IN THE COURT OF APPEALS OF IOWA

No. 0-216 / 09-1220
Filed January 20, 2011

JOE UMTHUN and VIRGIL UMTHUN,
Plaintiffs-Appellants,

vs.

IMT INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Wright County, William C. Ostlund, Judge.

The plaintiffs appeal from the district court's grant of summary judgment in favor of the defendants. **AFFIRMED.**

Robert Malloy and Benjamin T. Cook, Goldfield, for appellants.

David J.W. Proctor and David N. May of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Joe Umthun and Virgil Umthun (Umthuns) appeal from a July 15, 2009 order dismissing their claims on summary judgment against IMT Insurance Company (IMT). Although not party to the insurance contract central to their underlying claims, the Umthuns argue they should be able to recover under the doctrine of "reasonable expectations" as a "secondary insured" of the insurance policy. They also claim the district court erred in dismissing their claim of professional negligence. We affirm.

I. Facts & Procedural Background.

In January 2004, the Umthuns, as sellers, entered into a real estate contract with Quality Communications (Quality), as buyers, of a commercial building. Quality paid the Umthuns a down payment of $24,000, with the remaining $216,000 to be paid in monthly installments along with a balloon payment due in ten years. The contract provided in part,

> In addition, Buyer shall pay real estate taxes and insurance, and provide proof of payment of each to Seller upon request. . . .
>
> . . . .
>
> 6. INSURANCE. Except as may be otherwise included in the last sentence of paragraph 1(b) above, Buyers as and from said date of possession, shall constantly keep in force insurance premiums therefore to be prepaid by Buyers (without notice or demand) against loss by fire, tornados and other hazards, casualties and contingencies as Sellers may reasonably require on all buildings and improvements, now on or hereafter placed on said premises and any personal property which may be the subject of this contract, in companies to be reasonably approved by Sellers in an amount not less than the full insurable value of such improvements and personal property or not less than the unpaid purchase price herein whichever amount is smaller with such insurance payable to Sellers and Buyers as their interests may appear. Seller[s'] interests shall be protected in accordance with the standard union-type loss payable clause. BUYERS SHALL PROMPTLY DEPOSIT SUCH POLICY WITH PROPER RIDERS

> WITH SELLERS for the further security for the payment of the sums herein mentioned. In the event of any such casualty loss, the insured proceeds may be used under the supervision of the Sellers to replace or repair the loss if the proceeds be adequate, if not, then some other reasonable application of such funds shall be made. But in any event such proceeds shall stand as security for the payment of the obligations herein.

Quality purchased an insurance policy with IMT through an independent insurance agent, John Dencklau of Dencklau Insurance Services. The policy contained an endorsement entitled, "Loss Payable Provisions," with three provisions applicable: "Loss Payable," "Lender's Loss Payable," and "Contract of Sale." The Umthuns were shown as "Loss Payee" under the designation of "Contract for Sale," which provided:

> D. Contract of Sale
>
> 1. The Loss Payee shown in the Schedule or in the Declarations is a person or organization you have entered a contract with for the sale of Covered Property.
>
> 2. For Covered Property in which both you and the Loss Payee have an insurable interest we will:
>
> a. Adjust losses with you; and
>
> b. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

After Quality purchased the policy, it provided Umthuns with a copy of the endorsement, entitled "Loss Payable Provisions." Virgil Umthun then contacted Dencklau to inquire about the policy. In his deposition, Virgil stated:

> A. I just asked him the nature of the coverage. . . . Well, if our loan was fully covered, because we had a carryover now of the contract, and I wanted to make sure we were covered then for that full contract, and he assured me we were.
>
> Q. When you say fully covered for the whole contract, were you wanting to know how much insurance coverage there was in terms of a dollar amount? A. Well, just whether or not we were covered with the balance of the contract, you know, after we made the $25,000 down payment—they did, then was the rest of the loan covered in that policy.

> Q. All right. So you wanted to know if there was enough insurance to cover the balance of the purchase price under that contract you entered into with Quality Communications? A. Right.
>
> Q. All right. So it sounds to me then that the question you posed to John Dencklau was a question that dealt with the amount of coverage in terms of dollar amount? A. Right.
>
> . . . .
>
> Q. Do you recall having any discussions with John Dencklau about whether you would be—you and your brother would be afforded coverage under the policy if either of the Quality Communications' principals later did something that violated their obligations under the policy of insurance? A. No.

As to his conversations with Quality, Virgil testified:

> A. I just asked them if they had the insurance in order and what coverage they had, and that's about all we really discussed.
>
> Q. And then they showed you a copy of the endorsement; is that correct? A. Right.

Regarding IMT, Virgil testified:

> Q. Have you had conversations with any representative of IMT Insurance Company about Quality Communications' policy of insurance? A. No.
>
> Q. You've never talked with anyone from IMT Insurance Company? A. No, I haven't.

