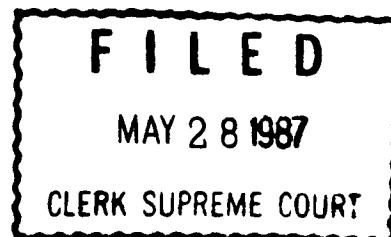


IN THE COURT OF APPEALS OF IOWA



JOHN GLENN PAYNE, KITA SUSANNE
PAYNE, and CINCINNATI MILACRON
COMPANY,)

Plaintiffs-Appellants,)

vs.)

NORTHLAND INSURANCE COMPANY,)

Defendant-Appellee.)

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Filed May 28, 1987

7-08
85-1846

Appeal from the Iowa District Court for Pocahontas County (No. CL18-0983)

- Newt Draheim, Judge.

Plaintiffs appeal from a judgment dismissing their petition alleging defendant breached its contractual duties to plaintiffs as third-party beneficiaries of an insurance contract. **AFFIRMED.**

Thomas T. Tarbox, of Bennett, Wilke, & Tarbox, Ft. Dodge, for plaintiffs-appellants.

David L. Phipps, of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, for defendants-appellees.

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

SACKETT, J.

Plaintiffs John Glenn Payne, Kita Payne and Cincinnati Milacron Company appeal from a judgment dismissing their petition alleging Defendant Northland Insurance Company breached its contractual duties to plaintiffs as third-party beneficiaries of an insurance contract between Northland and Ron Reed d/b/a Triple R. Trucking. We affirm.

This action arises out of a collision that occurred in Minnesota involving a tractor-trailer unit operated by Robert Reed, Ron Reed's son, and a vehicle operated by John Payne and apparently owned by Milacron. At the time of the collision, Ron Reed owned two businesses, Reed Livestock and Triple R. Trucking. Reed Livestock bought, sold and delivered hogs primarily within a 100-mile radius of Laurens, Iowa. The tractor-trailers used for Reed Livestock were insured with Mutual Fire and Auto Insurance Company and were not authorized interstate carriers. Triple R was an interstate contract carrier operating under an Interstate Commerce Commission Certificate of Public Convenience and Necessity and under ICC authority to haul food and food-related products. Tractor-trailers used primarily by Triple R were insured by Northland. Ron Reed testified the tractor-trailer in question had been leased from Harco Leasing Company in Chicago, Illinois.

Prior to the collision, Robert Reed had driven a load of meat from Storm Lake, Iowa to Salem, Ohio. He then picked up a load of aluminum from Apex International Alloys, Inc., the shipper listed on the bill of lading, in Cleveland, Ohio, and was delivering it to a Minnesota company when the collision happened. Desert Farm Lines was the carrier listed on the shipping documents and trip sheet. However, there was no formal written lease between Triple R and Desert

Farm Lines. It is unclear whether the tractor-trailer carried labels or placards for Desert Farm, Triple R or Reed Livestock.

Plaintiffs filed a negligence action in Minnesota district court. On January 19, 1983, plaintiffs obtained a default judgment against Robert Reed and Ron Reed, individually and doing business as Reed Livestock, Reed Stockyards and Triple R. The Minnesota judgment was transcribed and recorded as a foreign judgment by the Pocahontas County district court on March 21, 1983. Execution of the judgment was returned unsatisfied on August 30, 1983. Plaintiffs then filed a direct action under Iowa Code chapter 516 against Northland and Mutual on September 19, 1983, 243 days after entry of judgment in the Minnesota district court and 180 days after the filing of plaintiffs' foreign judgment in Iowa district court. Counts I and II of plaintiffs' petition alleged Reed's insurers, Northland and Mutual respectively, had failed to satisfy a valid judgment entered against their insured. Count III alleged Northland had breached its contractual obligation to plaintiffs as third-party beneficiaries of Triple R's interstate carrier insurance contract with Northland.

Northland moved for summary judgment on Counts I and II of plaintiffs' petition alleging plaintiffs were barred by the 180-day statute of limitations governing direct actions by judgment creditors against insurers. Iowa Code §516.3 (1983). Northland also moved for summary judgment on Count III contending plaintiffs' claim for recovery as third-party beneficiaries was really a direct action and thus barred by §516.3. The trial court granted Northland's motion as to counts I and II and overruled Northland's motion on Count III.

After trial to the bench on a stipulated record, the trial court entered a judgment dismissing plaintiffs' petition on the third-party beneficiary claim. This appeal followed.

Our scope of review on actions at law is on assigned error only. Iowa R. App. P. 4. Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The trial court is vested with wide discretion and its findings are entitled to the same weight as a jury verdict. H. & S. Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa App. 1984). The trial court decision will be upheld if any proper ground appears in the record. Id.; Williamsen v. Casey, 220 N.W.2d 638, 639 (Iowa 1974).

Plaintiffs argue the trial court erred in failing to find Northland liable under the third-party beneficiary hearing and holding their claim under this theory was barred by the statute of limitations in §516.3 governing direct action.

