions paid to him on "cancelled or declined policies or on premiums we have returned." Under the second, Cunningham was to indemnify Aviva "for any

[1] Cunningham entered into this contract with AmerUs Life Insurance Company. After a merger in 2008, Aviva became the successor in interest to AmerUs and Indianapolis Life Insurance Company. For ease of reference, we use Aviva to refer to AmerUs.

damages or other loss, costs or expenses (including attorney fees)" Aviva incurred as the result of Cunningham's acts or omissions.

In a letter dated February 3, 2006, Aviva terminated the contract between the parties. On April 5, 2007, Aviva paid to Cunningham a final commission payment in the amount of $651,331.62.

In March 2009, Aviva received a complaint from Dr. David Stussy about an equity indexed life insurance policy issued by Aviva in 2006 that Cunningham had sold him. In a letter from Dr. Stussy's attorney dated March 16, 2009, Dr. Stussy alleged that Cunningham falsely represented the terms of the policy and forged Dr. Stussy's signature on a document. Dr. Stussy also alleged that not only was Aviva aware of the fraudulent activity, but Aviva assisted and encouraged it.

Aviva began investigating Dr. Stussy's claims, but Cunningham refused to respond to Dr. Stussy's allegations. In a letter dated December 30, 2008, Cunningham's attorney informed Aviva that Cunningham "is not inclined to provide any information to Aviva and is not aware of what has been occurring with regard to this account." Aviva concluded the complaints about Cunningham's conduct were founded, and that Aviva could be placed at risk of substantial money damages if the matter was litigated.

On May 8, 2009, Aviva and Dr. Stussy entered into a settlement agreement. The agreement stated that Dr. Stussy had paid approximately $1,200,898 in premiums. In exchange for a release of all claims against Aviva and Cunningham, Aviva paid Dr. Stussy $553,306 and forgave a loan that had

been taken out against the policy in the amount of $453,816.09. The settlement agreement further stated the release applied to all claims connected to the policy and "any other allegations detailed in [the letter from Stussy's attorney dated] March 16, 2009," and Aviva denied any allegation of fault or wrongdoing and the settlement should not be construed as any admission of liability.

On April 28, 2009, Cunningham filed a petition, seeking recovery of commission payments he alleged Aviva owed him. Aviva answered and asserted counterclaims, in which it sought reimbursement for part of the commission it had paid Cunningham for the Stussy policy, indemnity for expenses Aviva incurred to settle the legal claim regarding the Stussy policy, and legal expenses Aviva incurred to bring the current action.

On September 16, 2009, Aviva caused Cunningham to be served with interrogatories, request for admissions, and request for production of documents. On the date the discovery requests were due, Cunningham's attorney requested an extension of time and the parties agreed to extend the deadline to November 2, 2009. Cunningham, however, did not respond by the agreed date.

Aviva filed a motion for partial summary judgment, with respect to Cunningham's claims asserted against Aviva. Meanwhile, on November 18, 2009, Cunningham served Aviva with his responses to Aviva's request for admissions. Cunningham did not respond to the other pending discovery requests. On January 21, 2010, the district court granted Aviva's motion for partial summary judgment, and entered judgment against Cunningham and in favor of Aviva.

On February 25, 2010, Aviva filed a motion for partial summary judgment with respect to its counterclaims against Cunningham. On April 16, 2010, Cunningham filed a motion to withdraw or amend the admissions that had been served on November 18, 2009. The district court denied Cunningham's request to withdraw his admissions, but permitted Cunningham to amend his admissions.

On August 10, 2010, the district court granted summary judgment in favor of Aviva on its breach of contract and indemnification claim. The court entered judgment against Cunningham and in favor of Aviva for,

> $378,832.60 representing the current amount of unpaid commissions Mr. Cunningham must refund to Aviva; $553,306 representing the out-of-pocket expenses paid by Aviva to settle the claims made by Dr. Stussy; and for reasonable attorney fees which shall be determined by the Court upon the submission by Aviva of an affidavit of reasonable attorney fees in the matter.

On September 3, 2010, Cunningham filed a motion to amend or enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2), which the district court denied. Cunningham appeals.

II. Standard of Review.

A district court's ruling on a motion for summary judgment is reviewed for correction of errors at law. Iowa R. App. P. 6.907; *Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 873 (Iowa 2007). Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

> Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the record,

> we view the facts in the light most favorable to the party opposing the motion for summary judgment.

