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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

101

Filed November 20, 1984

GRINNELL MUTUAL REINSURANCE COMPANY,

Plaintiff-Appellee,

vs

TONI O. AGUE and LeROY AGUE,

Defendants-Appellants,

and JAMES A. WIERCK and WILLIAM A. WIERCK,

Defendants.

4-330
83-1642

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Appellants claim that the lower court erroneously dismissed its counterclaim against Grinnell Mutual Reinsurance Company for alleged malice in bringing a declaratory action against the appellants and Grinnell's insured. AFFIRMED.

John L. Riccolo and Tim A. Estlund of Wenzel, Piersel, Riccolo & Estlund, P.C , Cedar Rapids, for defendants-appellants.

Ralph w. Gearhart and Thomas P. Peffer of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

Appellants claim that the lower court erroneously dismissed its counterclaim against Grinnell Mutual Reinsurance Company for alleged malice in bringing a declaratory action against the appellants and Grinnell's insured. We affirm.

The appellants, Toni and LeRoy Ague, were involved in an automobile accident with Grinnell's insured, James and William Wierck. After making five claims payments to the Agues as a result of the accident, Grinnell filed a declaratory judgment action against the Agues and Wiercks seeking to establish that the insurance contract was procured through fraud. The Agues filed a counterclaim alleging the action by Grinnell was made in bad faith, malice, or negligence in an attempt to avoid the obligations under the insurance policy, and constituted stubborn litigiousness and harassment of the Agues. They demanded attorneys fees, litigation costs, and compensation for emotional and mental distress along with punitive damages. The court granted a motion to dismiss for failure to state a claim upon which relief may be granted.

A claim will be dismissed only when it appears to a certainty that under any state of facts which could be proven no claim is presented. Curtis v. Board of Supervisors of Clinton County, 270 N.W.2d 447, 448 (Iowa 1978).

The court based its ruling on the case of Long v. McAllister, 319 N.W.2d 256 (Iowa 1982). The court there refused to recognize as a tort third-party recovery against an insurer for the insurer's bad faith toward the third party in failing to settle a liability claim with the insured. Id. at 261. The third party could at the time go directly against the insurance company only when liability had been established and the victim could not collect directly from the insured. Id.; Iowa Code § 516.1 (1983). The court indicated the only basis a court might have for supporting a claim by the third party against the insurer in any other case would have to arise out of the bad faith of the insurer toward the insured. Id. The court

noted that, at the time of the decision, an insured could not proceed against the insurance company for its failure to pay the insured's own claim, a tort it referred to as a first-party tort. Id.

Since the time of the Long decision, our court has indicated it would recognize such a first-party tort in certain circumstances. In Pirkl v. Northwestern Mutual Insurance Ass'n, 348 N.W.2d 633, 635 (Iowa 1984), the court stated at footnote two, "we (have) recognized an independent tort liability for the breach of a liability insurer's duty to act in good faith in representing an insured against a third party..." It distinguished other cases which indicated such a tort would not be recognized by stating that in the facts of those cases the claims the insurer failed to pay were as a a matter of law "fairly debatable." Id. The court cites Higgens v. Blue Cross of Western Iowa and South Dakota, 319 N.W.2d 232, 235 (Iowa 1982), but in that case the court expressly refused to decide the issue of whether to recognize the tort. The other two cases, Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30, 33-34 (Iowa 1982), and Koppie v. Allied Mutual Insurance Co., 210 N.W.2d 844, 846-48 (Iowa 1973), both dealt with the excess judgment statute section 516.1 of the Code, and not with the so-called first-party tort. While the court's ruling in this regard is not evident, it appears from the dicta found at footnote two of Pirkl that the court now will recognize the first-party tort. Under the reasoning of Long, then, since the insured may proceed against the insurer it may be possible that the third party could also proceed in this vein. The appellants argue that the third-party victim in such a declaratory judgment action is put in the shoes of the insured in being forced to prove the duty of the insurance company to pay.

While appellants' argument has merit, further policy considerations were discussed at Long relevant to this situation. The court rejected the action by the third party against the insurer on a contract claim, holding that the third party is

merely an incidental beneficiary and has no rights to enforce. Long, 319, N.W.2d at 262 The court stated that since the third party would gain only if the contract is carried out according to its terms, the third party is an incidental beneficiary. Id

The court also refused to recognize a tort action, explaining its views as follows:

> The insurer has a fiduciary duty to the insured but an adversary relationship with the victim. The effect of the policy is to align the insurer's interests with those of the insured. In meeting its duty to the insured, the insurer must give as much consideration to the insured's interests as it does to its own. It has no such relationship with a third party. Instead the insurer stands in the shoes of the insured in dealing with the victim. Because the insured has a right to require liability to be proven as a predicate for payment of the loss, the victim cannot compel the insured to negotiate and settle the loss before hand.

Id These considerations also apply in this case, and appellants for these reasons have no claim upon which relief may be granted.

Appellants claim that the case of New Hampshire Insurance Co. v. Christy, 200 N W.2d 834 (Iowa 1972) supports its claim that the declaratory judgment action was improperly brought. However, in Christy, the court approved an action by an insured, and not a third party, against the insurer. Id. at 845. For the same reasons expressed in Long, this concept may not be extended to the third party.

Appellants present no claim for relief recognized in Iowa and we affirm the trial court's dismissal of the action.

AFFIRMED.