Apparently satisfied that Quality had purchased insurance, and relying on a general notion that the policy covered the Umthuns' remaining financial interest in the property, the Umthuns cancelled their own insurance policy on the property.

On July 27, 2004, a fire damaged the building. However, due to Quality's failure to comply with document requests as part of IMT's fire investigation, IMT denied Quality's claim for damages. Quality then sued IMT for breach of contract, but the suit was dismissed when the district court granted IMT's motion for summary judgment on October 30, 2006. Quality filed a notice of appeal, but ultimately dismissed its appeal on April 9, 2007.

Meanwhile, the Umthuns filed the current law suit against IMT on July 24, 2006. IMT filed a motion for summary judgment on all of the Umthuns' claims. On January 3, 2008, the district court partially granted the motion, dismissing Unthuns' breach of contract and bad faith claims. In that ruling, the district court found the duties owed the loss payee differed with the designation made in the insurance policy. The court stated:

> Under the "Contract of Sale" provision, the loss payee stands in the shoes of the named insured [Quality] as to loss payment. Under the "Lender's Loss Payable" provision, the loss payee's right to loss payment is independent of the named insured's right [to] such payment.

The issues remaining following the January 2008 partial grant of summary judgment were: Count II, seeking reformation of the insurance policy to reflect the reasonable expectations of the Umthuns; and Counts V and VI, seeking damages based on IMT's negligence in writing and issuing a policy that failed to instruct either Quality or the Umthuns that it "was contrary to the express agreement between [the Umthuns] and the primary insured [Quality]." On July 15, 2009, the district court granted IMT's motion for summary judgment as to the remaining claims. The Umthuns appeal and assert the district court erred in dismissing its reformation of contract claim based on the doctrine of reasonable expectations and its negligence claim.

II. Scope of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907. Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

> Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment.

Shriver v. City of Okoboji, 567 N.W.2d 397, 400 (Iowa 1997) (internal citations and quotation omitted).

III. Contract Reformation; Reasonable Expectations.

The doctrine of reasonable expectations has been summarized as:

> As we have stated on a prior occasion, the doctrine [of reasonable expectations] is carefully circumscribed and does not contemplate the expansion of coverage on a general equitable basis. The doctrine can only be invoked [when] an exclusion (1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction. Moreover, as a precondition to reliance on this doctrine, an insured must establish that an ordinary layperson would misunderstand the policy coverage or that there are circumstances attributable to the insurer that led the insured to expect coverage.

American Family Mut. Ins. Co. v. Corrigan, 697 N.W.2d 108, 118 (Iowa 2005) (quoting *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 206 (Iowa 1995), and *Essex Ins. Co. v. The Fieldhouse, Inc.*, 506 N.W.2d 772, 777 (Iowa 1993) (internal quotations omitted)).

Part of Umthuns' argument on appeal loses some force, as the January 2008 ruling found that the "loss payable" provisions of the insurance endorsement were "unambiguous." The Umthuns did not appeal that ruling, nor

do they challenge that finding in this appeal.[1] As we agree with that finding, we determine the Umthuns cannot now attempt to show the endorsement language was somehow "bizarre or oppressive" such that the contract should be reformed. *LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 311 (Iowa 1998) (holding layperson would not misunderstand exclusion that was "clear and unambiguous").

The district court found that Umthuns' expectations as to coverage arose because of Virgil's brief conversation with Dencklau, who was an agent for the insured, Quality, not as an agent for IMT. Evidence presented by IMT bore out its position that private party contract sellers are designated under "contract of sale" and not "lender's loss payable," a designation reserved strictly to financial lending organizations. The district court also found the Umthuns' expectations arose from the terms of the real estate contract between them and Quality, which did not implicate IMT. IMT's underwriting file for Quality did not contain a copy of the real estate contract between Umthuns and Quality.

The Umthuns accurately state that the doctrine of reasonable expectations has been applied to fact patterns whereby one party reasonably believed its financial interests were protected by an insurance policy. *Cf. Cairns v. Grinnell Mut. Reins. Co.*, 398 N.W.2d 821, 826 (Iowa 1987) (examining whether the doctrine of reasonable expectations applied to the interests of an insured). However, they fail to cite any authority which would extend this doctrine to

[1] The Umthuns filed a notice of appeal, but then dismissed the appeal. *See Mason City Prod. Credit Ass'n v. Van Duzer*, 376 N.W.2d 882, 885 (Iowa 1985) (explaining that a partial summary judgment ruling is not a final ruling that may be appealed, unless the issues are separable from the issues that remain to be decided in the district court).

someone who was not an "insured" under the policy, but rather designated as "loss payee" under a contract of sale. We agree with the district court's reliance on *Cedar Rapids v. Insurance Company of North America*, 562 N.W.2d 156 (Iowa 1997).

