IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TANNER IRVING, a minor by and through his Guardian ad Litem, SCOTT IRVING; NICHOLAS IRVING,	)	1 CA-CV 07-0281
	)	DEPARTMENT B
Plaintiffs/Appellants,	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
STATE FARM INSURANCE CO., INC.,	)	**FILED 3-13-08**
Defendant/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-052661

The Honorable Robert C. Houser, Jr., Judge

AFFIRMED

Scott Irving — Phoenix
Nicholas Irving
Plaintiffs/Appellants

The Cavanagh Law Firm, P.A. — Phoenix
By R. Corey Hill
Christopher Robbins
Attorneys for Defendant/Appellee

I R V I N E, Judge

¶1 Tanner Irving, a minor, by and through his guardian ad litem, Scott Irving; Nicholas Irving and Scott Irving (collectively "Irvings") appeal from the trial court's order granting State Farm Mutual Automobile Insurance Company's ("State Farm") motion to dismiss for failure to state a claim,

the trial court's failure to sanction State Farm's counsel, and the trial court's order granting State Farm's motion for attorneys' fees. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 This case arises out of an automobile accident. Scott Irving is the father of Nicholas and Tanner. In September 2005, Nicholas was driving his father's pickup truck with his brother, Tanner, as a passenger. Heading south on 7th Avenue, Nicholas approached the intersection at 7th Avenue and Desert Hills Road. The intersection had stop signs at 7th Avenue for drivers heading east or west on Desert Hills Road, but not for drivers heading north or south on 7th Avenue. Jeffrey Shrake was driving east on Desert Hills Road and failed to yield right of way to Nicholas, resulting in an automobile accident. The accident caused injuries to Nicholas and Tanner, and caused damage to the pickup truck.

¶3 Subsequently, Scott Irving filed a lawsuit against Jeffrey Shrake and his wife, and the Shrake's automobile insurance carrier, State Farm, on behalf of his two sons, himself, and two classes of people similarly situated with

---

[1] The Irvings do not cite to any references in the record as required by Arizona Rules of Civil Appellate Procedure 13(a)(4). We therefore disregard the Irvings' statement of facts. *See State Farm Mut. Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998).

regard to personal injury and/or property damage claims against State Farm. The Irvings alleged many causes of action against the Shrakes and State Farm including: personal injury, property damage, breach of contract, abuse of process, and bad faith breach of covenant of good faith and fair dealing. The Shrakes answered the Irvings' complaint. State Farm, however, filed a motion to dismiss the breach of contract, abuse of process, and breach of covenant of good faith and fair dealing claims against it for failure to state a claim, arguing that the Irvings cannot sue it directly.

¶4 The trial court held oral argument on State Farm's motion to dismiss and granted the motion with prejudice. State Farm filed an application for attorneys' fees pursuant to Rule 11 of the Arizona Rules of Civil Procedure and Arizona Revised Statutes ("A.R.S.") section 12-349 (2003), which the court granted over the Irvings' opposition and request for sanctions against State Farm's counsel. Although the Irvings filed suit against both State Farm and the Shrakes, the trial court, pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, entered final judgment dismissing the Irvings' claims against State Farm. *See* Ariz. R. Civ. P. 54(b); *see also Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980) (per curiam) (finding that court must use language that expressly

indicates finality in order for appellate court to exercise jurisdiction over an interlocutory order).

¶5 The Irvings timely filed a notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) and -120.21 (2003).

DISCUSSION

A. Motion to Dismiss

¶6 The Irvings first argue that the trial court erred in granting State Farm's motion to dismiss for failure to state a claim. Specifically, the Irvings argue that the court erred because they are third party beneficiaries of the insurance contract between State Farm and the Shrakes. Thus, they contend claims for breach of contract and breach of covenant of good faith and fair dealing are appropriate. The Irvings argue that at a minimum the court should have allowed them an opportunity to obtain a copy of the insurance contract to determine whether they were third party beneficiaries of the insurance contract. They also claim that State Farm is liable for abuse of process for its conduct in failing to negotiate a reasonable settlement with them before the lawsuit was filed. Alternatively, the Irvings argue that other causes of action may be construed from the facts of the case, which would make a motion to dismiss improper.

