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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-439 / 88-1413

FRANK KIRK, Administrator of the Estate of **VANCE S. KIRK**, Deceased,

Plaintiff-Appellee/Cross-Appellant,

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vs.

FARM & CITY INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

FRANK KIRK and **SHIRLEY KIRK,**

Plaintiffs-Appellees/Cross-Appellants,

vs.

FARM & CITY INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Defendant appeals and plaintiff cross-appeals an order awarding punitive damages against defendant. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

David J. Grace of Davis, Grace, Horvath, Gonnerman & Rouwenhorst, P.C., Des Moines, for appellant.

Richard O. McConville of Scalise, Scism, Sandre & Uhl, Des Moines, for appellees.

Heard by Donielson, P.J., and Sackett and Habhab, JJ. but decided en banc.

SACKETT, J.

Defendant Farm & City Insurance Company appeals and plaintiffs Frank Kirk, Administrator of the Estate of Vance S. Kirk, and Frank Kirk and Shirley Kirk cross-appeal following a trial court verdict granting plaintiffs recovery under an uninsured motorist insurance provision of an insurance contract with defendant. The trial court ordered defendant to pay plaintiffs $20,000, the amount of the uninsured motorist coverage. Defendant had paid this amount of the judgment and no appeal was taken on this issue. Defendant challenges the trial court's finding of fraud on its part and the trial court's decision to award punitive damages of $50,000.

Defendant challenges the sufficiency of the evidence for an award of punitive damages. Plaintiffs contend it was error for the trial court to find against them on their bad faith claim when the trial court found defendant had committed fraud. Plaintiffs also contend the trial court erred in not finding intentional infliction of emotional distress. Plaintiffs contend the punitive damage award should have been larger.

This case was decided by the trial court before the Iowa court's decision in Dolan v. AID Ins. Co., 431 N.W.2d 790 (Iowa 1988). Dolan changed and clarified the Iowa law on the issue of first party bad faith claims. We reverse the award of punitive damages and remand the case to the trial

court to consider the facts of this record under the dictates of Dolan.

The facts are as follows. Vance S. Kirk, the unmarried son of plaintiffs Frank and Shirley Kirk, was one of three persons killed in a one-car accident in Illinois in which a car owned by Lanny Weeks hit a tree. Weeks apparently was not insured, and uninsured motorist coverage for decedent Vance was available from defendant Farm & City in the amount of $20,000.

The accident happened in the late evening of April 19, or the early morning of April 20, 1984. Investigators arriving at the scene after 5 a.m. on April 20 determined the bodies had been there several hours. The car had received extensive damage to the point the investigating officer described it as having "disintegrated." Because all three bodies were thrown from the car, the investigating officer was unable to determine with certainty who was driving the vehicle. The men were last seen alive on April 19 at 10:30 p.m., when they left a bar to return to a motel. Weeks was driving at that time.

On May 10, 1984, a coroner's jury found Vance's death was the result of an accident when the car struck the tree. Shortly after the accident, Vance's parents hired an attorney to represent them on the claim. Defendant immediately paid a $1,000 medical payment under the policy but was reluctant to pay the uninsured motorist coverage.

On June 14, 1984, plaintiff's attorney acknowledged receipt of $1,000 and demanded $20,000, the amount of uninsured motorist coverage. On June 15, 1984, defendant offered $10,000. On April 18, 1986, the plaintiff-administrator filed suit against defendant to recover the $20,000 uninsured motorist coverage. Combined with that action was a claim by Frank and Shirley as Vance's parents for intentional infliction of emotional distress. Prior to judgment, the defendant never offered more than $10,000, but did, as discussed earlier, pay the $20,000 following the trial court's findings.