> We are convinced that the doctrine of reasonable expectations recognized in the *Rodman* decision has reference to the expectations of an insured who contracts directly with the insurer. It does not extend to an additional insured whose expectations do not arise from dealings with the insurer but rather from private agreements made with the named insured.

Cedar Rapids, 562 N.W.2d at 159.

Clearly Quality did not secure the type of insurance coverage that it agreed to purchase under the terms of the real estate contract. Nonetheless, IMT was not party to that agreement, nor can any expectation the Umthuns had with their agreement with Quality be imputed to IMT. The only inquiry Umthuns had as to their coverage under the endorsement was with Dencklau and that was after the policy was issued to Quality. The Umthuns had no hand in securing the policy from IMT, nor did they approve of the endorsement language when Quality purchased the policy. See *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 50 (Iowa 2003) (stating the party asserting the doctrine of reasonable expectations must show not only the expectations, but also that such were relied upon by the insurance purchaser at the time the purchaser was deciding to buy the policy).

Therefore, Umthuns cannot show that the endorsement "eviscerates terms explicitly agreed to," nor does it "eliminate the dominant purpose of the transaction," because the Umthuns were not party to the purchase of the policy. *Essex Ins. Co.*, 506 N.W.2d at 777. They did however "rely" on whatever they

were able to glean from the unambiguous language in their copy of the endorsement and a very brief conversation with Dencklau, the agent for the insured, Quality. The district court did not err in dismissing their reformation claim against IMT based on the doctrine of reasonable expectations.

IV. Negligence.

The Umthuns assert that IMT was negligent in regards to writing the insurance contract. "The elements of a negligence claim include the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 718 (Iowa 1999). A negligence claim may be prohibited by the economic loss doctrine. *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 692–93 (Iowa 2010).

> The economic loss doctrine has been characterized as a generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm. The rationale for this limitation on recovery is that purely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions. Accordingly, we ultimately look to the policies behind tort law and contract law to determine whether a loss is compensable in tort or in contract.

Id. (citations and quotations omitted).

The district court agreed with IMT that the economic loss doctrine barred Umthuns' negligence claims against IMT. It acknowledged, and IMT conceded that Iowa case law has extended tort liability to professional negligence cases, although such cases involve purely economic loss. *See Kemin Indus., Inc. v KPMG Peat Marwick*, 578 N.W.2d 212, 220 (Iowa 1998). However, it found no Iowa case that would uphold a professional negligence claim against an

insurance company. In dismissing Umthuns' negligence claims, it also found no facts had been presented to support the claim that "any licensed professional from IMT negligently drafted the policy at issue."

The Umthuns claim that IMT was in various ways, negligent in issuing the policy it did with Quality. They assert that IMT should have understood the relationship between the sellers and the buyers of the property, and tailored the "loss payable" provision to that separate real estate contract. IMT responds that Umthuns were not party to those negotiations and IMT and Quality were free to enter into the terms they chose. We agree. Again, it was not incumbent upon IMT to make sure the terms of the real estate contract between Umthuns and Quality were satisfied. That obligation fell on Quality, with oversight by Umthuns. *See Cedar Rapids*, 562 N.W.2d at 159 (holding that if the primary insured failed to procure coverage for the secondary insured as required under a separate agreement, the secondary insured must look to the primary insured for recourse and not the insurance company, which was only required to defend in accordance with the provisions of its policy with the primary insured).

We further agree with IMT that this issue was largely decided in the January 3, 2008 ruling when the district court noted:

> [The Umthuns] do not point to any language in the endorsement or law that states [IMT] was required to give them a certain type of loss payee coverage. . . . [The Umthuns] have not shown that [IMT] was required by law or by the language of the contract to give [Umthuns] the "Lender's Loss Payable" designation.

Although the Umthuns claim IMT should pay them damages under the rubric of "professional negligence," they cite no authority that would support their position. IMT acknowledges that damages can be assessed against an insurance agent,

as opposed to the insurance company, for "professional negligence." *See Humiston Grain Co. V. Rowley Interstate Transp. Co.*, 512 N.W.2d 573, 575–76 (Iowa 1994) (discussing a case where damages may be assessed against an insurance agent for professional negligence); *Long v. Time Ins. Co.*, 572 F. Supp. 2d 907, 912 (S.D. Ohio 2008) (holding that the economic loss doctrine barred the plaintiff's professional negligence claims against an insurance company). We find no authority which would extend "professional negligence" to an insurance company, as an exception to the damages bar of the economic loss doctrine.

Again, the Umthuns were not IMT's "insured." Moreover our Iowa case law has not been extended to hold an insurance company as IMT owes a professional duty to either its own insured or to someone named in an endorsement and given a "loss payable" designation. Viewing the facts presented most favorably to the Umthuns, we affirm the district court's grant of summary judgment in favor of IMT.

AFFIRMED.