¶7 State Farm contends that the trial court did not err in dismissing the claims. State Farm argues that Arizona law

does not allow a third party claimant to file a direct cause of action against an adverse party's automobile insurance company when there has been no assignment or transfer of the insured's rights. Specifically, it argues that State Farm and the Irvings did not have any contractual relationship to support allegations of breach of contract and breach of covenant of good faith and fair dealing. Furthermore, it contends that the Irvings' abuse of process claim fails because State Farm had not been involved in judicial proceedings with the Irvings. State Farm argues that the Irvings failed to state a proper claim against it, supporting the grant of its motion to dismiss.

¶8 We review a motion to dismiss for failure to state a claim de novo. *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, 402, ¶ 8, 142 P.3d 708, 710 (App. 2006). When we review a motion to dismiss, "we accept as true the complaint's allegations and affirm dismissal only if the plaintiffs are not entitled to relief under any facts susceptible of proof." *Leal v. Allstate Ins. Co.*, 199 Ariz. 250, 251, ¶ 2, 17 P.3d 95, 96 (App. 2000). In Arizona, we do not favor motions to dismiss for failure to state a claim and we do not grant them "unless it appears that the plaintiff should be denied relief as a matter of law given the facts alleged." *Logan v. Forever Living Prods. Intern., Inc.*, 203 Ariz. 191, 193, ¶ 7, 52 P.3d 760, 762 (2002).

¶9 The Irvings focus their argument on the three claims alleged in their complaint against State Farm: (1) breach of contract, (2) breach of covenant of good faith and fair dealing, and (3) abuse of process. The essential premise of the Irvings' argument is that they are third party beneficiaries of the insurance contract and thus are able to sue for its breach. In order to recover as a third party beneficiary of a contract, three elements must be present: (1) the contract must indicate an intention to benefit the third party beneficiary, (2) the contemplated benefit must be both intentional and direct, and (3) it must be clear that the parties intended to recognize the third party as the primary party in interest. *Norton v. First Fed. Sav.*, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981).

¶10 The Irvings' complaint does not allege facts to support their third party beneficiary argument. Instead, the complaint simply alleges third party beneficiary status without presenting any facts demonstrating that when the Shrakes and State Farm entered into the insurance contract they intended to benefit the Irvings or that the Irvings were a primary party in interest. Although the record does not contain a copy of the insurance contract, Arizona law has clearly rejected the proposition that an accident victim is an intended third party beneficiary of an insurance contract between the negligent party and his or her insurance carrier absent an assignment of rights.

See Leal, 199 Ariz. at 254, ¶ 21, 17 P.3d at 99 ("[I]t is well established that a third-party claimant, a stranger to the contract, cannot sue the insurer for tortious breach of the duty of good faith."); *Ring v. State Farm Mut. Auto. Ins. Co.*, 147 Ariz. 32, 35, 708 P.2d 457, 460 (App. 1985) ("It is clear in Arizona that a judgment creditor must obtain an assignment of the insured's rights before proceeding directly against the insurer for liability in excess of the policy limits.").

¶11 Arizona does not allow an accident victim to file a direct action against the negligent party's insurance company without the benefit of an assignment primarily because a third party claimant "is a stranger to the fiduciary relationship between the insured and his insurer." *Ring*, 147 Ariz. at 35, 708 P.2d at 460. Case law acknowledges both contract and tort causes of action against insurance companies, however, a contract or contractual relationship is a prerequisite to filing such claims. *See Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 586, ¶¶ 25-28, 20 P.3d 1158, 1167 (App. 2001) (discussing the difference between a contract claim and a tort claim based on a contract versus a contractual relationship).

¶12 Moreover, "[a]n insurance policy is a contract between the insurer and its insured." *Liberty Ins. Underwriters, Inc. v. Weitz Co.*, 215 Ariz. 80, 83, ¶ 7, 158 P.3d 209, 212 (App. 2007). In general, automobile insurance policies

are intended to protect the insured, not any other third party. An insurance company's contractual obligations and duties are thus intended to benefit the insured. *See Page v. Allstate Ins. Co.*, 126 Ariz. 258, 259, 614 P.2d 339, 340 (App. 1980) ("The duty to settle is intended to benefit the insured, not the injured claimant.").

