FILED
APR 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KENNETH SANDBULTE and FLORENCE SANDBULTE,	)	
	)	Filed April 23, 1986
Plaintiffs-Appellants,	)	
	)	5-517
vs.	)	84-1886
FARM BUREAU MUTUAL INSURANCE COMPANY,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Cherokee County (No. Cl 1061 & CL 1313), Charles H. Barlow, Judge.

Plaintiffs appeal from judgment for defendant-insurer in an action for breach of an unwritten insurance contract. **AFFIRMED.**

Randall A. Roos, Sioux Center, Iowa, for plaintiffs-appellant.

Wendell Pendleton and Ted Brown of Pendleton & Brown, Storm Lake, for defendant-appellee.

Heard by Oxberger, C.J., Snell, and Schlegel, JJ.

OXBERGER, C.J.

Plaintiffs are appealing from the jury verdict in favor of the defendant insurance company. The plaintiffs say the evidence does not support the verdict, that the jury was improperly instructed regarding the defendant's duty to them, and in a separate instruction was improperly told to consider the elements of the tort of intentional infliction of emotional distress. We affirm.

The plaintiffs, Kenneth and Florence Sandbulte, are the insured of defendant Farm Bureau Mutual Insurance Company. On April 22, 1976, a pickup truck owned by Kenneth Sandbulte and operated by Wendell Sandbulte ran a stop sign and struck a motorcycle operated by Ken Vander Lugt. It was evident from the beginning that liability on the part of the Sandbultes was clear and that the damages would be considerable. Vander Lugt suffered brain damage and nearly died. He will never be able to function normally. At the time of the accident, Sandbultes were insured by Farm Bureau under two policies. The Banner automobile policy clearly applied and the limits of the insurance were $50,000. Soon after the accident, Farm Bureau and the Sandbultes disagreed whether their other county Squire farm liability policy, with limits of $300,000, should apply. An offer was made to the Van Lugts of the $50,000 Banner policy in June 1976. The offer was neither accepted nor rejected. Farm Bureau continued to assert to the Sandbultes their opinion that the Squire policy did not apply. Sandbultes had been discussing the situation with their attorneys, Loren Veldhuizen and Earl Klay. Both Klay and Veldhuizen thought the Squire policy applied.

The Vander Lugts obtained counsel and in April 1978, gave permission to their attorney Charles Wolle to settle the claims for $90,000, with $50,000 to come from Farm Bureau and $40,000 to come from the Sandbultes' personal funds. Wolle was to begin the bargaining with a figure of $130,000. The demand was sent to Veldhuizen and he says he disclosed the offer to Farm Bureau. In late

April, suit was filed by the Vander Lugts. Farm Bureau hired attorney Robert Beebe to represent the Sandbultes and Farm Bureau in the lawsuit. Another offer to settle was made by Wolle in March of 1979. It called for payment of fifty percent of the face amount of the disputed Squire policy, $150,000, plus the $50,000 policy limits on the Banner policy. Beebe indicated in a letter to another attorney it would be a problem if they paid part of the Squire policy, since it could estop them from claiming coverage did not apply. He suggested to the company that a declaratory judgment be brought to determine if the Squire policy applied. Farm Bureau then hired Harold Grigg to handle the declaratory judgment suit filed April 24, 1979.

Grigg then attempted to obtain a continuance and says he tried to get Beebe to join with him. The court did not allow the trial of the Vander Lugt case to be continued because Grigg was an interloper and did not have standing. The trial was reassigned to May 29, 1979. Wolle again contacted Beebe, Grigg, and Klay and made a settlement demand for $375,000, stating that if the demand was not met, he would go to trial and expected a million-dollar judgment. The settlement was approved. The Sandbultes' farm was sold to satisfy partially the judgment in excess of $50,000.

The declaratory judgment action came before the Iowa Supreme Court on appeal, where it was held the Squire policy did not apply. Farm Bureau Mutual Insurance Co. v. Sandbulte, 302 N.W.2d 104 (Iowa 1981). Plaintiffs commenced this action against the insurer alleging breach of a duty to defend. The district court granted summary judgment and the action came before the supreme court on appeal. The court determined the action was for breach of an unwritten contract and also affirmed denial of the Sandbultes' separate motion for summary judgment where they contended bad faith was shown as a matter of law. Sandbulte v. Farm Bureau Mutual Insurance Co., 343 N.W.2d 457 (Iowa 1984). The matter

was remanded. At the end of trial, the jury returned a verdict for defendant insurer incorporating special interrogatories specifically finding that the company had not acted in bad faith during the course of the settlement negotiations.

