IN THE COURT OF APPEALS OF IOWA

No. 6-1027 / 06-0310
Filed March 28, 2007

JOHN E. WALTER,
Plaintiff-Appellant,

vs.

GRINNELL MUTUAL REINSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Plaintiff appeals from the district court's grant of summary judgment for defendant in his third-party bad faith suit. **AFFIRMED.**

Vance Jorgensen of Vance Jorgensen Law Firm, Mason City, for appellant.

Douglas A. Haag of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P., Des Moines, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Plaintiff-appellant, John Walter, appeals from the district court's grant of summary judgment for defendant-appellee, Grinnell Mutual Reinsurance Company (Grinnell). He contends the court erred (1) in misapplying the law applicable to third-party bad-faith claims and in making a factual determination of a disputed fact, and (2) in denying his motion to amend his petition. Alternatively, he contends the law should be changed if the district court applied it correctly. He further contends that the court's factual determination unconstitutionally deprived him of his right to a jury trial. We affirm.

I. Background

Plaintiff was seriously injured when he was struck by a car while he was crossing a street. The driver had vehicle liability coverage of $100,000 through Grinnell. When plaintiff sued the driver, Grinnell retained counsel to represent the driver. Plaintiff, whose medical bills exceeded $83,000 at the time, offered to settle for the policy limit of $100,000. Grinnell offered $5000. A jury determined plaintiff's damages to be $201,160 and that he was twenty percent at fault. Judgment was entered against the driver for $160,928.

After the judgment, the driver assigned any claims she might have against Grinnell to plaintiff in exchange for a covenant not to execute. Plaintiff then sued Grinnell, alleging it acted in bad faith for refusing to settle for the policy limits. Grinnell moved for summary judgment. Following a hearing, the district court sustained Grinnell's motion and dismissed the suit. The court concluded the standards for third-party bad faith claims and first-party bad faith claims are the same. It applied a "fairly debatable" standard in determining "Grinnell had a

reasonable basis for not agreeing to settle for the policy limits." It found plaintiff's claim fairly debatable for two reasons. First, it concluded a jury could have found plaintiff more than fifty percent at fault for failure to exercise ordinary care because of his intoxication and for failure to use the crosswalk. Second, it concluded a jury could have established damages in an amount, when reduced by plaintiff's fault, that would have resulted in a judgment within the policy limits.

II. Scope of Review

Review of a ruling on a motion for summary judgment is for correction of errors at law. *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The court must view the record in the light most favorable to the nonmoving party. *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 228 (Iowa 2004). In determining if there is a genuine issue of material fact, the court should also afford the nonmoving party every legitimate inference the record will bear. *Smidt v. Porter*, 695 N.W.2d 9, 14 (Iowa 2005). "If the moving party can show that the nonmoving party has no evidence to support a determinative element of that party's claim, the moving party will prevail in summary judgment." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). "We can resolve a matter on summary judgment if the record reveals a conflict only concerns the legal consequences of undisputed facts." *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 675 (Iowa 2005).

III. Merits

Summary Judgment. Plaintiff contends the district court misapplied the law concerning bad-faith claims against insurers. The district court concluded the standards are the same for first-party and third-party bad faith claims, citing *Johnson v. American Family Mutual Insurance Co.*, 674 N.W.2d 88, 90 (Iowa 2004). Based on that conclusion, it looked to a first-party bad faith case, *Bellville v. Farm Bureau Mutual Insurance Co.*, 702 N.W.2d 468, 473 (Iowa 2005), for the elements to establish bad faith: (1) the insurer "had no reasonable basis for denying the plaintiff's claim or for refusing to consent to settlement, and (2) the defendant knew or had reason to know that its denial or refusal was without reasonable basis." The first element is objective; the second is subjective. *Id.* If a claim is "fairly debatable," an insurer has a reasonable basis for denying a claim. *Id.* In granting summary judgment, the court determined plaintiff's claim was fairly debatable, so plaintiff could not establish the elements of bad faith as a matter of law.

Plaintiff asserts *Johnson* does not stand for the proposition that the standards are the same. He argues the distinct standards for third-party and first-party bad faith claims still apply and the court erred in concluding the standards are the same. Alternatively, he contends if the district court was correct in its understanding of the law concerning third-party bad faith claims, the law should be changed.

