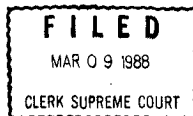


IN THE COURT OF APPEALS OF IOWA



THOMAS L. MAXWELL, CAROL)
MAXWELL and TIM MAXWELL,)

Plaintiffs-Appellants,)

vs)

FARM BUREAU MUTUAL INSURANCE)
COMPANY,)

Defendant-Appellee.)

Filed March 9, 1988

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7-327
86-1220

Appeal from the Iowa District Court for Muscatine County (C3467-685),

J L Burns, Judge.

Plaintiffs appeal a judgment in the district court upon a jury verdict in their favor, but in which the court dismissed count II of their petition and failed to submit the issue of punitive damages to the jury. **AFFIRMED.**

Benjamin W. Blackstock of Eells, Blackstock, Affeldt & Harms, Cedar Rapids, for plaintiffs-appellants.

Thomas J. Shields of Lane & Waterman, Davenport, for defendant-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The plaintiffs appeal a judgment in the district court upon a jury verdict in their favor, but in which the court dismissed count II of the plaintiffs' petition and failed to submit the issue of punitive damages to the jury. The plaintiffs allege the district court erred in: (1) refusing to recognize their claims against their insurer for bad faith failure to settle a first-party claim and breach of duty; (2) refusing to admit competent and relevant evidence in support of count II; and (3) dismissing count II.

The plaintiffs, Thomas L. Maxwell, Carol Maxwell, and Tim Maxwell, are co-owners of a hog farming operation. A rain and wind storm hit the farm during the early morning of March 4, 1985. The power went out in the hog confinement building after rain got in and caused a circuit to short out. Without the ventilation system working, the temperature rose and 330 market weight hogs died. The plaintiffs reported the loss to the defendant, Farm Bureau Mutual Insurance Company. The Maxwells were informed on April 22, 1985, that their claim was denied because Farm Bureau believed the damage was caused by dry caulking, not wind damage (policy provided coverage only if damage was due to wind or hail). The Maxwells then brought this suit.

At trial, a verdict was returned for \$27,935.87 in favor of the plaintiffs on their breach of contract claim. The district court dismissed the plaintiffs' count II and they have appealed that ruling. Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. We affirm.

The plaintiffs contend that the district court erred in failing to recognize and submit their count II claim against Farm Bureau for bad faith failure to settle the Maxwells' first-party claim. Iowa has not yet recognized a first-party bad faith action for failure to settle an insurance claim. Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 111 (Iowa 1986). The Iowa Supreme Court

has stated that "[w]hen a claim is 'fairly debatable' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." M-Z Enters., Inc. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408, 415 (Iowa 1982). We conclude that it was not error for the district court to refuse to recognize the tort of bad faith failure to settle a first-party insurance claim.

The plaintiffs also claim that the district court erred in not recognizing their count II claim of tortious breach of contract. When a contract imposes a duty, the neglect of such a duty is a tort and an action will lie ex delicto. Amco Ins. Co. v. Stammer, 411 N.W.2d 709, 713 (Iowa App. 1987). The Maxwells argue that Farm Bureau negligently, or willfully, failed to properly investigate and pay the loss suffered by the Maxwells and, thus, Farm Bureau committed a tortious breach of the insurance contract. This court has stated that to allow an ex delicto tort claim in cases such as this "would amount to recognition of the first-party bad faith cause of action which our supreme court has repeatedly declined to recognize in similar cases." Id. Accordingly, we conclude that the district court did not err in refusing to recognize the Maxwells' claim for tortious breach of contract.

The plaintiffs' count II seeks punitive damages. The Iowa Supreme Court, in Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 920 (Iowa 1979), noted that punitive damages may be recovered in contract actions where the "defendant was guilty of malice, fraud, gross negligence, or an illegal act." Under these criteria, we fail to find support for the imposition of punitive damages on Farm Bureau. The record indicates that the claims investigation was properly carried out and the decision to deny coverage was made without any misconduct warranting punitive damages. "[S]uch recovery [of punitive damages] may not be predicated on action which involves no more than upsetting the justified expectations

of the insured." PirkI v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 636 (Iowa 1984).

Based on the foregoing discussion, we hold that the district court did not err in dismissing count II of the plaintiffs' petition. We therefore need not address whether the court erred in refusing to admit evidence in support of count II.

AFFIRMED.