

IN THE COURT OF APPEALS OF IOWA

No. 9-324 / 88-1201

FILED

MAR 27 1990

CLERK SUPREME COURT

MICHAEL J. YETMAR,

Appellant,

vs.

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ECONOMY FIRE & CASUALTY CO.,

Appellee.

Appeal from the Iowa District Court for Webster County,
Louie F. Beisser, Judge.

Plaintiff was unable to satisfy a default judgment against two tort defendants. He then filed this direct action against the tort defendants' insurer. The district court ruled in favor of the insurer, and plaintiff has appealed. **REVERSED.**

James L. Kramer and Neven J. Mulholland of Johnson, Erb, Latham, Gibb & Carlson, P.C., Fort Dodge, for the plaintiff-appellant.

Jerry C. Estes of Estes & Leehey, Fort Dodge, for the defendant-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ. Habhab, J., takes no part.

SCHLEGEL, J.

Joseph Schuster operated a dry wall business on the same premises where his home was located. He employed Michael Yetmar (plaintiff) as a laborer. One evening Schuster and plaintiff shared a beer in the Schuster yard. While they were talking, the Schuster family dog bit plaintiff and severed his ear.

Joseph Schuster reported the dog bite injury to his local insurance agent, from whom he had obtained both a homeowner's liability policy and a workers' compensation policy from separate insurance companies. The local agent reported the injury to the two insurance companies. Yetmar received over \$12,000 in workers' compensation benefits from the workers' compensation carrier.

Plaintiff filed an action against Schuster and his wife, alleging both negligence and strict liability under Iowa Code section 351.28. The insurance company from whom the Schusters had purchased a homeowner's liability policy, Economy Fire & Casualty Company (Economy), was aware a suit had been filed and it investigated the circumstances surrounding the incident. Although plaintiff's petition was filed July 20, 1984, (and amended August 10, 1984), it was not served on the Schusters until October 29, 1984.

A default judgment was subsequently entered against the Schusters. When the judgment could not be satisfied against the Schusters, plaintiff brought a direct action against Economy.

The district court ruled in favor of Economy in plaintiff's action. The district court found that although Economy was aware in general terms of the dog bite injury and the possibility of a claim by Yetmar, the Schusters had never forwarded notice of service of the petition to Economy. The district court held such notice by the Schusters was a condition precedent to coverage by Economy, and the absence of such notice defeated recovery of plaintiff's claim. Plaintiff has appealed from the district court's rejection of his action against Economy.

This was a law action tried to the court, and hence our review is for corrections of error at law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We view the evidence in the light most consistent with the judgment. Our deference to the trial court's finding of facts does not extend to its determinations of law. Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d 189, 192 (Iowa 1982).

At issue is what effect the Schusters' failure to notify their insurer that they were served notice of the suit on October 29, 1984, should have on plaintiff's direct action against Economy. Past cases have recognized a delay in giving an insurer notice of a claim will not foreclose coverage unless the insurer was prejudiced by the delay.

Bruns v. Hartford Accident and Indemnity Co., 407 N.W.2d 576, 579 (Iowa 1987); Henschel v. Hawkeye-Security Insurance Company, 178 N.W.2d 409, 415 (Iowa 1970); Henderson v. Hawkeye-Security Insurance Company, 252 Iowa 97, 105, 106 N.W.2d 86, 91 (Iowa 1960). A delay in forwarding any summons, notices, or other forms of process may also be subjected to a prejudice standard. Glade v. General Mut. Ins. Ass'n, 216 Iowa 622, 627, 246 N.W. 794, 797 (Iowa 1933).

The insurance policy issued by Economy to the Schusters provided the insureds were to forward to Economy "every notice, demand, summons, or other process relating to the accident or occurrence." Courts have recognized a policy requirement as to the forwarding of litigation papers is a condition precedent to coverage, even if a policy does not contain an express statement to this effect. 44 Am. Jur. 2d Insurance 1441 (1982). See also 45 C.J.S. Insurance 1048 (1946) (where policy provides for forwarding of process, failure to do so may bar claims of both the insured and injured party).

Numerous reasons exist for requiring an insured to forward litigation papers. The failure to do so precludes an insurer from engaging in early settlement negotiations, participating in significant pretrial proceedings, and from assuming control of the defense and making strategic decisions. Keeton & Widiss, A., Insurance Law 7.2(d)

(1988). Plaintiff contends the lack of notice to Economy and the subsequent entry of a default judgment were not prejudicial in this case because of the strict liability nature of section 351.28. See LeMars Mut. Ins. Co. of Iowa, 304 N.W.2d 422, 427-28 (Iowa 1981) (section 351.28 imposes strict liability on a dog owner); Peters v. Lyons, 168 N.W.2d 759, 766 (Iowa 1969) (section 351.28 imposes absolute liability).

None of the reasons for requiring the forwarding of litigation papers exist because Economy was not prejudiced in this matter. Economy admitted it had received notice of the claim and the identity of the policy. It also knew the identity of the insured, the place and time of the occurrence, and the circumstances of the injury. Economy actively participated in the investigation of the claim. Economy also knew that a suit had been filed. In addition, it should have been obvious to Economy that a defense was needed due the strict liability imposed in this type of case. Given the fact that Economy knew the suit had been filed, the failure to send the final notice was a mere technical error and did not prejudice Economy.

REVERSED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. This case involves not the mere delay in forwarding notice of service of process to the insurer, but the complete failure to do so. While Economy was aware a suit had been filed, it was never notified the petition had been served on the Schusters. A civil action is commenced by the filing of a petition, Iowa R. Civ. P. 48, but no duty to answer or defend arises until a defendant is served with original notice and a copy of the petition. Iowa R. Civ. P. 53. The filing of the petition alone does nothing but toll the statute of limitations. Iowa R. Civ. P. 55. Until the papers were served, the district court could not obtain jurisdiction of the action and no trial could occur.

The majority recognizes the insurance policy issued by Economy to the Schusters provided the insureds were to forward to Economy "every notice, demand, summons, or other process relating to the accident or occurrence," yet it overlooks the effects of the Schusters' failure to forward the petition and original notice to its insurer. The majority argues Economy knew the suit had been filed and it could not have been prejudiced by the "mere technical error" of the Schusters' failure to inform it the petition had been served. The majority does not explain how an insurer can effectively defend a claim if it is not even informed notice has been served and the case has commenced to the point where jurisdiction attaches and the defendant

now has a duty to answer. The Schusters' failure to forward the notice denied Economy the opportunity of filing an answer and defending the suit on behalf of the Schusters.. The lack of notice precluded Economy from negotiating a settlement or bringing a declaratory action prior to entry of a judgment.

An injured person's rights in another's liability insurance policy rise no higher than the rights of the insured. Aid Ins. Co. (Mut.) v. Chrest, 336 N.W.2d 437, 440 (Iowa 1983). The Schusters' coverage was contingent upon their compliance with the policy provisions, including the provision regarding the forwarding of legal notices. Their failure to forward notice of service of process to Economy effectively foreclosed it from defending the action. This failure should bar any claims against the policy by the Schusters or plaintiff.