Shriver v. City of Okoboji, 567 N.W.2d 397, 400 (Iowa 1997) (internal citations and quotation omitted).

The purpose of summary judgment is to avoid "useless trials." *Sorensen v. Shaklee Corp.*, 461 N.W.2d 324, 326 (Iowa 1990). The party resisting a motion for summary judgment may not simply rest on the pleadings, but "must set forth specific evidentiary facts showing the existence of a genuine issue of material fact." *Liska v. First Nat'l Bank*, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981); *see also* Iowa R. Civ. P. 1.981(3), (5).

III. Analysis.

A. Admissions.

Cunningham first asserts the district court erred by considering improper evidence. Aviva served Cunningham with a request for admissions and after Cunningham failed to timely respond, the answers were deemed admitted. *See* Iowa R. Civ. P. 1.510(2) (providing an untimely response results in the matter being admitted). One request stated that the contract contained the indemnification clause, which Cunningham later amended his answer to state, "The document speaks for itself."

In the summary judgment ruling, the district court stated,

> The Court bases its findings and ruling upon the contract between the parties itself.
>
> . . . .
>
> The fact that the Court through Judge Michael Huppert had previously found that Aviva's request for admissions are deemed admitted under Iowa Rules of Civil Procedure reduces if not eliminates any genuine issue of material fact as to whether or not

> the indemnification agreement is enforceable and applicable to Mr. Cunningham.

Cunningham filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), in which he argued that the district court should not have considered the admissions prior to being amended and the amended admissions controverted material facts. The district court denied Cunningham's motion, stating:

> The Court has considered the Motion by the Plaintiff-Counterclaim Defendant to enlarge the findings of fact and amend the conclusions of law entered by the Court in this matter. The Court finds that the prior ruling by the Court is hereby affirmed and the Court further states that the Court in making its decision relied upon the contract between the parties and the facts as presented. The Court further emphasizes that the contract between the parties controls the decision and there was no genuine issue as to any material fact regarding the contract between the parties. Therefore, the contract, being unambiguous, supports the decision rendered by the Court.

On appeal, Cunningham argues the district court considered the admissions that were previously deemed admitted, but were later amended. Aviva responds that while the admissions may have provided the most direct path to summary judgment in favor of Aviva, the record had ample evidence in other forms that supported granting Aviva's motion and the district court stated it reviewed "the entire court file" in granting Aviva's motion.

The only mention of the admissions was in the discussion of whether the indemnification agreement was applicable and generally enforceable against Cunningham. However, Cunningham did not dispute the existence of indemnification clause, or that it was generally enforceable against him. In its post-trial ruling, the district court clarified that in determining "whether or not the indemnification agreement is enforceable and applicable to Mr. Cunningham,"

the contract was unambiguous and supported summary judgment. We find no error.

B. Commission Claim.

Cunningham next asserts the contract did not require him to refund the commissions he earned on the Stussy policy. The contract stated:

> We may reject applications for insurance without specifying the reasons or cancel any policy and return the premium. You shall refund us promptly upon demand any compensation we paid to you or your agents on cancelled or declined policies or on premiums we have returned.

Cunningham argues there was a genuine issue of material fact as whether the policy was cancelled and premiums were returned. He further argues that because the Stussy policy lapsed due to nonpayment of premiums, the policy was not cancelled and premiums were not returned. Aviva responds the record demonstrates that policy lapsed, which later resulted in the cancellation of the policy, and pursuant to the settlement agreement a substantial portion of the premiums were returned to Dr. Stussy.

In a letter from Dr. Stussy to Aviva in November 2008, Dr. Stussy stated that he recently received a letter stating that his policy had lapsed and he believed this was in error as he "was informed by [Aviva] in January 2008 that the policy would be in force for 4.3 years if no further premiums were paid." He requested Aviva provide him with his file for his attorney to review and would "then go through the reinstatement process if necessary." Dr. Stussy then threatened litigation, after which Aviva cancelled the policy and returned the premiums paid pursuant to the settlement. The record demonstrates that the

Stussy policy lapsed for nonpayment, but it was later cancelled. We find Cunningham's argument is without merit.

