INDIANA SUPREME COURT

Michael Dodd and Katherine Dodd v. American Family Mutual Insurance Company

983 N.E.2d 568 (Ind. 2013) · No. 12S02-1203-CT-170 · Decided March 5, 2013

SUMMARY

The Indiana Supreme Court affirmed summary judgment for American Family Mutual Insurance Company after the insurer voided an insurance policy based on the insureds' failure to disclose a prior fire loss. The court held that the insureds had not preserved or supported their argument that the insurer's failure to tender paid premiums prevented rescission, and further held that the tender requirement did not apply because the insurer had previously paid a claim exceeding the premiums at issue.

CASE DETAILS

COURT	Indiana Supreme Court
WRITING FOR THE COURT	Dickson, Chief Justice; Rucker; David; Massa; Rush
JURISDICTION	Indiana
DECIDED	March 5, 2013
DOCKET	12S02-1203-CT-170
DISPOSITION	affirmed
PROCEDURAL POSTURE	The plaintiffs appealed from the trial court's grant of summary judgment for American Family on their breach-of-contract and intentional-infliction-of-emotional-distress claims. The Indiana Supreme Court granted transfer after the Court of Appeals affirmed in part, reversed in part, and remanded.
STANDARD OF REVIEW	Summary judgment is reviewed under the same standard used by the trial court. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law; the evidence and reasonable inferences are construed in favor of the nonmoving party. If the facts are undisputed, reversal is warranted only when the law was incorrectly applied.
PRECEDENTIAL VALUE	Published Indiana Supreme Court opinion; precedential

PARTIES	Michael Dodd, Katherine Dodd v. American Family Mutual Insurance Company

TOPICS

insurance coverage · summary judgment · conditions precedent · appellate procedure · contracts

PRACTICE AREAS

insurance · contracts · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether American Family was barred from voiding or rescinding the insurance policy because it had not first returned or tendered the premiums paid by the Dodds.
2. Whether the Dodds preserved and supported the premium-tender issue in opposition to summary judgment.
3. Whether the prior payment of a claim exceeding the amount of premiums created an exception to the premium-tender requirement.

HOLDINGS

1. The Dodds could not obtain reversal based on American Family's alleged failure to tender premiums because they did not raise that issue or submit designated evidence on it in opposition to summary judgment; they first raised it in their motion to correct error.
2. An insurer generally must offer to return premiums within a reasonable time after discovering the insured's alleged breach, and failure to do so may constitute waiver of the alleged fraud.
3. An insurer need not tender a return of premiums before rescinding the policy when it has paid a claim under the policy in an amount greater than the premiums paid.

KEY QUOTATIONS

> *"It is correct that an insurer must first offer to return the premiums it has collected from the insured within a reasonable time after the discovery of the alleged breach."*

> *"Even if this argument had been made and supported on summary judgment, the law provides an exception to the requirement that an insurer tender a return of the premiums in order to rescind a contract."*

FACTUAL BACKGROUND

The Dodds applied for property insurance from American Family in December 1998 after a prior home fire and answered negatively when asked whether any applicant or household member had suffered past or current losses. After a 2003 fire destroyed their garage, Michael disclosed the 1998 fire during American Family's investigation. American Family treated the nondisclosure as a material misrepresentation, voided the policy ab initio, and denied the claim. Before the 2003 loss, American Family had paid the Dodds $5,500 for hail damage under the policy, while the premiums at issue totaled $2,079.80.

PROCEDURAL HISTORY

After American Family denied the Dodds' claim for losses from a 2003 garage fire and voided the policy based on nondisclosure of a prior fire loss, the trial court granted American Family summary judgment on all claims. The Court of Appeals affirmed in part, reversed in part, and remanded on the breach-of-contract claim. The Indiana Supreme Court granted transfer, vacated the Court of Appeals opinion, affirmed the trial court's summary judgment, and directed the trial court to release the tendered premiums to American Family.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The trial court was directed to release and return the tender of premiums to American Family.