The jury was also instructed on plaintiffs' damages for mental suffering and emotional distress. They were given the elements of the tort of intentional infliction of emotional distress although that tort was never pleaded by the plaintiffs. The court overruled plaintiffs' posttrial motions, stating that even if there was error in submitting the instruction, the error was harmless because the jury did not reach the issue of damages.

On appeal, plaintiffs say: (1) the court erred when it told the jury it could consider the insurance company's reliance upon the efforts of plaintiffs' attorneys to negotiate a settlement; (2) its motion for a directed verdict and judgment n.o.v. should have been granted because there is no substantial evidence to support the jury's findings; and (3) the court erred in giving its instruction on the elements of intentional infliction of emotional distress.

An insurance company is guilty of bad faith in its actions towards the insured if it does not fulfill the requirements implied by the insurance contract. Loudon v. State Farm Mutual Automobile Insurance Co., 360 N.W.2d 575, 578 (Iowa Ct. App. 1984). The plaintiffs refer to Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30, 33 (Iowa 1982), for their proposition that it is the duty of the insurance company to handle the entire claim, including that amount over the policy limits. There, it is stated, "It is the insurer's duty to conduct the whole defense, regardless of the amount involved, whether it exceeds or does not exceed insurer's liability, and to protect insured as well as itself against liability at all stages of the litigation. . ." Id. Plaintiffs strongly assert that it is error to consider the insurance company's reliance on their attorneys to effect the negotiations. They say this duty is absolute and cannot be delegated. They cite

a federal case applying Nebraska law which indicates the insured does not need to become involved in defending the lawsuit, including the situation where the claim exceeds the policy limits. Lienemann v. State Farm Mutual Insurance Co., 540 F.2d 333, 336 (8th Cir. 1976).

We agree with plaintiffs' statement that the insurance company's duty to defend extends to those amounts over the policy limits and that the company is held to a stringent standard in assuring an adequate defense to the insured and in aggressively pursuing appropriate settlement. However, the bad faith claim refers to "the absence of good faith required by the implied contract." Louden, at 579. In Louden we noted that acquiescence is recognized as a defense to a bad faith suit and referred to another case where the supreme court "applied the doctrine to issues agreed on by the plaintiff's own attorney. The court stated that, 'where (the personal attorney) acquiesced or agreed with procedures to be taken involving judgment, plaintiff cannot now be heard to say such were unreasonable or constitute bad faith.' " Id. at 583 (citing Kohlstedt v. Farm Bureau Mutual Insurance Co., 258 Iowa 337, 341, 139 N.W.2d 184, 186 (1965). In Kohlstedt the plaintiff's counsel was involved in negotiations, and the court indicated that where the counsel was so involved, the plaintiff could not complain about the results. Kohlstedt, at 341, 139 N.W.2d at 186. Authorities also state:

> The company may protect itself against excess liability where the settlement value of the claim is recognized as being in excess of the policy limits by making an offer to settle for the maximum sum within the policy limits, or advising the insured of continued willingness to pay such sum at any time that the claim can be settled for that sum or for that sum plus whatever the insured is willing to add. Perhaps the company has an obligation to attempt to negotiate such settlement for the insured, but the insured usually would prefer to conduct the negotiations and surely cannot successfully complain of the inactivity of the company regarding negotiations if he himself has undertaken them.

Keetoon, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1148-49 (1954).

We find that although the insurance company has a duty to defend, the duty is not absolute to the point that the insured's counsel can take over negotiations of settlement and then point to alleged bad faith on the part of the company in not more aggressively negotiating with the opposing party. We believe the law stated in the above cases is ample precedent for this conclusion. Therefore, there was no error in the court's instruction to the jury that it could consider the plaintiffs' attorneys involvement in the case as it reflected upon the bad faith of the insurer.