The distinct standards and the rationale behind them is set forth succinctly in *North Iowa State Bank v. Allied Mutual Insurance Co.*, 471 N.W.2d 824, 828-29 (Iowa 1991):

> We have allowed application of different standards for tort recovery in bad-faith actions against an insurer depending on the type of claim presented and the conduct required of the insurer. We have recognized a bad-faith cause of action in an insurer's representation

> of an insured in a third-party liability claim. We have reasoned that the insurer, in handling a claim which might exceed the policy, owes a fiduciary duty to the insured to act responsibly in settlement negotiation to prevent exposure of the insured to unreasonable risk. This places a duty on the insurer to investigate the claim and take affirmative action as necessary to protect the interest of the insured.
>
> Recently, we have recognized that an insurer may be responsible for the tort of bad faith in first-party situations in which the dispute involves the insured's right to recover under the policy. . . . [W]e [have] described the insurer-insured relationship in a first-party situation as being an arm's-length relationship. In a first-party action, the "insurer has no clearly defined duty of investigation [as in a third-party claim] and may require the insured to present adequate proof of loss before paying the claim." Finally, we have held that the insurer is not responsible in a first-party bad-faith claim if the claim is fairly debatable.

(Citations omitted.) "The fiduciary duty required of an insurer in a third-party claim arises only when the insured is required to represent the insured's position against a third party." *Id.* at 829 (citing *Pirkl v. Northwestern Mut. Ins. Ass'n*, 348 N.W.2d 633, 635 (Iowa 1984)).

The district court read *Johnson* as making the third-party and first-party standards the same. The question in *Johnson* was whether the jury instructions correctly stated the law. *Johnson*, 674 N.W.2d at 90. The language in question was "[d]efendant had no reasonable basis for its judgment that the demand for settlement was not reasonable" and "[t]he insurance company may reject settlement demands which it has a reasonable basis to believe are not reasonable." *Id*. After quoting from *Henke v. Iowa Home Mutual Casualty Co.*, 250 Iowa 1123, 1130, 97 N.W.2d 168, 173 (1959) and *Ferris v. Employers Mutual Casualty Co.*, 255 Iowa 511, 518, 122 N.W.2d 263, 267 (1963) concerning rejection of settlement demands, the court determined the language in the instructions correctly stated the law. *Id.* at 91. *Henke* stated the test for reasonableness of the insurer's rejection as whether

"the settlement proposal has been fully and fairly considered and decided against, based upon an honest belief that the action could be defeated or the judgment held within the policy limits." *Henke*, 250 Iowa at 1130, 97 N.W.2d at 173. *Ferris* asked whether "the insurer in good faith believed that it could successfully defend." *Ferris*, 255 Iowa at 518, 122 N.W.2d at 263. The *Johnson* court observed, "Of course, the reasonableness of an insurer's rejection of a settlement offer within policy limits must be judged from the point of view of one who is exposed to the entire risk." *Johnson*, 674 N.W.2d at 91. That standard differs from the first-party bad-faith test whether a claim is fairly debatable. We conclude the district court applied the wrong standard in ruling on the motion for summary judgment.

Applying the proper third-party bad-faith standard, however, we conclude summary judgment was appropriate. The record reveals Grinnell believed it could defend successfully and that, even though a judgment might exceed the policy limits, the plaintiff's contributory fault meant the driver was not exposed to unreasonable financial risk. Accordingly, we affirm the district court's grant of summary judgment.

Jury Trial. Plaintiff also contends granting summary judgment denied him his right to a jury trial. We find nothing in the record where this issue was raised in or decided by the district court. It is a "fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Stammeyer v. Iowa Dep't of Pub. Safety*, 721 N.W.2d 541, 548 (Iowa 2006) (citing *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 167 (Iowa 2003)). We find nothing properly before us to review. *Id*.

Leave to Amend. Plaintiff contends the court erred in denying his motion for leave to amend his petition to add claims and an additional party. Our review of a ruling on a motion for leave to amend a petition is for abuse of discretion. *See Holliday v. Rain and Hail L.L.C.*, 690 N.W.2d 59, 63 (Iowa 2004). Leave to amend is to be freely given when justice requires it. *Medco Behavioral Care Corp. v. Iowa Dep't of Human Servs.*, 553 N.W.2d 2d 556, 563 (Iowa 1996). However, leave to amend should be denied when it substantially changes the issues. *See Wooldridge v. Central United Life Ins. Co.*, 568 N.W.2d 44, 47 (Iowa 1997). In this case, the proposed amendment would have changed the issues significantly and added another party. We conclude the district court did not abuse its discretion in denying the plaintiff's motion for leave to amend.

AFFIRMED.