CASES CITED

- Dodd v. American Family Insurance Co., 956 N.E.2d 769 (Ind. Ct. App. 2011)
- Hardy v. Hardy, 963 N.E.2d 470, 473 (Ind. 2012)
- Woodruff v. Indiana Family & Social Services Administration, 964 N.E.2d 784, 790 (Ind. 2012)
- Grand Lodge of Brotherhood of Railroad Trainmen v. Clark, 189 Ind. 373, 379-80, 127 N.E. 280, 282 (1920)
- Prudential Insurance Co. v. Smith, 231 Ind. 403, 412-13, 108 N.E.2d 61, 65 (1952)
- American Standard Insurance Co. v. Durham, 403 N.E.2d 879, 881 (Ind. Ct. App. 1980)
- Great Eastern Casualty Co. v. Collins, 73 Ind. App. 207, 211, 126 N.E. 86, 87 (1920)

OPINION

Michael Dodd and Katherine Dodd v. American Family Mutual Insurance Company 983 N.E.2d 568
DICKSON, J.
ATTORNEY FOR APPELLANTS ATTORNEY FOR APPELLEE
C. David Little Robert S. O'Dell Power, Little & Little O'Dell & Associates, P.C. Frankfort, Indiana Carmel, Indiana
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In the Indiana Supreme Court Mar 05 2013, 1:06 pm _________________________________ No. 12S02-1203-CT-170 MICHAEL DODD AND KATHERINE DODD, Appellants (Plaintiffs), v. AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Appellee (Defendant). _________________________________ Appeal from the Clinton Superior Court, No. 12D01-0409-CT-412 The Honorable Justin H. Hunter, Judge _________________________________ On Transfer from the Indiana Court of Appeals, No. 12A02-1010-CT-1414 _________________________________ March 5, 2013 Dickson, Chief Justice. After a fire at a home resulted in an insurance claim, the insurance company denied cov- erage on grounds that the

insureds had failed to disclose prior fire losses on their insurance appli- cation. In the ensuing litigation, the trial court granted the insurance company's motion for summary judgment and the Court of Appeals affirmed the trial court in part, reversed in part, and remanded for further proceedings. Dodd v. Am. Family Ins. Co., 956 N.E.2d 769 (Ind. Ct. App. 2011). We granted transfer and now affirm the trial court's grant of summary judgment. In 1998, Michael Dodd and Katherine Salmons were living together in Frankfort, Indi- ana, in a home owned by Katherine and insured by Farm Bureau Insurance ("Farm Bureau"). On March 24, 1998, that home was destroyed by a fire. Farm Bureau paid a settlement for the loss in September 1998, but disputed certain aspects of the claim. Seeking to rebuild their home, in December 1998, Michael and Katherine completed an application for property insurance with American Family Mutual Insurance Company ("American Family"). The application indicated that Michael was the titleholder of the property and listed Katherine (then his "girlfriend/fiancé [sic]") as an unrelated person in the household. Appellants' App'x. at 109. The application also asked if the "[a]pplicant or any member of household . . . had any past / current losses at any lo- cations?" Id. This question was answered in the negative. Id. Michael signed the application, and American Family issued the policy. Michael and Katherine were married in the summer of 2000. On September 19, 2003, their garage was destroyed in a fire and the Dodds filed a claim with American Family. During follow-up investigations to determine the cause and origin of the fire, Michael disclosed the 1998 fire to American Family. American Family, treating the prior fire loss nondisclosure as a misrepresentation, voided the insurance policy ab initio and denied the Dodds' claims for the 2003 garage fire losses. The Dodds filed suit against American Family claiming breach of contract and intentional infliction of emotional distress. The trial court granted American Family's motion for summary judgment as to both claims, finding that American Family owed no insurance coverage or com- pensatory damages to the Dodds due to misrepresentations in the insurance application, and that American Family owed the Dodds neither punitive nor other damages on the Dodds' claim for intentional infliction of emotional distress. The Dodds brought this appeal, challenging the grant of summary judgment on grounds that American Family failed to return the premiums paid by the Dodds. Approximately five months after the entry of final judgment, and three-and-a-half months after the Dodds filed their notice of appeal, American Family filed a motion with the trial court to interplead all of the premiums it had collected from the Dodds, totaling $2,079.80. The trial court agreed to hold the funds until the conclusion of the Dodds' appeal. The Court of Appeals affirmed the trial court in part, reversed in part, and remanded for further proceedings on the plaintiffs' breach of contract claim. Dodd, 956 N.E.2d at 770. We granted transfer, thereby vacating the opinion of the Court of Appeals, Ind. Appellate Rule 58(A), and we now affirm the trial court. The Dodds' appellate briefs describe these proceedings as an appeal from summary judgment. Appellants' Br. at 8, 20; Appellants' Reply Br. at 4. Their challenge to the grant of summary judgment is predicated upon the contention that American Family was not entitled to void or rescind the policy because it had not first returned all paid premium amounts to the Dodds.

