IN THE COURT OF APPEALS OF IOWA

No. 6-896 / 05-1594
Filed December 28, 2006

WESTVIEW, INC., AND
DUANE VANDER VEEN,
Plaintiffs-Appellants,

vs.

IOWA MUTUAL INSURANCE CO.,
Defendant-Appellee.

Appeal from the Iowa District Court for Osceola County, Patrick M. Carr, Judge.

Plaintiffs appeal the district court's partial grant of summary judgment and directed verdict for defendants on their claims of breach of contract, bad faith, and estoppel against an insurer. **AFFIRMED.**

Daniel E. DeKoter of DeKoter, Thole & Dawson, P.L.C., Sibley, for appellants.

Roy M. Irish of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

I. Background Facts and Proceedings

Westview, Inc. is a corporation engaged in dairy operations and is owned by Duane Vander Veen and his wife. We will refer to Westview and Vander Veen together as "Westview." In 1998 Westview entered into a contract with Sanborn Building Center, Inc. and Kenneth Vander Stouwe to build a pole barn for dairy cows. A wind storm knocked over the building before it was completed, and construction was delayed. Property damage due to the wind storm amounted to $41,350.[1]

Westview filed suit against Vander Stouwe and Sanborn Building Center under theories of negligence, breach of contract, and breach of express and implied warranties.[2] In the negligence claim, Westview alleged Vander Stouwe failed to properly brace the rafters while the building was being constructed and this caused the rafters to collapse in the wind storm. Westview claimed it suffered consequential damages of more than one million dollars due to lost milk production as a result of the delay in the construction of the pole barn.

Vander Stouwe had a commercial general liability policy with Iowa Mutual Insurance Company, with policy limits of one million dollars. Iowa Mutual issued a reservation of rights letter, stating it was reserving the question of coverage, except for the direct property damages of $41,350. Iowa Mutual asserted that

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[1] The construction contract provided, "Owner to carry fire, tornado and other necessary insurance." After the wind storm, Westview made a claim against its insurer, Farmers Mutual Insurance Company, for $41,000, and received this amount.

[2] Westview and Sanborn Building Center entered into a settlement agreement, and Sanborn was dismissed from the suit. Westview received $15,000 in the settlement.

most, if not all, of the damages claimed by Westview were outside the coverage of the policy.

Iowa Mutual agreed to defend Vander Stouwe in the suit and hired the Fitzgibbons Law Firm of Estherville, Iowa. An attorney of that firm, Ned Stockdale, filed a motion for summary judgment based on the economic loss doctrine. *See Determan v. Johnson*, 613 N.W.2d 259, 264 (Iowa 2000) (finding that where a buyer loses the benefit of a bargain because goods are defective, he should look to contractual remedies, not tort); *American Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439 (Iowa 1999) (noting the economic-loss doctrine prohibits tort recovery for purely economic losses, consigning such claims to contract law).

The motion for summary judgment asserted that Westview's claims for construction delays and improper construction were not tort claims, but rather should be considered contract claims. The district court agreed, and granted summary judgment to Vander Stouwe on the negligence claims. Iowa Mutual continued to defend Vander Stouwe.[3]

Vander Stouwe hired independent counsel, Lloyd Bierma, and entered into a settlement agreement with Westview, which provided the parties did not consider the district court's rulings to be final and binding, especially on the issue of negligence. In settlement of all claims, Vander Stouwe signed a confession of judgment for $300,000, but Westview agreed not to collect from him. Vander

[3] On behalf of Vander Stouwe, Iowa Mutual offered to settle the case for $43,000, but Westview rejected this offer.

Stouwe assigned his rights against Iowa Mutual to Westview, and Westview was to attempt to collect the $300,000 from Iowa Mutual.

Westview filed the present suit against Iowa Mutual, raising theories of (1) breach of contract for failing to pay the $300,000, (2) third-party bad faith based on the defense of Vander Stouwe, and (3) breach of contract based on a failure to properly defend Vander Stouwe. Counts II and III were based on the allegation that Iowa Mutual did not provide an adequate and proper legal defense to Vander Stouwe because the claims where there was arguably insurance coverage were dismissed based on the motion for summary judgment. Westview alleged Iowa Mutual acted in its own best interests and not those of Vander Stouwe.