Plaintiffs recognize the verdict must stand unless there is no substantial evidence to support the result. Iowa R. App. P. 14(f)(1). The issue of whether there is bad faith is a fact question. Louden, at 582. It must be submitted to the jury unless the only conclusion reasonable mind could reach is that Farm Bureau acted in bad faith. Id. at 14(f)(17). Along these lines, the evidence must be viewed in the light most favorable to Farm Bureau. Id. at 14(f)(2).

The plaintiffs say their attorneys, Veldhuizen and Klay, were hired only to determine the question of whether the Squire coverage applied. Vehldhuizen stated he had told the company he would handle the "overage." In his mind, this meant the amounts over $350,000. The company thought this meant amounts over $50,000. Plaintiffs say the company had no reason to think their attorney was in charge of the negotiations, and that they properly relied upon Farm Bureau to take care of attempts to reach a settlement.

We hold a jury could find that the involvement of plaintiffs' attorneys went well beyond the question of application of the Squire policy. Although plaintiffs say their attorney did not get involved in the settlement attempts until May of 1979, when it was apparent Farm Bureau was not taking care of the matter, the record shows that Veldhuizen and Klay's office were discussing settlement with Wolle in 1977. In April 1978, the settlement demand for $130,000 was sent

to Veldhuizen. He testified that the settlement negotiations had not been working out up to the time of the lawsuit because the amounts demanded were more than the Sandbultes could produce. When another offer was made in March 1979, Wolle and Klay were discussing the terms. Farm Bureau also produced evidence which could lead the jury to believe that it was the plaintiffs' attorneys who had control of the negotiations. Farm Bureau was not sent a copy of correspondence between the attorneys and Wolle involving a worker's compensation settlement. Sandbulte provided Veldhuizen a copy of his financial statement for the purpose of negotiating a settlement, and a copy was not given to Farm Bureau. Beebe also testified he was told by Klay after the answer was filed to hold all action while Klay worked on a settlement.

The evidence was conflicting from the many witnesses, but there is substantial evidence to support a jury finding that the plaintiffs' attorneys had taken over the settlement aspects of the case. Considering the pertinent law on this area which we have reviewed, we find the court did not err in denying the plaintiffs' motion for a directed verdict, or for a motion for judgment n.o.v.

The plaintiffs further claim the court erred in submitting to the jury the elements of intentional infliction of emotional distress. Damages for mental distress are compensible when they are incident to certain contract obligation, and in such instances the elements necessary for a finding of intentional infliction of emotional distress need not be met. Bossuyt v. Osage Farmers National Bank, 360 N.W.2d 759, 777-78 (Iowa 1985). The trial court had previously ruled that it appeared the claims of plaintiffs were aggravations of the basic financial damages, but then later submitted an instruction to the jury setting out the elements of the separate tort of intentional infliction of emotional distress. The defendant says this case is not the type described in Bossuyt as included in those where the elements need not be proven.

The court ruled that even if it had erred, there was no prejudice to the plaintiffs because the jury never reached the issue of damages. Plaintiffs respond by saying the jury could have confused the elements of the tort with that which is required to make a finding of bad faith by the company.

Where a jury finds in favor of the defendant as to liability, the plaintiff cannot contend that there was error in the instructions regarding damages. Berding v Thade, 243 N.W.2d 857, (Iowa 1976). *There must be prejudice to a party to* warrant reversal. Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1968).

In the instruction the court made it clear that the issue was entirely separate from the bad faith claim. It stated that if the jury found the plaintiff met the elements the amount of recovery "shall be included in your compensatory or actual damage verdict. . . ". In the special interrogatories the jury was asked whether the company was guilty of bad faith regarding its defense of the Vander Lught's claim. They answered no. They also stated Farm Bureau did not fail to *communicate settlement offers, did not refuse* to pursue settlement negotiations, did not act out of self-interest or fail to assume an active role in the defense, did not advise Sandbultes of the effects of an excess verdict, did not fail to provide competent counsel, did not fail to advise of a conflict of interest, and that Sandbultes did have knowledge of the opportunities to settle and that defendant had prevailed by a preponderance of the evidence. Based upon this, we cannot find error in the jury instruction since it did not prejudice the plaintiffs.

AFFIRMED.