On summary judgment, we review an appeal through the same lens as that used by the trial court. Hardy v. Hardy, 963 N.E.2d 470, 473 (Ind. 2012). Summary judgment is proper only when the moving party demonstrates that there is no genuine issue of material fact with respect to a claim or its elements. Woodruff v. Ind. Family & Soc. Servs. Admin., 964 N.E.2d 784, 790 (Ind. 2012). Once this prima facie case is made, the non-moving party bears the burden of com- ing forward with designated evidence to demonstrate the existence of a genuine issue of material fact. Id. All evidence, and the reasonable inferences drawn from it, must be construed in favor of the non-moving party. Id. If the facts are undisputed, we reverse only if the law has been in- correctly applied to those facts; but in all cases we may affirm on any theory supported by the evidence in the record. Id. It is correct that an insurer must first offer to return the premiums it has collected from the insured within a reasonable time after the discovery of the alleged breach. Grand Lodge of Bhd. of R.R. Trainmen v. Clark, 189 Ind. 373, 380, 127 N.E. 280, 282 (1920). Failure to offer such return of premiums, or if refused, to pay it into court, constitutes a waiver of the alleged fraud. Id. at 379; Prudential Ins. Co. v. Smith, 231 Ind. 403, 412–13, 108 N.E.2d 61, 65 (1952). However, in response to American Family's motion for summary judgment, the Dodds did not assert any claim that American Family had failed to tender the premiums paid or that such failure was a prerequisite to the voiding of an insurance policy on grounds of material misrepresenta- tions in the policy application. Further, the Dodds did not identify any designated evidence showing any failure by American Family to tender the paid premiums. This issue was thus not before the trial court when it granted summary judgment. The issue was first raised by the Dodds in their subsequent motion to correct error. Even if this argument had been made and supported on summary judgment, the law pro- vides an exception to the requirement that an insurer tender a return of the premiums in order to rescind a contract. Under this exception, "such a tender is not necessary where . . . the insurer has paid a claim thereon which is greater in amount than the premiums paid." Am. Standard Ins. Co. v. Durham, 403 N.E.2d 879, 881 (Ind. Ct. App. 1980) (alteration in original) (quoting 6 Couch on Insurance 779, §§ 34–35 (2d ed. 1961)); see also Great E. Cas. Co. v. Collins, 73 Ind. App. 207, 211, 126 N.E. 86, 87 (1920) ("The law, as well as equity and good conscience, does not require appellant to return the premiums where appellee was appellant's debtor for more than the amount thereof."). The designated evidence shows that American Family had previously paid a claim to the Dodds, under the policy in question, for hail damage. Appellants' App'x at 106; Tr. at 85–86. The Dodds dispute neither the claim nor the payment amount of $5,500. Ap- pellants' Br. at 5; Appellants' App'x at 30; Appellee's App'x at 240. Given that the amount of premiums at issue is $2,079.80, Appellee's App'x at 1351, the Dodds could not prevail on their claim of failure to tender premiums—the premise upon which all of their appellate arguments are predicated.1 Conclusion We affirm the trial court's grant of American Family's motion for summary judgment, and the final judgment entered thereon. We further direct the trial court to release and return the tender of premiums to American Family. Rucker, David, Massa, and Rush, JJ., concur. 1 In the Summary of the Argument section of their appellants' brief, the Dodds assert that, be- cause the failure to return premiums precludes American Family from voiding or rescinding the insurance contract, American Family intentionally violated its continuing duty of coverage by failing to pay the Dodds' insurance claim, and is thus subject to liability for bad faith punitive damages. In their Argument section, the Dodds explain this contention, stating that the trial court erred in granting summary judgment on the question of punitive damages because the judge "did not see that where [American Family] did not return the policy premiums to the Dodds, [American Family] failed to void the policy as a matter of law." Appellants' Br. at 19. The Dodds' claim of summary judgment error related to their claim for punitive damages is thus subsumed within their challenge to the summary judgment on grounds of the failure to tender or return premiums, which we reject.