

IN THE COURT OF APPEALS OF IOWA

No. 6-367 / 95-0350

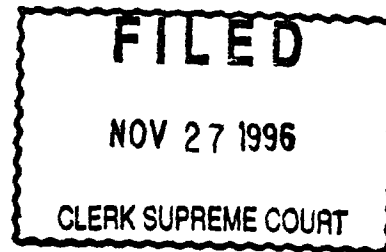
**CLARENCE HERMSEN and
THERESA HERMSEN,**

Plaintiffs-Appellants,

vs.

**KEMPER CORPORATION, ECONOMY
FIRE & CASUALTY d/b/a THE ECONOMY
COMPANIES and VIRGIL S. MOSER,**

Defendants-Appellees.



Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch,
Judge.

In this personal injury action, the HermSENS challenge the order granting
summary judgment in the defendants' favor. **AFFIRMED.**

James H. Reynolds, Dubuque, for appellants.

Todd L. Stevenson and Les Reddick of O'Connor & Thomas, P.C., Dubuque,
for appellees.

Considered by Habhab, P.J., and Streit and Vogel, JJ.

STREIT, J.

Plaintiffs appeal the district court order granting summary judgment in personal injury action.

On August 21, 1991, Virgil S. Moser was driving a motorcycle and rear-ended a car driven by Clarence Hermesen. Hermesen suffered injuries to his shoulder. An adjuster from Economy Fire & Casualty, Moser's insurance carrier, contacted Hermesen regarding his claim and requested tax returns and medical records.

In May or June of 1992, Hermesen hired his current attorney, James H. Reynolds, to advise him regarding his rights on his claim. All future contact with Economy was through Reynolds regarding information needed to expedite negotiations for settlement. No offer was ever made by Economy to settle the case, nor was any agreement entered into by Economy and Hermesen to waive the statute of limitations. There was no contact between the parties from August 27, 1993 until Hermesen filed his lawsuit in 1994.

On June 27, 1994, Hermesen and his wife filed a petition against Defendants Kemper Corporation and Economy Fire & Casualty d/b/a Economy Companies alleging negligence and bad faith. Defendants filed a motion to dismiss. The district court denied the motion. Defendants answered the petition and then filed a motion for summary judgment.

The district court granted the motion. It found the Hermstens had hired an attorney within the limitation period and the petition was filed untimely. It also found the Hermstens had no cause of action for third-party bad faith and determined they had no private cause of action under Iowa Code chapter 507B (1993). The court denied the Hermstens' motion for reconsideration and new trial.

The Hermstens appeal. They claim the trial court erred in finding no genuine issue of material fact existed on the issue of: (1) whether the defendants were estopped from asserting a statute-of-limitations-defense on the grounds an insurance company agent represented to them that the time period would be extended; and (2) whether they had a third-party bad faith claim against the insurers or a cause of action under Iowa Code chapter 507B based upon the insurers' alleged unfair or deceptive acts.

Our scope of review is for errors at law. Iowa R. App. P. 4. Summary judgment is appropriate only if there exists no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c); *See Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, *Milne*, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. *Id.*; *Sherwood*

v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423; *Gott*, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e).

Defendant's motion for summary judgment alleged the Hermsens' negligence claim was barred by the statute of limitations. The Hermsens argue the adjuster from Economy Fire & Casualty agreed to put off an agreement regarding a settlement on damages until the extent of Hermsen's shoulder injury became more certain. According to the Hermsens, the adjuster agreed to give Hermsen until two years after his last medical treatment to make the settlement. There is nothing in Hermsen's affidavit or Hermsen's resistance to the motion for summary judgment to generate such facts. Requests for information alone from the Defendant's insurance adjuster to the Plaintiff is not enough to constitute waiver for statute of limitations. There must be an express waiver or negotiations to toll the statute of limitations. *See Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302 (Iowa 1982) (running of one-year limitation tolled by negotiations, but not waived because no express waiver of limitation clause). Summary judgment is affirmed.

Defendant's motion for summary judgment also alleged the Hermsens had no cause of action for third-party bad faith. There is no independent cause of action in Iowa for third-party bad faith. *Long v. McAllister*, 319 N.W.2d 256, 262 (Iowa 1991). We affirm the district court.

AFFIRMED.