

IN THE COURT OF APPEALS OF IOWA

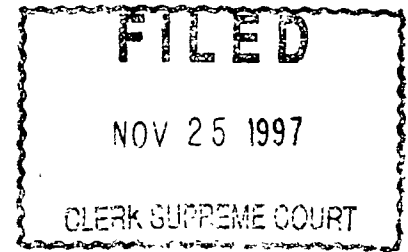
No. 7-352 / 96-1109

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DAVID SOUKUP,  
Appellant,

vs.

FARM BUREAU MUTUAL INSURANCE COMPANY  
and IVAN TJELTE,  
Appellees.



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Appeal from the Iowa District Court for Winneshiek County, Jon C. Fister,  
Judge.

Plaintiff appeals from the district court's order granting defendants' motions  
to dismiss and denying plaintiff's motion to amend his petition. **REVERSED AND  
REMANDED.**

David C. Thompson and Morris L. Eckhart of Milroy and Eckhart, Vinton, for  
appellant.

David L. Riley of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellees.

Heard by Cady, C.J., and Huitink and Streit, JJ.

**STREIT, J.    000300**

A worker injured in a tractor accident sued the liability insurance company of his employer for breach of contract, negligence, and negligent misrepresentation. The court dismissed the claims because plaintiff did not follow the procedures of Iowa Code section 516.1 and for failing to state a claim upon which relief can be granted. We reverse.

***I. Background & Facts.***

On November 2, 1993, the plaintiff, David Soukup, was injured in a tractor accident while working for his employers, Randall and Sheri Greenslade. The Greenslades had liability insurance with Farm Bureau Mutual Insurance Company through its agent, Ivan Tjelte. Randall Greenslade thought he had workers' compensation insurance coverage at the time of Soukup's accident. The day following the accident, however, Tjelte told the Greenslades they did not have workers' compensation coverage.

Soukup filed a petition against Farm Bureau and Tjelte for breach of contract, negligence, and negligent misrepresentation. Soukup's breach of contract claim alleged he was a third-party beneficiary of the insurance contract the Greenslades believed they had purchased from Farm Bureau through Tjelte. His tort claims alleged Tjelte and Farm Bureau negligently failed to provide workers' compensation insurance coverage and negligently misrepresented the Greenslades had all the necessary insurance for their farming operation. Soukup filed a separate action

against the Greenslades for damages based on the same causes of action. That case was pending at the time of this appeal. The court sustained Farm Bureau's motions to dismiss all claims of the petition and denied Soukup's motion to amend his petition.

## ***II. Motion to Dismiss.***

Farm Bureau secured the dismissal of Soukup's claim on a motion to dismiss. See Iowa R. Civ. P. 104(b). We sustain a motion to dismiss only if the petition on its face shows no right to recovery under any set of facts. *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994). Because of the lenient standards of pleading and review, only rarely will a petition fail under a motion to dismiss. *Stessman v. Am. Black Hawk Broadcasting*, 416 N.W.2d 685, 686 (Iowa 1987).

Under the notice pleading requirements of Iowa Rule of Civil Procedure 69(a), a petition must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Iowa R. Civ. P. 69(a)(West 1997). The pleader does not need to identify a specific legal theory. *Stessman v. Am. Black Hawk Broadcasting*, 416 N.W.2d 685, 686 (Iowa 1987). The requirement is the pleader must assert the prima facie elements of a claim so as to give notice to the defendant. *Id.*

Appellate review of a district court's ruling on a motion to dismiss is limited to correction of errors at law. *Estate of Dyer v. Krug*, 533 N.W.2d 221, 222 (Iowa 1995). This court cannot sustain a motion to dismiss on grounds not asserted in

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district court. *Haupt v. Miller*, 514 N.W.2d 905, 907 (Iowa 1994). Any decision to sustain a motion to dismiss must rest on legal grounds. *Id.* When reviewing a petition that has been dismissed by 104(b) motion this court must resolve all doubts and ambiguities in the plaintiff's favor. *Id.* The petition will be assessed in the light most favorable to the plaintiff. *Holsapple v. McGrath*, 521 N.W.2d 711, 712 (Iowa 1994). Allegations set out in the petition are taken as true. *Stessman*, 416 N.W.2d at 686.