Iowa Mutual filed a motion for summary judgment, stating there was no coverage under the insurance policy for the claims against Vander Stouwe and so he had nothing to assign to Westview. Westview resisted and filed a motion for partial summary judgment, stating that under the case of *Kelly v. Iowa Mutual Insurance Co.*, 620 N.W.2d 637, 644-45 (Iowa 2000), Iowa Mutual should be required to pay a fair and reasonable settlement demand. Iowa Mutual resisted plaintiff's motion for partial summary judgment.

The district court granted Iowa Mutual's motion for summary judgment and denied Westview's motion. The court determined Iowa Mutual would be required to pay the settlement amount under *Kelly*, 620 N.W.2d at 645, only if there was coverage under the insurance policy. The court found the wind storm was an "occurrence" as that term was defined in the policy. The court further found, however, that there was no coverage under the policy for certain types of

property damage, and Westview's claims were for these types of property damage. Because there was no coverage under the policy, Iowa Mutual was not required to pay the settlement amount, making summary judgment appropriate.

Westview filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). On reconsideration, the district court determined it should not have granted summary judgment on all three counts in the petition. The court determined summary judgment was appropriate on Count I, regarding whether Iowa Mutual should pay the settlement amount. The court found summary judgment on Counts II and III, regarding the adequacy of the defense, was not appropriate at that time. Westview then amended its petition to claim Iowa Mutual should be estopped to deny coverage based on its prejudicial conduct toward Vander Stouwe.

The case proceeded to a jury trial on the remaining issues. Plaintiff presented the testimony of Bierma, who testified he acted as independent counsel for Vander Stouwe, but remained in contact with Stockdale, and he had been aware of the motion for summary judgment. William Lego, a claims adjuster for Iowa Mutual, testified he was in contact with Stockdale but he did not direct the defense of Vander Stouwe. Leonard Bucklin, an attorney called as an expert, testified the Fitzgibbons Law Firm should have acted solely in the best interest of Vander Stouwe. Bucklin stated the law firm breached its fiduciary duty to Vander Stouwe by filing the motion for summary judgment that eliminated the negligence claims. Vander Veen testified about his consequential damages arising from the delay in completion of the pole barn.

Plaintiff then rested, and Iowa Mutual filed a motion for directed verdict. The district court granted the motion for directed verdict. The court questioned whether the actions of the Fitzgibbons Law Firm should be attributable to Iowa Mutual. The court also determined Stockdale's motion for summary judgment was not designed to eliminate coverage under the insurance policy. The court concluded the actions of Stockdale for the firm did not rise to the level of actionable conduct. Furthermore, on the estoppel claim, the court determined there was no evidence of detrimental reliance by Vander Stouwe.

Westview filed a motion for new trial and a motion for leave to amend the petition to conform to the proof. The district court denied these motions. Westview appealed the decisions of the district court.

II. Summary Judgment

Westview contends the district court should have granted its motion for partial summary judgment. We review for the correction of errors at law. 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 nonmoving party. *Eggiman v. Self-Insured Co.*, 718 N.W.2d 754, 758 (Iowa 2006).

Westview's motion for partial summary judgment was based on the following provision:

> An insurance company cannot use its erroneous belief that it has no coverage to justify a refusal to settle. At the point in time that the insurer is faced with a fair and reasonable settlement demand

> that a reasonable and prudent insurer would pay, the insurer must either abandon its coverage defense and pay the demand or lose its right to control the conditions of settlement. If the insurer prefers to debate coverage and, accordingly, refuses to pay the settlement demand, the insured is free to either pay the settlement demand or stipulate to the entry of judgment in the amount of the demand. The insurer, if found to have coverage, will be liable for the insured's settlement if the settlement is found to be fair and reasonable.

