IN THE COURT OF APPEALS OF IOWA

No. 2-044 / 91-919

KENNETH ALBERT FEES, JR.,
JANET ELAINE FEES, and
KENNETH ALBERT FEES, JR.,
as Father and Next of Friend to
JESSE DANIEL FEES and APRIL DAWN FEES,

Appellants,

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vs.

MUTUAL FIRE AND AUTOMOBILE
INSURANCE COMPANY, DAVE TEMPLE
INSURANCE SERVICES, and JOHN WOODLAND,

Appellees.

Appeal from the Iowa District Court for Hamilton County, M. D. Seiser, Judge.

Plaintiffs appeal the trial court's ruling granting defendants' motions for summary judgment. **REVERSED.**

Patrick B. Chambers, Webster City, for appellants.

Jack W. Rogers, Des Moines, for appellee Mutual Fire and Automobile.

Bruce P. Bickel, Ames, for appellee Dave Temple Insurance Services.

Mark D. Aljets and Michael E. Marshall of Smith, Schneider, Stiles, Mumford, Schrage, Zurek, Wimer & Hudson, P.C., Des Moines, for appellee John Woodland.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Kenneth and Janet Fees owned a house which was destroyed by fire. Their fire insurer, Mutual Fire and Automobile Insurance Co. (Mutual), was reluctant to cover the loss due to a suspicion of arson. The Fees hired an attorney to negotiate with Mutual about coverage. Eventually the Fees, their attorney, and Mutual reached a settlement agreement. Under that agreement Mutual paid the Fees $43,257.92. In return, the Fees executed a general release.

The Fees subsequently filed this action to avoid the release on the ground of economic duress. The defendants moved for a summary judgment, asserting the action was barred by the general release. The district court granted the defendants' motions. The Fees appeal.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. Milne, 424 N.W.2d at 423. The evidence must be viewed in the light most favorable to the resisting party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1968). Every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Id.

Fees claim the release is invalid because it resulted from economic duress. Turner v. Low Rent Housing Agency, 387 N.W.2d 596, 598 (Iowa 1986), sets forth the rule for avoiding a contract on grounds of duress.

> If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Id. (quoting Restatement (Second) of Contracts § 175(1), at 475 (1981)).

> In the comment to this section, the draftsmen of the Restatement rule note that '[a] threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it.'

Turner, 387 N.W.2d at 598.

> [U]nder this standard, duress exists where: (1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party.

Id. (quoting Totem Marine Tug & Barge Inc. v. Alyeska Pipeline Service Inc., 584 P.2d 15, 22-23 (Alaska 1978)).

We cannot say as a matter of law the plaintiffs did not suffer economic duress. After the fire the Fees and their children were left homeless. The arrangement for alternative living quarters at a motel was not fulfilled by Mutual. As a result, the Fees began living in a tent at Little Wall Lake where Mr. Fee ran a concession stand.

Early on, the insurance investigator threatened the Fees with allegations of arson. Mutual continued to insinuate arson was suspected during the three-month investigation process even though the state fire marshal had determined the cause of the fire was an electrical deficiency.

Mutual instructed the Fees to itemize all personal property indicating replacement cost values. The Fees followed Mutual's instruction and thereafter submitted a proof of loss statement. Mutual rejected the statement maintaining a more definite replacement cost statement was necessary. Mutual also contended certain items were overvalued in comparison to a bankruptcy inventory which had been filed by the Fees two years previously. Mutual maintained this contention, despite the fact the bankruptcy values were fair market values and those listed in the proof of loss statement were replacement values.

The attorney representing the Fees indicated the information they had supplied to Mutual conformed to Mutual's policy and he was at a loss to advise them on how to comply with the company's insistence on a more definite replacement cost statement. The Fees were also advised by their attorney litigation could take years, it would be costly, and therefore it was not a reasonable alternative.

At that point, the family was still residing in a tent and their financial condition was poor.

When viewed in the light most favorable to plaintiffs, we hold the record does present a genuine issue of material fact concerning the existence of economic duress. The trial court erred in granting defendants' motions for summary judgment. We reverse.

Costs of this action are taxed to defendants.

REVERSED.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court.

I believe the case of Turner v. Low Rent Housing of the City of Des Moines, 387 N.W.2d 596 (Iowa 1986), casts sufficient light on the problem before us to warrant affirming the trial court's ruling on the motion for summary judgment. Like in this case, the Turner case involved an allegation of economic duress. Our supreme court in Turner stated:

> We believe this statement from an eighth circuit case is appropriate here because of Anderson's claim of financial emergency:
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> > In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities. W. R. Grimshaw Co. v. Nevil C. Winthrow Co., 248 F.2d 896, 904 (8th Cir. 1957).

Turner, 387 N.W.2d at 599.

The plaintiff here urges in his brief, as an alternative to his main argument, that he believes the requirements to establish economic duress as enunciated in Turner are far too restrictive. He contends, the belief that simply having the ability to litigate is an alternative that defeats the use of economic distress is unreasonable. We are directed to other states that have addressed this issue and permitted recovery in less restrictive fashion than does Iowa. However, we are bound by the teachings of Turner.

In the case at bar, the Fees were represented by counsel Charles Deppe, a well-respected attorney in our state. He settled his clients' claim within a few thousand dollars of their original asking.

His original demand was $45,637.47. Mr. Fees acknowledges that he authorized his attorney to submit this amount. The letter was written on August 17, 1988, and some sixteen days later a settlement agreement for $43,257.92 was reached. In addition to the $43,257.92 paid at the time of the execution of the release, the Fees had previously received about $1,000.00 from Mutual Fire and the policy deductible was waived. Mr. Fees admits the total settlement he received was within about $1,000.00 of the amount sought as settlement two weeks earlier.

At the time when the Fees entered into the release, they discussed the matter with Mr. Deppe. Mr. Deppe explained that if they signed the release it was a full and final settlement of their claims. Factually, it appears Mr. Fees was an insurance salesman (health and life) and was acquainted with the impact of a policy release.

Turning to the release itself, the jurat signed by Attorney Deppe acknowledged that the plaintiffs executed the release as their voluntary act indeed. There the matter rested for some eighteen months, at which time the

Fees, through their attorney, Mr. Deppe, brought this action to set aside the release based upon economic duress.

The law favors settlement of controversies. As Justice Lavorato stated in Waechter v. Aluminum Co. of America, 454 N.W.2d 565, 568 (Iowa 1990):

> We recently summarized the law regarding settlement agreements in Wright v. Scott:
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> > The law favors settlement of controversies. A settlement agreement is essentially contractual in nature. The typical settlement resolves uncertain claims and defenses, and a settlement obviates necessity of further legal proceedings between the settling parties.

Thus in the case at bar, the Fees were represented by competent legal counsel and settled their fire loss claim with Mutual Fire in an amount almost equal to their askings. When I apply the facts of this case to the principles set forth in Turner, I believe the trial court was correct in sustaining the motion for summary judgment. I believe the moving party has carried the burden to establish not only that there is no genuine issue of material fact, but also that it is entitled to judgment as a matter of law. I would affirm.