UNITED STATES COURT OF APPEALS

TENTH CIRCUIT



TAMARA AYRAUD, a minor, by and through her parents and next friends, THOMAS AYRAUD and CLAIRE AYRAUD; and

THOMAS AYRAUD and CLAIRE AYRAUD, individually,

Plaintiffs-Appellants,

v.

NATIONAL CASUALTY COMPANY,

Defendant-Appellee.

No. 87-1465
(D.C. No. 87 M 46)
(D. Colorado)

ORDER AND JUDGMENT*

Before MOORE, BALDOCK, and McWILLIAMS, Circuit Judges.

Thomas and Claire Ayraud, on behalf of themselves and their minor daughter, Tamara Ayraud, brought the present action against National Casualty Company in the United States District Court for the District of Colorado. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

From the complaint we learn that Tamara, age 4, was entrusted by her parents to the custody and supervision of Crested Butte Nursery School in Crested Butte, Colorado. While in the custody of the school, Tamara wandered into a group of horses and was kicked in the head causing a skull fracture which required surgery and medical treatment. It was further alleged that at the time of Tamara's injury the school had an insurance policy with the defendant, National Casualty Company, under which the latter agreed to pay all sums which the school became legally obligated to pay for medical services required by children under the school's care.

The first claim for relief was, in essence, that the defendant company, after an investigation, initially refused to negotiate a settlement even though it knew that the school was negligent. Defendant's refusal was based on its belief that "there were two other potentially negligent parties," that is, the owner of the horse which kicked Tamara and the owner of the land where this unfortunate incident occurred. It was further alleged that when the defendant later became aware that Tamara's parents were in financial distress caused by their inability to pay Tamara's hospital and medical expenses, the defendant then offered to settle the entire claim for $9,500.00, which sum was less than the hospital and medical expense incurred by Tamara's parents, which offer was refused.

The gist of the first claim was that the defendant had "a duty of good faith and fair dealing in paying benefits due under its policy" and that it breached that duty. As a result of that

breach, plaintiffs[1] alleged that they suffered mental and emotional distress, and loss of enjoyment of life for which they sought $1,000,000.00. They also asked for punitive damages in the sum of $5,000,000.00.

A second claim for relief was based on the same events as above outlined and was couched in terms of outrageous conduct. As a result of such outrageous conduct, plaintiffs claimed to have suffered emotional distress for which injury they sought $1,000,000.00 and an additional $5,000,000.00 as punitive damages.

In response to the complaint, the defendant filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), asserting inter alia, that although an insurance company under Colorado law has a duty to act in good faith and deal fairly with its insured, it has no such duty to act in good faith and deal fairly with a third party who may have a claim against its insured. Accordingly, defendant argued that plaintiffs' first claim for relief should be dismissed. Defendant also moved to dismiss plaintiffs' second claim for relief based on outrageous conduct, because of the same lack of any duty owed plaintiffs by defendant.

The plaintiffs filed a memorandum in opposition to defendant's motion to dismiss. In that memorandum the plaintiffs stated that their evidence would show and, if necessary, that they were prepared to plead the following: (1) The insurance policy in question was purchased by the school to protect it in its operation as a child care center; (2) that under C.R.S. § 26-6-101 to 112 (1982), which regulates child care centers, and, more

[1] Presumably the parents, but not Tamara.

particularly, under C.R.S. § 26-6-108(j) (1982), the school was required to "maintain financial resources adequate for the satisfactory care of children served in regard to . . . medical services . . ."; and (3) that the policy purchased from the defendant by the school was for the purpose of complying with the statutory requirement that it maintain such "financial resources." It was plaintiffs' position that they were not a mere "third party" to the insurance contract between the school and the defendant, but rather that they were a "third party beneficiary" under the policy, and that in such circumstance the defendant did owe them the duty of good faith and fair dealing.

The district court granted defendant's motion to dismiss both claims and this appeal follows. In granting the motion to dismiss the plaintiffs' first claim, the district court held that since the plaintiffs were "third parties" to the insurance issued the school by the defendant, the defendant had no contractual duty to the plaintiffs and, therefore, could not be found to have violated any implied covenant of good faith and fair dealing. Apparently, the district court dismissed the second claim for relief on the same basis, commenting that the "allegations of the complaint are simply insufficient."

In its order of dismissal, the district court made no mention of the position taken by the plaintiffs, in their memorandum in opposition to the motion to dismiss, that the insurance taken out by the school with the defendant was for the purpose of complying with C.R.S. § 26-6-108(j) (1982), and that plaintiffs, therefore,

were not third parties to the insurance contract, but instead were third party beneficiaries.