Cunningham next argues the district court erred in summarily dismissing his affirmative defenses. He argues he was not required to return the commission based upon the doctrines of waiver, estoppel by acquiescence, in pari delicto, and unclean hands. Having reviewed Cunningham's arguments, we hold they are without merit and the summary disposition was appropriate. We affirm the entry of summary judgment on the breach of contract claim and entry of judgment against Cunningham and in favor of Aviva in the amount of $378,832.60.

C. Indemnification Claim.

Cunningham next asserts he was not required to indemnify Aviva for its loss resulting from the settlement with Dr. Stussy. Aviva sought indemnification pursuant to the contract between the parties. *See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 (Iowa 2002) (explaining a right to indemnification must arise from either a contract or tort law). In examining a contractual indemnification claim, the contract "ultimately determines the rights of the parties because our legal principles concerning indemnification are often qualified by the particular terms of the agreement." *Duckett*, 732 N.W.2d at 877. In construing a written contract, the intent of the parties must control and, except in cases of ambiguity, is determined by the language used in the contract. *Id.* Additionally, "two questions must be answered when determining a party's right to indemnification: (1) for whose

negligent acts causing damage is indemnity promised? and (2) what is the scope of the area in which indemnity is available?" *Id.* at 878 (internal citations and quotations omitted).

The indemnification provision stated:

> You agree to indemnify us for any damages or other loss, costs or expenses (including attorney fees) we incur as a result of the acts or omissions of you or your agents. This duty to indemnify shall extend to any amount you owe to us including attorney fees and other costs of collection. We may make demand upon you for any amount owed to us by your agent without first making a claim therefore against the agent.
>
> You grant to us a first priority security interest in all compensation payable to you to the extent of any amount you owe to us, and we shall have the right to offset any such amount against such compensation. Any amount you owe to us shall be due upon demand and therefore shall bear interest at the rate which shall not exceed the prime rate plus 5 percent. The prime rate shall be that interest rate established periodically by Wells Fargo Bank, Des Moines, Iowa, or any successor thereof.
>
> The duty to indemnify, grant of security interest, and right of offset established herein shall survive the termination of this contract.

The parties agree that the contract does not permit Aviva to recover for its own wrongful acts, and thus only permitted recovery for Cunningham's wrongful acts. *See Duckett*, 732 N.W.2d at 878 ("[A]n indemnity agreement must clearly express an intention to indemnify the indemnitee for its own negligence in order to give it that effect." (citing *McNally*, 648 N.W.2d at 571 ("[I]ndemnification contracts will not be construed to permit an indemnitee to recover for its own negligence unless the intention of the parties is clearly and unambiguously expressed.")). Additionally, the contract did not require Aviva to establish it was liable to Dr. Stussy in order to be indemnified for the settlement. *See Duckett*, 732 N.W.2d at 880 (explaining that "an indemnitee who has settled the

underlying claim must first establish it was liable to the injured party as an element of recovering indemnification," but only if the contract requires it).

> When an indemnification agreement permits the indemnitee to recover indemnification independent of any underlying liability to the injured party, then the allegations of liability by the injured party do not limit the indemnitee's claim for indemnification. Instead, when the indemnification agreement permits indemnification for a loss incurred for reasons other than legal liability, or a "purely voluntary" loss, the indemnitee is entitled to show as a part of the indemnification claim that the loss incurred by settling the underlying claim brought by the injured party was based on non-legal reasons, such as a business decision, despite the allegations of its own legal liability.

Id. at 880. Thus, Aviva could

> settle a claim brought by the injured party based on claims of its own negligence, then show in an indemnification action that the loss or settlement by [Aviva] was actually a 'purely voluntary' loss based on the liability of [its agent Cunningham], not its own negligence.

Id. at 881.

Cunningham raises two arguments on appeal. He argues that because Dr. Stussy's claim was based on allegations of wrongful acts by Aviva and Cunningham and this claim resulted in the loss to Aviva, Aviva has sought indemnification from Cunningham for its own wrongful acts. He also argues the loss was the result of Aviva's own wrongful acts, and consequently Aviva has not established that the settlement was a purely voluntary loss. Relevant to both of his arguments is his claim there is "a genuine issue of material fact as to whether Aviva was guilty of any wrongdoing relating to Stussy's allegations."