¶13 In this case, the insurance contract is between the Shrakes and State Farm. The Irvings are not privy to the contract nor do they allege facts to support an independent contract or contractual relationship with State Farm. This is not a case in which the insured assigns his or her rights to the injured claimant. *See, e.g., Ring*, 147 Ariz. at 37, 708 P.2d at 462 (holding that "an injured plaintiff may not bring garnishment proceedings against an insurer for an alleged bad faith failure to settle without an assignment of the insured's rights."). The complaint does not allege that insured, Jeffrey Shrake, assigned his rights to the Irvings.

¶14 Nor is this a situation in which the injured third party claimant forgoes his or her legal claims against an insured in return for certain promises from an insurance company. *See, e.g., Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 76-77, ¶¶ 14-17, 985 P.2d 556, 561-62 (App. 1998) (finding injured third party claimant had a cause of action for bad faith breach of covenant of good faith and fair dealing when injured

third party claimant released his legal claims in return for promises from the insurance company pursuant to settlement agreement, creating a fiduciary duty). The complaint does not allege that the Irvings gave up their right to sue the Shrakes in return for any promises from State Farm. Indeed, the Irvings' lawsuit against the Shrakes remains pending in superior court. Consequently, the Irvings' claims are not based on a fiduciary relationship with State Farm that is a prerequisite to pursuing a breach of covenant of good faith and fair dealing claim.

¶15 The Irvings also allege that State Farm's conduct during settlement negotiations was outrageous and that State Farm did not pay claims in a timely manner or in a reasonable amount. Even assuming the Irvings' allegations are true, such conduct by an insurance company does not create a duty owed to third party claimants. *See Leal*, 199 Ariz. at 252-54, ¶¶ 11-22, 17 P.3d at 97-99 (finding an insurance company did not voluntarily assume a duty of good faith and fair dealing to an injured third party claimant by promising to treat the third party claimant as a "customer," by sending third party claimant a Customer Service Pledge, and by implying a special relationship existed).

¶16 In order to pursue a breach of contract claim, a contract must exist. Here, the complaint alleges no contract

between the Irvings and State Farm. Likewise, in order to pursue a breach of covenant of good faith and fair dealing claim, a contractual relationship must exist creating a duty. *See Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986) ("The law implies a covenant of good faith and fair dealing in every contract. The duty arises by virtue of a contractual relationship."). Therefore, the Irvings are not entitled to relief under any of the facts susceptible of proof in their complaint and their claims fail as a matter of law.

¶17 The Irvings also argue that State Farm abused the process of the court by refusing to conduct pre-lawsuit settlement negotiations in a reasonable, timely, and fair manner. In order to establish a claim for abuse of process, a plaintiff must show two elements: (1) the defendant committed a willful act in the use of the judicial process and (2) the defendant acted for an ulterior purpose inconsistent with legitimate goals of litigation. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257, ¶ 11, 92 P.3d 882, 887 (App. 2004). The Irvings concede that under existing law, the trial court did not err in granting the motion to dismiss their abuse of process claim. Indeed, they concede that they cannot prove the first element of an abuse of process claim under existing law because "judicial process" does not include pre-lawsuit conduct. The

complaint does not allege any prior legal proceedings or judicial process between the Irvings and State Farm.

¶18 Nevertheless, the Irvings ask this Court to expand the current interpretation of the word "process" to include pre-lawsuit settlement negotiations in the interest of equity. The cases in Arizona have held that pre-lawsuit conduct (or settlement negotiation) was insufficient to constitute the willful act necessary to prove an abuse of process claim. *See id.* at ¶ 14 (finding "that a plaintiff must prove that one or more specific judicially sanctioned processes have been abused to establish an abuse-of-process claim"). We do not find the reasoning in current case law defining judicial process to be flawed or unrealistic; therefore we will not disturb it. *See Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974) (The court of appeals is not bound by its prior decisions, but based on the principles of stare decisis and the need for stability in the law, we follow prior decisions unless "we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.").

¶19 Alternatively, the Irvings contend that other causes of action may be construed from the facts alleged. Based on our review of the record, the Irvings' complete lack of privity with State Farm prevents them from having any legitimate direct cause

of action against State Farm. Thus, we find no error in the trial court's decision to grant State Farm's motion to dismiss with prejudice.