On appeal, defendant states that in order for it to prevail on its 12(b)(6) motion to dismiss, it must appear beyond doubt that the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief.[2] And, on appeal, plaintiffs apparently concede that if they were merely "third parties" to the insurance contract purchased by the school from the defendant, they would have no cause of action against the defendant. However, in this connection it is the plaintiffs' position here, as it was in the district court, that by virtue of C.R.S. § 26-6-108(j) (1982), they were third party beneficiaries under the policy of insurance issued the school by the defendant, and that in such circumstance the defendant owed them a duty.[3]

In their complaint, although the plaintiffs made no mention of the Colorado statute regarding child care centers, as above mentioned, the plaintiffs in their memorandum in opposition to defendant's 12(b)(6) motion clearly indicated that they were relying on that Colorado statute. In fact, they offered to replead and incorporate the statute into their complaint if it was necessary to establish the sufficiency of their claim. The district court in granting defendant's 12(b)(6) motion, however, deemed the

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[2] Defendants cited such cases as Hiatt v. Schreiber, 599 F. Supp. 1142 (D. Colo. 1984), and Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983).

[3] In thus arguing plaintiffs relied in part on Savio v. Traveler's Ins. Co., 678 P.2d 549, 552 (Colo. App. 1983), which held that an employee can bring a "first party" bad faith action on the basis of an insurance contract between his employer and the compensation carrier.

plaintiffs to be only third parties and did not consider, so far as we can tell from its order of dismissal, the Colorado statute. Under the described circumstances, we believe the Colorado statute regulating child care centers was before the district court, and that defendant's motion to dismiss must be considered by the district court, in the first instance, in light of that statute.

We note that in this court the defendant in its answer brief makes no mention of the Colorado statute, even though plaintiffs in their opening brief argue that by virtue of the statute and the policy of insurance[4] issued the school by the defendant, they are third party beneficiaries and not just third parties, and that in such circumstance defendant did owe them a duty.

In any event, we reverse and remand with directions that the district court reconsider defendant's motion to dismiss in light of C.R.S. § 26-6-108(j) (1982), and indicate the effect of that statute, if any, on the present controversy. We do not indicate that the motion to dismiss should, or should not, be granted.

Judgment reversed and case remanded for further proceedings.

Entered for the Court

Robert H. McWilliams
Circuit Judge

[4] The policy issued the school by the defendant is not a part of the record on appeal.

No. 87-1465 - TAMARA AYRAUD, etc. v. NATIONAL CASUALTY CO.

MOORE, Circuit Judge, dissenting:

I respectfully dissent. In my judgment it is unnecessary to return this case to the district court to decide whether C.R.S. § 26-6-108(j) (1988) provides plaintiffs with a claim for relief. That claim is predicated upon the holding in Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985), that a workman could bring an action against his employer's workman's compensation insurance carrier. Savio is an exception to the general rule that only parties to a contract can sue for a bad faith breach.

The holding in Savio was grounded upon a portion of the workman's compensation statute which is unique. Under C.R.S. § 8-44-105 (1977), every contract of workman's compensation insurance must contain "a clause to the effect that the insurance carrier shall be directly and primarily liable to the employee." Because of this statute, the Savio court reasoned that the employee "stands in the same position as an insured in a private insurance contract." Savio, 706 P.2d at 1272. That situation remarkably differs from this.

There are two basic reasons why the statute relied upon by plaintiffs must be distinguished from the statute followed in Savio. First, § 26-6-108(j) contains no provision requiring child care centers to carry liability insurance. The statute merely reads that the license of a child care center can be revoked if the facility "[fails] to maintain financial resources adequate for the satisfactory care of children served in regard to upkeep of

premises and provision for personal care, medical services, clothing, and other essentials in the proper care of children." C.R.S. § 26-6-108(j) (1988). Only plaintiffs' imaginative argument suggests that the words "financial resources" equate with "insurance."

The second reason for distinction between the operative statute in this case and that in Savio is the absence of a provision making the center's insurance carrier (if any) primarily liable to children or their parents. It was the presence of a similar provision in the workman's compensation statute which motivated the Savio court to conclude a worker was a "first party" beneficiary of a workman's compensation policy.

I believe in remanding this case for consideration whether § 26-6-108(j) provides plaintiffs a claim for relief, this court reads too much in the statute. If the Colorado General Assembly had intended first to require child care facilities to carry liability insurance, and second to make children and their parents first party beneficiaries of such policies, the General Assembly would have followed the example already set in the workman's compensation act and done so directly. In my opinion, there is no room for a contrary inference. The trial court's failure to cite § 26-6-108(j) is inconsequential. I would affirm.