The record contained the March 2009 letter from Dr. Stussy's attorney to Aviva, the settlement agreement, and two affidavits of Aviva employees—

Barbara Addy, a senior specialists, agency services, and Louise Marling, a senior vice president-customer and agency services and insurance administration. In the March 2009 letter, Dr. Stussy alleged that Cunningham had falsely represented the policy terms and forged Dr. Stussy's signature on a "Life Insurance Fact Sheet." Dr. Stussy also alleged that Aviva sold unsuitable indexed life insurance though a variety of agents and "had full knowledge that agents were engaged in fraud and indeed helped finance and establish 'financial planning' companies that duped consumers who were nearing retirement age." The letter set forth several legal grounds alleging that Aviva was liable for Cunningham's actions, but also set forth two legal grounds on which it alleged Aviva was liable for its own actions: (1) Aviva had a duty to determine the suitability of the policy for the policy purchaser under Minnesota law, which cannot be delegated to the agent; (2) the actions of Aviva violated the deceptive trade practices laws. Finally, the letter stated,

> I am aware that Aviva . . . [has] been the subject of several class actions involving the sale of annuities through living trust [wills]. I am not aware of such an action, however, relating to the sale of indexed life insurance. Under these circumstances, it would seem to me prudent for [Aviva] to come to terms with Dr. Stussy and try to resolve this matter.

The settlement agreement extinguished all possible claims arising from the sale of the policy to Dr. Stussy against Aviva and Cunningham. Both Addy and Marling's affidavits stated that Dr. Stussy alleged Cunningham had misrepresented the terms of the policy and forged Dr. Stussy's signature, and an investigation resulted in Aviva determining Dr. Stussy's complaints were founded. Marlin's affidavit further stated,

> Because of the risk of substantial monetary damages, the perceived strengths of Dr. Stussy's claims and the known skill and experience of his legal counsel, Aviva made a business decision to resolve Dr. Stussy's complaints by agreeing to pay him Five Hundred Fifty-Three Thousand, Three Hundred Six Dollars ($553,306.00) in exchange for his full release of all potential claims against Aviva and its predecessors *and against Cunningham and his company*.

The underlying claim that gave rise to Aviva's loss was based upon allegations of wrongdoing by both Aviva and Cunningham. While Aviva claims there were only allegations that Aviva was vicariously liable for the acts of its agents, the letter also alleged Aviva took actions to establish financial planning offices to defraud elderly consumers. The settlement released all claims against Aviva and Cunningham. While Marlin's affidavit claimed the settlement was the result of a business decision, it does not speak to the allegations of wrongdoing on Aviva's part. We find there was a genuine issue of material fact as to whether the underlying claim and resulting settlement were based at least in part upon Aviva's own wrongful acts. Consequently, we reverse the entry of summary judgment on Aviva's indemnification claim and remand.

D. Attorney Fees and Legal Expenses.

Cunningham asserts the district court erred in awarding attorney fees and legal expenses to Aviva, and argues in part that Aviva cannot recover attorney fees because Aviva was defending against its own wrongdoing. Because the attorney fees were awarded pursuant to the indemnification clause and we reverse the entry of summary judgment on Aviva's indemnification claim, we also reverse the award of attorney fees and remand.

IV. Conclusion.

The district court entered summary judgment on Aviva's breach of contract, indemnity, and awarded attorney fees. With respect to Aviva's breach of contract claim, there was no genuine issue of material fact and Cunningham's arguments to the contrary are without merit. We affirm the entry of summary judgment on this claim. With respect to Aviva's indemnification claim, the underlying claim that gave rise to Aviva's loss was based upon allegations of wrongdoing by both Aviva and Cunningham. While Aviva claims there were only allegations that Aviva was vicariously liable for the acts of its agents, the letter also alleged Aviva took actions to establish financial planning offices to defraud elderly consumers. The settlement released all claims against Aviva and Cunningham. While Marlin's affidavit claimed the settlement was the result of a business decision, it does not speak to the allegations of wrongdoing on Aviva's part. We find there was a genuine issue of material fact as to whether the underlying claim and resulting settlement were based at least in part upon Aviva's own wrongful acts. Consequently, we reverse the entry of summary judgment on Aviva's indemnification claim and remand. Additionally, because the attorney fees were awarded pursuant to the indemnification clause, we also reverse the award of attorney fees and remand. We affirm in part, reverse in part, and remand.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.