Defendant's refusal to pay the uninsured motorist coverage was based on their claims that Vance Kirk may have been driving when the collision occurred, or that Vance was negligent in a way that may have contributed to the collision or that he was aware of a danger or assumed the risk under Illinois law.[1] The trial court found defendant had no knowledge from their investigation or any other source to support these claims. The court further found statements made by defendant's representative in letters of June 15, 1984, and November 29, 1984, that defendant's investigation showed Vance's recovery against Weeks would be questionable because of issues of Vance's comparative

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1. If any of these claims could have been proven, they would have lessened or absolved defendant's responsibility to pay the uninsured motorist coverage.

negligence and assumption of the risk were false and known by defendant to be false.

The court also found statements made by a representative of defendant in a February 4, 1985, letter--alleging they had no proof Vance was not driving the vehicle and no proof Weeks' vehicle was uninsured--were false and known by defendant to be false.

I.

The first question is whether there is substantial evidence to support an award of punative damages. See Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 167 (Iowa 1984); Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 384 (Iowa 1983); Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871, 879-80 (Iowa 1983); Holcomb v. Hoffschneider, 297 N.W.2d 210, 214 (Iowa 1980). In some instances, denial of a valid claim of a casualty insurer will support a claim for punitive damages. Pirkl v. Northwestern Mut. Ins. Ass'n, 348 N.W.2d 633, 636 (Iowa 1984). Such damages are recoverable in situations involving positive misconduct of a malicious, illegal, or immoral nature. Id. The evidence introduced and the finding made by the trial court do not reach the level necessary to support an award of punitive damages. We reverse the award of punitive damages.

II.

We next address plaintiff's issue on cross-appeal that the findings of fact on the fraud issue were contradictory

to the trial court's conclusion that bad faith did not exist. Plaintiff contends the issue of bad faith should have been resolved in his favor. To support a claim of first-party bad faith, plaintiff "must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Dolan, 431 N.W.2d at 794 (quoting Anderson v. Continental Ins. Co., 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978)).

When a claim is "fairly debatable," the insurance company is entitled to debate it, whether the debate concerns a matter of fact or law. Dolan, 431 N.W.2d at 794; M-Z Enters., Inc. v. Hawkeye-Secuity Ins. Co., 318 N.W.2d 408, 415 (Iowa 1982). Though we have determined the evidence does not support a finding of fraud, we agree with plaintiff that the fact-finding made by the trial court could support a finding of bad faith. When the trial court rejected plaintiff's claim for bad faith, the trial court was guided by appellate decisions prior to Dolan.

The verdict in this case came March 10, 1988, and notice of appeal was filed September 20, 1988. On November 23, 1988, the supreme court filed Dolan. Dolan recognized the court's prior approach in first party bad faith claims had not been instructive to trial courts. See Dolan, 431 N.W.2d at 793. In Dolan, for the first time, Iowa clearly recognized a cause of action in tort by an insured against

his or her insurance carrier for bad faith, when the insured has shown the absence of a reasonable basis for denial of benefits under the policy, and the insurance carrier's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. See Dolan, 431 N.W.2d at 794. We determine the issue should be remanded to the trial court to apply the dictates of Dolan.

III.

The last issue on the cross-appeal is plaintiff's claim the trial court erred in rejecting their claim for emotional distress. We find no error there. We reverse the order finding fraud, awarding punative damages, and denying recovery for bad faith. We find there is evidence that could support a finding of bad faith. We remand to the trial court to apply the dictates of Dolan to this record. An issue of prejudgment interest on punative damages has been rendered moot by our opinion.

We do not retain jurisdiction.

Costs on appeal are taxed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

All judges concur except Habhab, J., and Donielson P.J., who dissent.

HABHAB, J. (dissenting)

I respectfully dissent from that portion of the majority opinion which reverses and remands this case so the trial court may apply the legal principles enunciated in Dolan to the facts found here.

Dolan did not alter or materially change the "fairly debatable" test announced in Anderson. See Dolan, 431 N.W.2d at 799. I am convinced that appellees failed as a matter of law to show the absence of a reasonable basis for Farm & City's action in denying appellees' claim.

Donielson, P.J., joins this dissent.