IN THE COURT OF APPEALS OF IOWA

No. 0-772 / 99-1415
Filed January 24, 2001

JUSTIN J. JOENS and HEATHER R. JOENS,
Plaintiffs-Appellants,

vs.

UNITED FIRE & CASUALTY COMPANY,
Defendant-Appellee.

FILED
JAN 24 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Keokuk County, Dan F. Morrison, Judge.

Plaintiffs appeal from a district court ruling granting the defendant's motion for partial summary judgment in their breach of contract action. **AFFIRMED.**

Thomas M. Walter and Kenneth A. Duker of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellants.

Craig A. Levien and Jean Dickson Feeney of Betty, Neuman & McMahon, L.L.P., Davenport, for appellee.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Plaintiffs appeal from a district court ruling granting the defendant's motion for partial summary judgment in their breach of contract action. They contend the court erred in granting the motion for partial summary judgment on the issues of punitive damages and attorney fees. We affirm.

Background Facts and Proceedings. Justin and Heather Joens opened a restaurant, Joensy's on the Square, in Sigourney, Iowa. The business had been operating at least since January 1995. The business reported a net loss in 1995, and a net profit in the first three months of 1996. Defendant United Fire & Casualty Co. insured the premises. Originally, the business was underinsured. In January or February 1996, Bob Hall, the Joens's insurance agent, urged Justin Joens to increase the insurance coverage. Hall believed for Joens to leave the insurance coverage at the same level would have been disastrous. Joens eventually agreed to a partial increase, and paid the premium for the increased coverage in April 1996.

On May 6, 1996, Justin invited Hall to come with him to the casino in Tama and teach him how to play blackjack. Hall and Joens did not know each other well. Sometime during the few months prior to the May 13, 1996 fire at the restaurant, Joens talked to Hall about setting a fire and getting away with it.

The Joens were experiencing financial problems in 1996. They missed car payments in February and March 1996. In May 1996, the insurance company cancelled their car insurance because the premium had not been paid. They were a month behind on rent. They were behind in utility payments. They

had outstanding balances with a local grocery store, Reinhart's, and the country club. They had outstanding balances on three credit cards. Justin Joens owed his cousin $700 for a meat tenderizer he sold Justin when the restaurant opened. Justin was behind on federal and state income taxes, and overdue on the registration for his car.

On May 13, 1996 a fire occurred at Joensy's on the Square. A week before the fire, Heather Joens removed her wedding dress from the basement of the restaurant, allegedly because the neighbors were having water problems. However, State Arson Investigator Mike Hiles's investigation report indicates the neighbors had not been having water problems. Blinds were added to the front door and kitchen door of the restaurant a few weeks before the fire.

At approximately 7:00 p.m. on the night of the fire, Justin invited a police officer over to sample a tenderloin after closing the restaurant. While he was there, Justin took the officer to the basement to help him move a freezer. Justin asked the officer to follow him to pick up Heather at his in-laws and then follow him out of town, to check his brake lights. A gentleman apparently told Justin a few days earlier he should get them checked, because they were "glitching." The officer followed Justin to his in-laws. The fire started approximately one hour after Justin and the officer left the restaurant. The Joens learned of the fire at approximately 8:45 p.m., upon their arrival at a restaurant in Oskaloosa.

Hiles and John Woodland, an investigator hired by defendant, conducted separate investigations into the cause of the fire. Hiles's Field Investigation Report concluded the fire was incendiary in origin, and there were no accidental

sources of ignition where the fire started. Hiles and Woodland spoke about Woodland's impressions and opinions, but Hiles never saw a copy of Woodland's report.

On March 4, 1997, United Fire & Casualty denied Justin and Heather Joens's claim for property damage sustained as a result of the May 13, 1996 fire. The denial was based upon the "concealment, misrepresentation, or fraud" clause of the policy, as well as the exclusion for dishonest or criminal acts.

On March 26, 1997, Justin Joens was criminally charged with second-degree arson and first-degree fraudulent practice. The criminal case was dismissed in December 1997 for lack of sufficient evidence to establish beyond a reasonable doubt that Justin was guilty of either one of the criminal counts charged.

The Joens filed a petition on March 3, 1999, claiming willful and malicious breach of contract, and requesting attorney fees and punitive damages. United Fire & Casualty filed a motion for partial summary judgment, claiming, "to the extent plaintiffs' claims for a willful, malicious breach of contract, punitive damages and attorney fees claims are based upon any bad faith on the part of the defendant in denying this claim, defendant is entitled to judgment as a matter of law." Joens resisted the motion. The district court granted defendant's motion for partial summary judgment. Plaintiffs appeal.