Kelly, 620 N.W.2d at 644-45 (citations and footnotes omitted). Westview asserts that it entered into a fair and reasonable settlement with Vander Stouwe and Iowa Mutual, as the insurer, should be liable to pay the amount of the settlement.

Whether Iowa Mutual is liable to pay the amount of the settlement hinges upon whether Vander Stouwe had coverage under the insurance policy against Westview's claims. *See id.* at 645. The provision in *Kelly* only applies if the insurer has an "erroneous belief it has no coverage . . . ." *Id.* at 644. If in fact there is no coverage, the insurance company is not liable for a subsequent settlement by the insured. *Id.* at 645; *see also Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 408 (Iowa 2005) (noting an insurer is liable to pay a settlement if the insurer provides liability coverage for the third-party tort claim).

Looking at the commercial general liability policy in question, we agree with the district court's conclusion that Vander Stouwe was not covered for the claims made by Westview for consequential damages. The policy excludes certain types of property damage, including:

> (j) "Property damage" to:
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> . . . .
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> (5) That particular part of any real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if that "property damage" arises out of those operations; or

> (6) That particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.
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> . . . .
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> (l) "Property damage to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
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> . . . .
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> (m) "Property damage" to "impaired property" or property that has not been physically injured arising out of:
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> (1) A defect, deficiency, inadequacy, or dangerous condition in "your product" or "your work"; or
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> (2) A delay or failure by you or anyone acting in your behalf to perform a contract or agreement in accordance with its terms.

In particular, we note that Westview was seeking damages based on loss of use of dairy cows, which were not physically injured in the wind storm, due to a delay or failure by Vander Stouwe to perform a contract or agreement in accordance with its terms. Westview points out that exclusion (m) does not apply to the loss of use of other property, here the cows, arising out of sudden and accidental physical injury to Vander Stouwe's product or work "after it has been put to its intended use." Here, the pole barn had not been put to its intended use at the time it was damaged, because it was not yet finished. We conclude there was no coverage for Westview's consequential damages claims under the policy.

Westview placed great emphasis in their argument of the existence of an admission. Westview asserts Iowa Mutual admitted there was "coverage in the amount of $1 million for all claims of loss based on the legal theory of negligence . . . ." Iowa Mutual later clarified and amended this admission to provide that the policy limits were one million dollars for negligence claims. As the district court noted, Iowa Mutual's position was understood by the parties from the beginning of the case–that it was disputing coverage except for the property damage

directly caused by the wind storm. We determine Iowa Mutual did not admit there was coverage for all of Westview's claims.

We conclude Iowa Mutual was not obligated to pay the settlement amount. *See id.* at 644-45. We determine the district court properly granted summary judgment to Iowa Mutual on this issue.

III. Directed Verdict

Our standard of review on appeal from the grant of a motion for directed verdict is for correction of errors at law. *Mensink v. American Grain*, 564 N.W.2d 376, 379 (Iowa 1997). The court should review the evidence in the light most favorable to the nonmoving party to determine whether a fact issue was generated. *Dettman v. Kruckenberg*, 613 N.W.2d 238, 250-52 (Iowa 2000). Where substantial evidence does not exist to support each element of a plaintiff's claim, the court may sustain the motion. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 313 (Iowa 1998).

A. Westview claims the district court improperly granted a directed verdict to Iowa Mutual on its claim of breach of the contract to defend. It asserts Iowa Mutual had a duty to provide a proper and adequate defense for Vander Stouwe, and the attorney chosen by Iowa Mutual had a duty to act in Vander Stouwe's best interests. Westview relies upon Bucklin's testimony that defense counsel had breached the standard of care by filing the motion for summary judgment without obtaining Vander Stouwe's informed consent.

A claim by an insured against an insurer for failure to defend may be assigned to the injured party. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 533 (Iowa 1995). When an insurer assumes the duty to defend, it has control over

the defense, and it is required to give proper consideration to the interests of the insured. *Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 33 (Iowa 1982). A covenant of good faith and fair dealing is implied in the duty to defend. *Kelly*, 620 N.W.2d at 643. "A covenant is implied in an insurance contract that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement." *Loudon v. State Farm Mut. Ins. Co.*, 360 N.W.2d 575, 578-79 (Iowa Ct. App. 1984) (citation omitted).