A motion to dismiss cannot be based upon facts not alleged in the pleading unless judicial notice can be taken of those facts. *Id.* When the parties rely on facts not contained in the pleadings, the appropriate procedure is summary judgment. *Estate of Dyer*, 533 N.W.2d at 223.

### ***III. Sufficiency of the Petition.***

***A. Breach of Contract Claim.*** Soukup's petition alleges he is a third-party beneficiary of the contract between the Greenslades and Farm Bureau. He alleged Farm Bureau breached its contractual obligations with the Greenslades to provide workers' compensation coverage to Soukup. He alleged he was damaged as a result.<sup>1</sup> These allegations give fair notice to Farm Bureau of Soukup's claim.

Even so, Farm Bureau contends the petition fails because there are no facts conceivable under which Soukup could show a right of recovery. Farm Bureau contends Soukup can not bring a direct action against Farm Bureau for failure to

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<sup>1</sup> The remedy herein has not been disputed. Plaintiff seeks damages for injuries suffered while at work—damages usually determined by the Industrial Commissioner.

provide liability coverage to the Greenslades without following the conditions precedent of section 516.1.<sup>2</sup> Soukup did not obtain a judgment against the insured party and obtain an unsatisfied judgment against them.

Soukup argues there are facts conceivable under which he could show a right of recovery for the allegations in his petition. We agree. Iowa law recognizes the right of a third-party beneficiary to a contract to maintain an action against a defendant in certain circumstances. *Millright v. Romer*, 322 N.W.2d 30, 32 (Iowa 1982). Section 516.1 does not abrogate a third party's traditional remedies under liability policies. *Cent. Nat. Ins. Co. v. Ins. Co. of No. Am.*, 522 N.W.2d 39, 41 (1994). Section 516.1 applies to (1) policies that insure against the insured's liability to third parties, and (2) policies that indemnify an insured for payments the insured makes to third parties. *Steffens v. American Standard Insurance Co.*, 181 N.W.2d 174 (Iowa 1970). The statute does not apply to claims asserted by persons who allege they are third-party beneficiaries of an insurance contract.

We do not suggest a contract existed or that Soukup can prove his allegations. However, neither of these are inconceivable. In order to enforce a contract, a third-party beneficiary must first show the existence of a contract. Next, he must show the contract was made for his express benefit. *Khabbaz v. Swartz*, 319 N.W.2d

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<sup>2</sup> Section 516.1 requires all policies insuring the legal liability of the insured shall contain a provision which provides that in the event an execution on a judgment against the insured is returned unsatisfied in a action by a person who is injured, the judgment creditor has a right of action against the insurer. Iowa Code § 516.1 (West 1997).

279, 285 (1982). To derive a benefit from a contract, the contract must have been made or entered into directly or primarily for the benefit of such third person. *Uhl v. City of Sioux City*, 490 N.W.2d 69, 73 (Iowa App. 1992). A party must be either a donee beneficiary or a creditor beneficiary, as those terms are defined in Restatement, Contracts, Section 133, in order to recover damages flowing from breach of a contract to which he was not a party. *Peter Kiewit Son's Co. v. Iowa Southern Utilities Co.*, 355 F.Supp. 376, 392 (S.D.Iowa 1973). "The real test is whether the contracting parties intended a third person should receive a benefit which might be enforced in the courts." *Khabbaz*, 319 N.W.2d at 285.

A person is a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.<sup>3</sup> *Olney v. Hutt*, 251 Iowa 1379, 1386, 105 N.W.2d 515, 519 (1960); Restatement, Contracts, § 133 at 151 (1932). An incidental beneficiary is a person benefitted by the performance of a contract who is neither a creditor or donee beneficiary. *Id.* Incidental beneficiaries cannot claim any right to the performance of a contract between other parties. *Johnson Farm Equipment Co. v. Cook*, 230 F.2d 119, 124 (8th Cir. 1956).