Standard of Review. We review a summary judgment ruling for errors at law. Iowa R. App. P. 4; *St. Ansgar Mills, Inc. v. Streit*, 613 N.W.2d 289, 292 (Iowa 2000). Summary judgment is appropriate where the moving party shows

no genuine issue of material fact exists and it is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 649 (Iowa 2000). We examine the record before the district court to determine whether any genuine issue of material fact exists and whether the court correctly applied the law. *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 45 (Iowa 1999). We view the facts in the light most favorable to the party opposing the motion for summary judgment. *Id.*

A party resisting summary judgment must set forth specific facts showing a genuine issue of trial and not rely on legal conclusions. *Bradshaw v. Waconda Club*, 476 N.W.2d 743, 745 (Iowa App. 1991). A resistance must contain sufficient specific facts constituting admissible evidence as to put into issue elements of fact which are material to the court's determination. *Willets v. City of Creston*, 433 N.W.2d 58, 63 (Iowa App. 1988).

Punitive Damages and Attorney's Fees. The Joens argue the district court erred in applying certain standards and ignored certain facts they brought forth. They claim evidence in their statement of disputed facts creates a jury question as to whether defendant committed the intentional tort of malicious prosecution, thus entitling them to punitive damages and attorney's fees. We disagree.

A breach of contract alone, even if intentional, will not form the basis of punitive damages. *Berryhill v. Hatt*, 428 N.W.2d 647, 656 (Iowa 1988). The breach must also constitute an intentional tort, or other wrongful act, committed with legal malice, that is with willful or reckless disregard for another's rights. *Id.*

The Joens fail to raise a factual issue to support their claim of willful and malicious breach of contract. They claim Hiles failed to follow procedures recognized by the American National Standards Institute and the National Fire Protection Association in investigating arson fires, but fail to indicate exactly which procedures he failed to follow, how he failed to follow them, and how that failure affected United Fire & Casualty's actions. In addition, the Joens allege Woodland, defendant's investigator, influenced Hiles, the State's investigator, but fail to present facts to support this allegation. Hiles, in deposition testimony, admitted speaking to Woodland about his impressions and opinions, but testified he never saw a copy of Woodland's report, and did not give any indication he was "influenced" by Woodland. The Joens also allege United Fire & Casualty was the "driving force" in Justin Joens' arrest, but fail to support the allegation with specific facts. These unsupported allegations fail to show defendant's alleged breach constituted an intentional tort, or other wrongful act, committed with legal malice, that was with willful or reckless disregard for the Joens's rights. Therefore, the Joens's claim for punitive damages and attorney fees based on a willful and malicious breach of contract must fail.

The district court, after concluding no intentional torts or legal malice existed to support an award of punitive damages for a breach of contract in this case, applied the law of "bad faith" denial of an insurance claim. We agree with the district court's application of a bad faith analysis to the Joens's claims. The Joens's breach of contract is based upon United Fire & Casualty's denial of a

claim. A bad faith claim also is based upon denial of a claim. *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988).

Where an objectively reasonable basis for denial of a claim exists, the insurer cannot be held liable for bad faith as a matter of law. *Morgan v. American Family Mut. Ins. Co.*, 534 N.W.2d 92, 96 (Iowa 1995). Where an insurance claim is "fairly debatable" the bad faith claim must fail. *Stahl v. Preston Mut. Ins. Ass'n.*, 517 N.W.2d 201, 203 (Iowa 1994). We conclude the claim in this case was "fairly debatable," thus creating a reasonable basis for denying it.

To determine whether an act of arson precludes coverage, there must be evidence of other unexplained surrounding circumstantial evidence in addition to evidence of motive to implicate the insured with arson. *Toney v. Black Hawk Mut. Ins. Ass'n*, 584 N.W.2d 570, 572 (Iowa App. 1998). In assessing whether other circumstantial evidence implicates the insured with the arson, the court will look at: (1) whether the property was overinsured; (2) the incendiary nature of the fire; (3) the insured's access to the premises; (4) evidence of breaking and entering or burglary; (5) other unexplained circumstances implicating the insured. *Id.*

Evidence in the record shows the Joens were experiencing financial problems. Despite these problems, they paid a higher premium to increase coverage for fire loss at the restaurant a few weeks before the fire. Blinds were added to the front door and kitchen door of the restaurant a few weeks before the fire. Heather removed her wedding dress from the basement of the restaurant a week prior to the fire. In the few months prior to the fire, Justin asked Hall, his

insurance agent, about setting a fire and getting away with it. On the night of the fire, Justin invited an officer over after closing to sample a tenderloin. Justin asked the officer to follow him to pick up Heather at his in-laws and out of town. The investigator concluded there were no accidental sources of ignition where the fire started. This evidence, taken as a whole, provides sufficient circumstantial evidence to implicate the insureds with arson, thereby creating a reasonable basis for denial of coverage. Therefore, defendants cannot be held liable for bad faith as a matter of law.

Because the Joens fail to raise a factual issue to support their claim of willful and malicious breach of contract, the law permitting punitive damages in breach of contract cases does not apply in this case. The district court correctly applied a "bad faith" denial argument and determined a reasonable basis existed for defendants to deny the Joens's claim under the insurance contract, thereby concluding the Joens's claims for punitive damages and attorney fees were "not viable" and granting defendant's motion for partial summary judgment.

AFFIRMED.