FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **REX NIPPER and LESTER D. BJORKLUND,** | ) | |
| Plaintiffs-Appellants, | ) | 238 |
| vs. | ) | |
| **HAWKEYE NATIONAL LIFE INSURANCE COMPANY,** et al., | ) | 8-175<br>87-1343 |
| Defendants-Appellees. | ) | |

Appeal from the Iowa District Court for Polk County (No. CL62-36558), Ray Hanrahan, Judge.

Plaintiffs appeal the summary judgment granted the defendants, contending the district court erred by holding that they lacked standing to sue. **AFFIRMED.**

Harvey L. Harrison, Des Moines, for plaintiffs-appellants.

Diane M. Stahle and William W. Schwarz of Davis, Hockenberg, Wine, Brown, Koehn & Shors, Des Moines, for defendants-appellees.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

**HABHAB, J.**

The plaintiffs brought this action alleging that Hawkeye National Life Insurance Company (Hawkeye) obtained certain customer lists and wrongfully caused individuals to cancel their life insurance policies with American Income Life Insurance Company (American). The plaintiffs are agents of American and allege damage in that they lost the potential to earn commissions had the American policies remained in effect.

Hawkeye moved for summary judgment on the grounds that the plaintiffs were not the real parties in interest and that plaintiffs' suit was barred by res judicata. The plaintiffs filed a general denial and resistance to the summary judgment alleging on the day of the hearing that they were real parties in interest as they were third-party beneficiaries to the insurance policies between American and its insureds. Plaintiffs also denied that res judicata applied.

By ruling dated September 17, 1986, the district court granted Hawkeye's motion for summary judgment. The court held that the plaintiffs did not have third-party beneficiary status and further, they were not entitled to bring an action for tortious interference with the insurance contract between American and its insureds.

The only issue in this appeal concerns the propriety of the summary judgment entered in favor of Hawkeye. Since

this appeal was filed, plaintiff David Harrison has dismissed his appeal with prejudice. The only remaining appellants are plaintiffs Rex Nipper and Lester D. Bjorkland, who will be referred to jointly as plaintiffs.

The standard to be met in a motion for summary judgment is set out in Iowa Rule of Civil Procedure 237, which provides in pertinent part:

> (c) Motion and proceedings thereon. The motion shall be filed at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may file opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Iowa R. Civ. P. 237(c).

We find that Hawkeye met the above two-pronged test. Because there is no genuine issue as to any material fact, we must determine if the moving party, Hawkeye, is entitled to judgment as a matter of law. We hold in the affirmative as set forth below.

I.

Plaintiffs first contend the district court erred by holding they lacked standing to bring this suit because they were not third-party beneficiaries of the contracts between American and its former customers. We find no error.

In order to have a cause of action as a third-party beneficiary, plaintiffs must be direct beneficiaries of the contracts between American and their insureds. See Bain v. Gillispie, 357 N.W.2d 47, 50 (Iowa App. 1984) (third party must be direct beneficiary, and not merely an incidental beneficiary to maintain a cause of action).

A direct beneficiary is either a "donee" beneficiary or a "creditor" beneficiary. Khabbaz v. Swartz, 319 N.W.2d 279, 284 (Iowa 1982). A donee beneficiary exists where the purpose of the promise is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance. Olney v. Hutt, 251 Iowa 1379, 1386, 105 N.W.2d 515, 519 (1960). A person is a creditor beneficiary if performance of the promise will satisfy an actual, supposed, or asserted duty of the promisee to the beneficiary. Id.

The plaintiffs obviously are not donee beneficiaries. There was no intent by American or its policyholders to confer a gift on the plaintiffs in the form of future commissions. The plaintiffs cannot be creditor beneficiaries because the policyholders owed no preexisting duty to them. As such, plaintiffs are mere incidental beneficiaries of the contracts between American and its insureds. They are not third-party beneficiaries. The trial court was not in error by so deciding.

Hawkeye correctly contends that plaintiffs' reliance on this theory is misplaced. The third-party beneficiary theory allows one to sue for the breach of a contract to which they are not a party. Olney v. Hutt, 251 Iowa 1379, 1384-85, 105 N.W.2d 515, 519 (1960). In this case, there is no breach of contract theory alleged by plaintiffs. Furthermore, as a third-party beneficiary, plaintiffs' cause of action would only be against one of the parties to the contract made for plaintiffs' benefit. There is no authority which allows a plaintiff to use a third-party beneficiary theory to sue for a tort, rather than a breach of contract, or which allows a plaintiff to sue an entity that was not a party to the contract.

In none of the cases cited by plaintiffs was the third-party beneficiary attempting to sue an entity who was clearly not a party to the contract being sued on. See Williams v. Hair Stadium, Inc., 334 N.W.2d 354 (Iowa App. 1983) (owner of building sued subcontractor for breach of contract between general contractor and subcontractor); Bain v. Gillespie, 357 N.W.2d 47 (Iowa App. 1984) (novelty store owners sued referee for breach of contract between referee and athletic conference); Farris v. General Growth Development Corp., 354 N.W.2d 251 (Iowa App. 1984) (injured employee sued general contractor for breach of contract between general contractor and employer); Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642 (Iowa 1973) (labor

union sued meat packer for violation of consent decree between meat packer and government.). Each of these cases also is for breach of contract and not for a tort.

Hawkeye was not a party to the insurance policy between American and American's insureds. The plaintiffs thus cannot legally or factually rely upon a third-party beneficiary theory to give them standing to bring causes of action sounding in tort. Furthermore, even if there was a breach of contract alleged, plaintiffs' cause of action under a third-party beneficiary theory would be against the party to the contract who breached it and not against an entity such as Hawkeye, who was clearly not a party to the contract in question. Accordingly, we uphold the trial court's decision to sustain Hawkeye's motion for summary judgment.

II.

Plaintiffs make a tortious interference claim. Plaintiffs, however, as agents for the principal, American, have no cause of action in tort for outside interference with an insurance contract between American and an insured. The Restatement (Second) of Agency section 374(2) provides as follows:

> (2) A servant or other agent has no action of tort because another has tortiously harmed the principal or destroyed his business, unless the other acted for the purpose of harming the agent's interests.

Comment (b) to this section states that:

> In conformity with the normal tort rule, a servant who loses his job or otherwise suffers economic loss as a result of the principal's misfortune, tortiously caused by another, has not thereby an action against the other. If, however, the other destroys the master's business in order to cause loss to the servant, the latter has a cause of action. See the Restatement of Torts section 870.

As the trial court stated:

> It is clear . . . that plaintiffs, as agents for American, have no cause of action in tort for interferences by a third party with insurance contracts between the principal (American) and its policyholders. There are no allegations that the actions of the defendants were intended to cause loss to the plaintiffs.

The trial court is affirmed as to the tortious interference claim.

III.

Having disposed of the case on the previous two assertions by plaintiffs, we need not reach the res judicata/issue preclusion claim put forth by the defendants.

**AFFIRMED.**