IN THE COURT OF APPEALS OF IOWA

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No. 7-246 / 96-1439

FILED
AUG 22 1997
CLERK SUPREME COURT

EDWARD CHARLES DOLAN,

Plaintiff-Appellant,

vs.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Plaintiff appeals from a district court order denying his petition to collect judgment, and claims for bad faith, fraud, conspiracy, and attorney fees. **AFFIRMED.**

Thomas L. Staack and James F. Kalkhoff of Dutton, Braun, Staack, Hellman & Iversen, P.L.C., Waterloo, for appellant.

Michael J. Coyle and Norman J. Wangberg of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for appellee.

Heard by Sackett, P.J., and Vogel, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SACKETT, P.J.

Plaintiff-appellant Edward Charles Dolan seeks to recover from defendant-appellee State Farm Fire & Casualty Company on a judgment rendered in favor of plaintiff and against Walter Olson, defendant's insured. Plaintiff was injured when Olson grabbed plaintiff's coat and pulled it over his head. Olson was charged with criminal assault. Plaintiff sued Olson claiming he was injured as a result of Olson's negligence. A jury found Olson negligent and returned a judgment in favor of plaintiff and against Olson for $69,013.92. Olson was insured for his negligent acts in an amount greater than plaintiff's judgment through a homeowners policy with defendant. Defendant refused to pay the judgment claiming Olson's act was intentional, not negligent. Olson was not insured for intentional acts. Plaintiff brought this suit seeking recovery from defendant on a number of theories. The district court denied plaintiff's claim and this appeal follows. We affirm.

The events that led to this suit first occurred when, on May 17, 1991, Olson attended a golf outing. Olson was drinking and at the end of the outing he confronted plaintiff, the golf professional, concerning his golf clubs. Plaintiff did not give him the response he wanted. Olson grabbed plaintiff's coat, pulled it over his head, and injured his shoulder. Plaintiff requested criminal charges be filed against Olson. Olson was found guilty of a simple misdemeanor assault.

On June 27, 1991, plaintiff filed a petition naming Olson as a defendant and claiming he was injured as a result of Olson's negligence. Plaintiff did not allege

Olson's act was intentional. Olson notified defendant seeking a defense under his homeowners policy on July 10, 1991. Defendant employed attorney Gene Yagla to represent Olson on plaintiff's claim. On the same day, defendant notified Olson it was defending under a reservation of rights, as it deemed Olson's action intentional. Yagla continued to represent both defendant and Olson. On January 8, 1992, defendant advised Olson based on the intentional act exclusion they denied Olson coverage for the act.

Yagla told Olson to consult an attorney specializing in bankruptcy. Yagla reasoned that Olson may be able to discharge his liability for the negligence in bankruptcy. Olson filed a bankruptcy petition.

Yagla continued to represent both defendant and Olson and represented both at trial.

Olson moved for a directed verdict contending plaintiff pled the wrong theory because the assault was an intentional act. The court overruled the motion, finding a jury question existed because there was evidence of both a negligent and an intentional act. The trial court refused to submit a jury instruction on an intentional tort theory unless plaintiff sought to rely on it as a basis for recovery against Olson.

On November 15, 1993, the jury found Olson negligent and awarded damages of $69,013.92. The judgment was not collectible from Olson.

On March 17, 1994, plaintiff filed this petition to collect the judgment from defendant. The petition was later amended to include claims of bad faith, fraud,

conspiracy, and attorney fees. Defendant continued to advance Olson's acts were intentional and therefore were not covered under the policy. Plaintiff contends defendant is precluded from making this argument because that issue was litigated in the civil suit where Olson had raised it as a defense.

On July 17, 1996, the district court denied plaintiff's request for judgment against defendant finding issue preclusion did not apply. The district court reasoned the judge in the civil trial precluded Olson from arguing his acts were intentional; therefore, the issue of an intentional act was not fully litigated, was not presented to the jury, and was not identical to the coverage dispute. The district court went on to find Olson's acts intentional, regardless of his intoxication, and found coverage was precluded. The district court determined Yagla, although representing both Olson and State Farm, did not act inappropriately nor was there a conflict of interest. The district court found no evidence of fraud or conspiracy between State Farm and Yagla. Finally, it denied plaintiff's request for attorney fees.

Plaintiff contends issue preclusion should apply and defendant should not be able to show the act was intentional because in the civil trial the issue of whether Olson acted intentionally was (1) raised, (2) thoroughly litigated, (3) material and relevant, (4) necessary and essential to the judgment, and (5) defendant had a full and fair opportunity to litigate the issue.