B. Sanctions Against State Farm's Counsel

¶20 The Irvings argue that the trial court erred by not sanctioning State Farm's counsel as requested in their pleadings. Upon review of the record and specific pleadings referenced by the Irvings, we do not find sanctionable conduct and deny the Irvings' request. *See* Ariz. R. Civ. P. 11; A.R.S. § 12-349. State Farm's counsel did not misrepresent facts or applicable law. The Irvings rely on a distinction between tort and contract allegations against State Farm. Under the facts of this case, however, such a distinction is irrelevant. The Irvings have no contractual relationship with State Farm and therefore do not have a direct cause of action against State Farm for any claim, whether tort or contract.

C. Attorneys' Fees

¶21 Finally, the Irvings argue that the trial court erred in awarding State Farm's application for attorneys' fees pursuant to Rule 11 and A.R.S. § 12-349. In reviewing an award of attorneys' fees pursuant to A.R.S. § 12-349, we review findings of fact under a clearly erroneous standard, but we review de novo the trial court's application of the statute. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶

27, 20 P.3d 590, 598 (App. 2001). In addition, we review a Rule 11 sanction for an abuse of discretion. *Linder v. Brown & Herrick*, 189 Ariz. 398, 407, 943 P.2d 758, 767 (App. 1997).

¶22 The trial court simply signed the judgment awarding State Farm its attorneys' fees and did not make specific findings. The Irvings failed to object to the trial court's lack of findings of fact and conclusions of law pursuant to A.R.S. § 12-349 in awarding attorneys' fees to State Farm and now cannot raise arguments contesting such finding. *See Trantor v. Fredrikson*, 179 Ariz. 299, 301, 878 P.2d 657, 659 (1994) (holding that a party's failure to object to lack of findings of fact and conclusions of law in making an award of attorneys' fees prohibits the party from raising the issue on appeal). When a trial court makes no specific findings, we assume that it made findings necessary to support its judgment. *See Rowland*, 199 Ariz. at 587, ¶ 34, 20 P.3d at 1168.

¶23 We do not find that the trial court abused its discretion in awarding State Farm's attorneys' fees. Rule 11 requires a party to proceed with claims in good faith. The good faith component of Rule 11 is an objective standard "about what a professional, competent attorney would do in similar circumstances to satisfy the rule's requirements." *Linder*, 189 Ariz. at 407, 943 P.2d at 767. Although the Irvings might have subjectively believed their claims were filed in good faith,

reviewing the claims using the objective standard does not support their good faith assertion. The case law is clear that the Irvings did not have a contractual relationship with State Farm and thus have no viable cause of action against State Farm. The Irvings focus on the distinction between a contract claim versus a tort claim; however, they fail to acknowledge that they have no privity with State Farm and so may not pursue any claim. We therefore do not find that the trial court abused its discretion or misapplied the law in awarding State Farm's attorneys' fees.

¶24 Additionally, the Irvings request attorneys' fees on appeal. The Irvings do not prevail and fail to cite any legal basis for their fee request. Therefore, we deny the request. *See* ARCAP 21(c); *Bank One, Ariz. N.A. v. Beauvais*, 188 Ariz. 245, 251-52, 934 P.2d 809, 815-16 (App. 1997).

¶25 State Farm also requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01(A) (2003) because this action is one arising out of a contract. Although we determined that no contract or contractual relationship exists between State Farm and the Irvings, a party seeking attorneys' fees under A.R.S. § 12-341.01(A) does not need to be a party to the contract forming the basis for the award. *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 30, ¶ 47, 126 P.3d 165, 177 (App. 2006). The purpose of § 12-341.01(A) is to "mitigate the burden of the expense of

litigation to establish a just claim or a just defense." A.R.S. § 12-341.01(B). Therefore, we grant State Farm's request for attorneys' fees pursuant to A.R.S. § 12-341.01(A) because it successfully defended against the Irvings' claims. We will determine the amount of attorneys' fees following State Farm's submission of a statement of fees and costs in compliance with Rule 21 of the Arizona Rules of Civil Appellate Procedure. Because we grant attorneys' fees based on A.R.S § 12-341.01(A), we need not address State Farm's alternative requests for fees.

CONCLUSION

¶26 For the foregoing reasons, we affirm the trial court's judgment granting State Farm's motion to dismiss, denying sanctions against State Farm's counsel, and awarding State Farm its attorneys' fees. Furthermore, we award State Farm attorneys' fees on appeal.

_____
PATRICK IRVINE, Judge

CONCURRING:

_____
DANIEL A. BARKER, Presiding Judge

_____
DIANE M. JOHNSEN, Judge