We consider:

> "Did the insurer exercise that degree of skill, judgment, and consideration of the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit may have been expected to utilize?"

Kooyman, 315 N.W.2d at 33 (citation omitted). On the other hand, an insurer's "sub-par" investigation and evaluation of a claim does not, standing alone, prove a claim of bad faith. *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 658 (Iowa 2000). In Iowa a plaintiff must present evidence of an indifference to or disregard of the interests of the insured. *Kooyman*, 315 N.W.2d at 33; *Loudon*, 360 N.W.2d at 578.

In ruling on the motion for directed verdict, the district court stated:

> So when I look at your case on an individualized basis, I don't agree with the fundamental premise of Mr. Bucklin which is that by throwing out the negligence claims, Stockdale threw out the coverage. . . .
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> But for today I haven't heard the kind of evidence that suggests that Mr. Stockdale threw Vander Stouwe to the wolves or left him uncovered. There's no evidence about closing the file, pulling the pleadings, leaving the case that I've heard. I'm sure there wasn't such evidence to be had.
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> So I've kind of concluded that the things that you say Stockdale did that have, one, breached the contract by failing to

> provide an adequate legal defense as required by the insurance contract, or by leaving him exposed without any insurance by virtue of filing this summary judgment motion do not seem to me to rise to the kind of level that I think our supreme court will say is actionable conduct in this context.

We concur in the district court's conclusion that Westview failed to present sufficient evidence to show bad faith under the insurance policy. Westview did not present evidence Iowa Mutual acted with indifference or with disregard to Vander Stouwe's interests. The motion for summary judgment filed by Stockdale limited the claims against Vander Stouwe, and was not contrary to his interests. We find no error in the district court's grant of the motion for directed verdict on this issue.

B. Westview contends the district court erred in directing a verdict on its third-party bad faith tort claim against Iowa Mutual. This issue is not based on the implied covenant of good faith and fair dealing which arises from a contract, which was discussed above. *See Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 (Iowa 2001) (noting every contract contains an implied covenant of good faith). The tort of bad faith arises in situations where the insurer has denied benefits or has refused to settle a third-party's claim against the insured within the policy limits. *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 51 (Iowa 2003). On issues such as that brought here, for bad faith failure to adequately defend, Iowa does not recognize a third-party bad faith tort action between a third-party claimant and the tortfeasor's insurer. *See Long v. McAllister*, 319 N.W.2d 256, 262 (Iowa 1982).

In ruling on Westview's posttrial motions after the directed verdict, the district court concluded, "The species of bad faith claimed by Plaintiffs have not

been recognized by any reported decision of an Iowa appellate court." We find no error in the district court's conclusion, and determine a directed verdict was appropriate on this issue.

C. Westview contends the district court erred in granting a directed verdict to Iowa Mutual on its claim of equitable estoppel. Westview asserts Iowa Mutual should be estopped from denying coverage because in defending Vander Stouwe it acted in a manner detrimental to his interests. Westview relies upon *Westfield Insurance Co. v. Economy Fire & Casualty Co.*, 623 N.W.2d 871, 879 (Iowa 2001) (citation omitted), which provides:

> When an insurance company assumes the defense of an action, with knowledge actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage.

The appropriate legal doctrine to apply in such situations is equitable estoppel, and not estoppel by acquiescence. *Westfield*, 623 N.W.2d at 880-81.

The elements of equitable estoppel are: (1) a false representation of concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury. *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005).

In ruling on the motion for a new trial, the district court found, "The required elements of reasonable reliance and actual prejudice were not established by substantial evidence." We find no evidence in the record to support the elements of equitable estoppel. We determine the district court did

not err in granting a directed verdict to Iowa Mutual on the issue of equitable estoppel.

We affirm the decision of the district court.

AFFIRMED.