The purpose of issue preclusion is to prevent relitigation of issues raised and resolved in a previous action. *Hall v. Barrett*, 412 N.W.2d 648, 650 (Iowa App.

1987). The four prerequisites for issue preclusion are: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Opheim v. American Interinsurance Exch.*, 430 N.W.2d 118, 120 (Iowa 1988); *Israel v. Farmer's Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143, 146 (Iowa 1983); *Cruise v. Wendling Quarries, Inc.*, 498 N.W.2d 916, 918 (Iowa App. 1993).

Defendant's policy insures Olson for his negligence. The question of whether Olson was negligent was an issue fully litigated in plaintiff's suit against Olson. Defendant was not a party to that suit. Yet Yagla, who represented Olson at trial, was serving both as Olson's attorney and defendant's attorney at trial. The issue of Olson's negligence was both litigated and material and necessary to the resolution of plaintiff's suit against Olson.

Defendant advances the issue of whether Olson acted negligently or intentionally was not litigated in the first action. The issue was raised; yet the jury never decided whether the act was negligent or intentional. The jury only found a negligent act.

Yagla cross-examined plaintiff about his earlier assertions that Olson's acts were intentional. The issue of whether Olson's conduct was intentional was raised when Olson moved to dismiss the action because the claim was only brought on a

negligence theory and Olson's acts were not negligent but intentional. The issue was raised again when Olson requested a special interrogatory asking the jury to find if he acted intentionally. The trial court refused to dismiss and refused to submit the requested interrogatory. The correctness of either ruling is not before us. The trial court's rulings on these issues were not appealed and became the law of the case.

To be actually litigated does not require the issue be thoroughly litigated. *See Hall*, 412 N.W.2d at 651. The requirement can be satisfied by a determination made without a trial on the merits. *See Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 296 (Iowa 1982). The requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it. *Continental Can Co., U.S.A. v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979). Here, the disputed issue, though raised, was never resolved by a trier of fact.

Plaintiff contends the issue was material in the Olson suit and essential to the resulting judgment. Plaintiff advances this is because had the jury found Olson's conduct intentional rather than negligent, he would not have recovered. Defendant advances there was no jury instruction on an intentional tort and plaintiff objected to keep such an instruction from being given.

Michael Bringolf, a State Farm claims representative, testified if State Farm was successful in the first suit in showing Olson's acts were intentional, State Farm would not need to pay under the policy.

Plaintiff further contends defendant controlled the litigation relying on *Edmundson v. Miley Trailer Co.*, 252 N.W.2d 415, 418-19 (Iowa 1977). Defendant argues plaintiff incorrectly advances it controlled the litigation. Defendant was not a party to the Olson litigation. Yet Yagla, when defending the Olson suit, was representing both Olson and defendant. *See Brown v. Kassouf*, 558 N.W.2d 161, 165-68 (Iowa 1997), where the court in finding issue preclusion considered the fact the parties shared the same attorney.

Plaintiff has failed to show the issue of whether Olson's conduct was negligent and not intentional was decided in the prior action. Though it was raised because of plaintiff's objections, it was not decided. Plaintiff has failed to show issue preclusion should apply. *See Brown*, 558 N.W.2d at 163; *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981).

Defendant contends the decision in the criminal case finding Olson guilty of criminal assault was dispositive of the issue in that the issue of Olson's intentional conduct was litigated there. It is unnecessary for us to consider this issue.

Plaintiff next contends because Olson did not satisfy his judgment, plaintiff can assume Olson's claims against State Farm. Plaintiff further contends the relationship between State Farm and Yagla constituted a conflict of interest and defendant engaged in bad faith, fraud, and conspiracy. Plaintiff contends Olson was encouraged to file bankruptcy when it was not necessary, Olson was not informed of

the conflict in asserting a defense of intentional acts in the civil suit, and State Farm set a reserve of only $333 on the claim.

Iowa Code section 516.1 provides:

> All policies insuring the legal liability of the insured, issued in this state by any company, association or reciprocal exchange shall, notwithstanding any other provision of the statutes, contain a provision providing that, in event an execution on a judgment against the insured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the insurer to the same extent that such insured could have enforced the insured's claim against such insurer had such insured paid such judgment.

The trial court found against plaintiff on each of these claims. This is a law action; therefore, we are bound by the findings of the trial court if supported by substantial evidence. *Faught v. Budlong*, 540 N.W.2d 33, 35 (Iowa 1995); *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). We find they are and affirm.

AFFIRMED.