Iowa Code §516.1 (1987) governs direct actions by plaintiffs against an insurer:

All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced his claim against such insurer had such insured paid such judgment.

In Steffens v. American Standard Insurance Company of Wisconsin, 181 N.W.2d 174, 178 (Iowa 1970), the Iowa Supreme Court held Iowa's direct action statute is not the exclusive remedy against a liability insurer. The court held further that the 180-day statute of limitations set forth in Iowa Code §516.3 therefore is not applicable to actions not brought under the direct action statute. Id. at 177.

Although a third-party beneficiary action is not one of the remedies the Steffens court specifically cited as available to a judgment creditor outside the ambit of the direct action statute, we determine the trial court was correct

in finding such action is not foreclosed by §516.1. That determination, however, does not mean plaintiffs are entitled to recover from Northland. Plaintiffs must still prove their third-party beneficiary claim.

To enforce a contract, third-party beneficiaries must prove they are "direct" beneficiaries of a contract made for their express benefit. Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co., 355 F. Supp. 376, 393 (S.D. Iowa 1973); Khabbaz v. Swartz, 319 N.W.2d 279, 284 (Iowa 1982); Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973), cert. denied 413 U.S. 830, 95 S.Ct. 52, 42 L.Ed.2d 55 (1974); Bain v. Gillespie, 357 N.W.2d 47, 50 (Iowa App. 1984). A direct beneficiary is either a donee beneficiary or a creditor beneficiary. Peter Kiewit Sons' Co., 355 F. Supp. at 393. It cannot be contended that plaintiffs are donee beneficiaries, that is, that Northland intended to bestow a gift on them. Accordingly, plaintiffs must come within the concept of creditor beneficiary or their claims will fail. In Bain, the court stated:

(1) Where performance of a promise in a contract will benefit a person other than the promisee that person is, *** (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary; (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary.

Bain, 357 N.W.2d at 50 (quoting Olney v. Hutt, 251 Iowa 1379, 1386, 105 N.W.2d 515, 519 (1960)). "The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." Bailey, 213 N.W.2d at 645 (quoting 17 Am. Jur.2d Contracts §304 at 727-30 (1964)). See D.R.R. v. English Enterprises, CATV, Division of Gator Transportation, Inc., 356 N.W.2d 580, 586 (Iowa App. 1984). In making

a determination our inquiry is not limited to the language of the contract; we may also examine the testimony of the parties involved and look to the circumstances surrounding the adoption of the agreements in question. Id.

In the instant case, the plaintiffs provided some support for the general legal issue that injured plaintiffs should be considered as intended beneficiaries of liability insurance required under specific statutes such as the Interstate Commerce Act. However, plaintiffs failed to establish under which specific insurance contract they should be intended beneficiaries: Triple R and Northland, Reed Livestock and Mutual, Desert Farm Lines and its insurance carrier, or Harco and its insurance contract.

To answer that question first requires determining the ownership of the tractor-trailer and the ICC authorized carrier for the aluminum. Plaintiffs maintained at trial that Triple R owned the tractor-trailer and was the authorized carrier. Plaintiffs' evidence, however, does not support their contention. Plaintiffs' only evidence at trial was a stipulated record consisting of Ron Reed's deposition and accompanying exhibits. Contrary to plaintiffs' contentions Ron Reed testified Harco owned the tractor-trailer and it was operated solely under Desert Farms' ICC authority when the collision occurred. The bill of lading and Triple R's invoice to Desert Farms which were incorporated into Reed's deposition support his testimony. Plaintiffs did not make any other offers of proof or request production of any documents showing that Triple R was the carrier in question. Thus, we determine plaintiffs did not sustain their burden of proof to establish by sufficient evidence that Northland was the insurer liable to plaintiffs. As such the trial court was correct in finding plaintiffs' claim, no matter how characterized, was still a direct action barred by the 180-day statute of limitations set forth in Iowa Code chapter 516.

Section 516.1 sets forth specific requirements before a plaintiff may obtain judgment under a direct action claim. An injured plaintiff has no rights to the tortfeasor's insurance policy until:

1. Judgment is entered against the insured;
2. Judgment against the insured is returned unsatisfied.

See Roach v. Estate of Ravenstein, 326 F. Supp. 830, (S.D. Iowa 1971); Farm & City Insurance Co. v. Coover, 225 N.W.2d 335, (Iowa 1975). In addition, Iowa Code §516.3 (1987) requires an injured plaintiff may maintain a direct action only if such action is brought against the insurer within 180 days of entry of judgment in the initial action. Pries v. M.F.A. Mutual Insurance Co., 255 Iowa 442, 444-45, 122 N.W.2d 925, 927 (Iowa 1963). See Schneberger v. United States Fidelity & Guaranty Co., 213 N.W.2d 913, 919 (Iowa 1973).

The instant action was initiated more than 180 days after entry of the Minnesota judgment, which constitutes the initial action. Since plaintiffs have not sustained their contention that the instant case is more than a direct action claim, we affirm the trial court's dismissal of plaintiffs' petition.

AFFIRMED.