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<sup>3</sup> A creditor can also be regarded as a donee beneficiary. Restatement, Contracts, § 133 at 151 (1932).

Because it is not inconceivable that Soukup could prove this claim with a set of facts, motion to dismiss should not have been granted.

***B. Claims for Negligence and Negligent Misrepresentation.*** Soukup claims Ivan Tjelte and Farm Bureau were negligent by not providing workers' compensation insurance coverage for his work-related injuries. Soukup further contends Farm Bureau and Tjelte were liable to him because they made negligent misrepresentations to the Greenslades.

To prove a negligence claim Soukup must prove Farm Bureau had a duty to him, *Wilson v. Nepstad*, 282 N.W.2d 664 (1979); they breached that duty, *Id.*; there was a causal connection between the breach and the resulting harm, *Ehmke v. Sioux City*, 131 N.W.2d 821 (1964); and he sustained actual damage. See *Schnebly v. Baker*, 217 N.W.2d 708 (Iowa 1974).

Soukup alleged the liability of Farm Bureau for negligent representation under the Restatement (Second) of Torts, section 552 (1977).<sup>4</sup>

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<sup>4</sup> § 552. INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information

We make no finding as to whether Farm Bureau was negligent or made negligent misrepresentations within the meaning of the Restatement.

In dismissing Soukup's negligence and negligent misrepresentation claims, the court made findings Farm Bureau owed no duty to Soukup and Soukup was not within the group of persons for whose benefit and guidance Tjelte supplied information. To make these determinations the court drew on facts outside of the petition and the proper scope of judicial notice, which is not proper in a motion to dismiss proceeding. *Curtis v. Bd. of Sup.*, 270 N.W.2d 447, 448 (Iowa 1978).

Because we cannot conclude as a matter of law that no facts are conceivable under which a claim for breach of contract, negligence, or negligent misrepresentation can be maintained, we reverse and remand for proceedings consistent with this opinion.

***V. Motion for Leave to Amend.***

Soukup appeals the court's denial of his motion for leave to amend his petition.

Iowa Rule of Civil Procedure 88 provides guidelines for deciding whether amendments to pleadings should be allowed.<sup>5</sup> Allowance or disallowance of

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to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

<sup>5</sup> It states:

A party may amend the pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the

amendments is a matter of legal discretion for the trial court. *Ackerman v. Lauver*, 242 N.W.2d 342, 345 (Iowa 1976). The court should apply rule 88 in the light of all the circumstances of the case. *Johnston v. Percy Construction, Inc.*, 258 N.W.2d 366, 371 (Iowa 1977) ("[T]he bounds of fair discretion are exceeded if the ruling lacks a sound legal basis."). The allowance of amendments should be the rule, and denial the exception. *Ackerman*, 242 N.W.2d at 345.

Under all of the circumstances of this case the district court should have granted the city's motion to amend. The circumstances did not support a denial of that motion. The district court ruled on the merits of the allegations in the proposed amendment. Because it ruled the allegations of the proposed amendment did not have merit, it denied the motion. The merits of the claim are factors to consider on a motion to amend pleading under Rule 88. The district court could have considered whether the proposed amendment would have so changed the issues as to surprise any party or cause prejudice. *See Moser v. Thorp Sales Corp.*, 312 N.W.2d 881, 896 (Iowa 1981). The amendment did not substantially change the issues because the amendment dealt with Farm Bureau's obligation to pay for the damages he sustained from his injury working for his employer. This was the same issue alleged in the petition. Soukup's proposed amendment clarified its theory of why Farm Bureau was

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party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend the pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

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obligated to pay his damages. No party demonstrated surprise or prejudice at the amendment. For these reasons the district court should have granted Soukup's motion to amend and then considered the allegations of the proposed amended petition in ruling on Farm Bureau's motion to dismiss.

**REVERSED AND REMANDED.**