

CASE NO: A11-303

State of Minnesota
In Court Of Appeals

Michael Cisar and Sharon Betsinger,

Appellants,

v.

Lisa J. Slyter, Town and Country Agency of Finlayson Inc.

Respondents/Cross Appellants,

and,

Spring Vale Mutual Insurance Company and
North Star Mutual Insurance Company

Respondents.

RESPONDENT SLYTER AND TOWN AND COUNTRY'S
RULE 128 ARGUMENT AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

RULE 128.01 SUMMARY OF ARGUMENT

Respondents/Cross-Appellants Lisa J. Slyter and Town and Country Insurance Agency, Inc. (Town and Country), respectfully submit the following short summary of argument pursuant to Rule 128.01 Subd. 2 supplemented by appendix with memorandum, exhibits and trial court reply memorandum.

STANDARD OF REVIEW

On appeal from a summary judgment the court determines whether there are any issues of material fact or whether the district court erred in its application of the law. Offerdahl v. University of Minnesota Hospitals and Clinics, 426 N.W.2d 425, 427 (Minn. 1988). These are questions of law subject to de novo review. Dairyland Ins. Co. v. Starkey, 535 N.W.2d 363, 364 (Minn. 1995). The reviewing court may affirm a trial court's grant of summary judgment on grounds not addressed by the trial court. Strauss v. Thorn, 490 N.W.2d 908, 915 (Minn. Ct. App. 1992); Myers ex rel. Myers v. Price, 463 N.W.2d 773, 775 (Minn. Ct. App. 1990).

FACTS

Appellants' homestead was damaged by fire on April 23, 2008. The property was insured by a combination policy issued by Respondents Spring Vale Mutual Insurance Company and North Star Mutual Insurance Company. This policy was procured by Appellants through Respondents/Cross Appellants Lisa J. Slyter and the Town and Country Agency of Finlayson.

In 2007 Town and Country was contacted by Appellants who had

remodeled their home, and were concerned whether their current \$357,000 limits were adequate. When revising insurance limits, Town and Country is required, directed and authorized by the insurers to utilize the Marshall & Swift software program to determine an updated value. This software program calculated a Reconstruction Cost Estimate of \$557,300, and a new policy was issued with those limits.

Following the fire, Appellants made a claim against the insurers for the full \$557,300 policy limits alleging that the property was a total loss and that, pursuant to Minnesota Statute Sec.65A.08, the Minnesota Valued Policy Law, they were entitled to the full policy limits. The insurers denied this claim on the grounds that Spring Vale is a township mutual fire insurance company exempt from 65A.08, and is only liable for the actual value.

The Spring Vale Policy contains an appraisal provision outlining a procedure for determining valuation if the homeowners and insurers cannot agree. An appraisal hearing was held which determined the value of the home was \$454,750. It is undisputed that after a deduction of \$9,095 for depreciation, Appellants were awarded and paid and accepted a total of \$445,655.

Appellants brought an action against Town and Country alleging misrepresentation and negligence in valuing the property. Appellants sought damages representing the difference between the \$445,655 value determined by the appraisal hearing and the policy limits of \$557,300 which Appellants believe they are entitled to.

By order dated December 17, 2010, the trial court granted summary judgment dismissing this action finding that Appellants had failed to commence suit within the applicable limitations period.

Respondent Town and Country sought summary judgment on numerous grounds the trial court did not address or rule upon in its order. While the trial court's silence cannot be fairly characterized as an adverse ruling requiring a related appeal, Respondent Town and Country has nonetheless filed a notice of related appeal to preserve with certainty review of these undecided issues. Hoyt Inv. Co. v. Bloomington Commerce & Trade Center Associates, 418 N.W.2d 173, 175 (Minn. 1988). Significantly, the trial court made specific findings of fact, based on uncontested evidence submitted by Town and Country, which fully support all of the following alternative grounds for dismissal.

SUMMARY OF ARGUMENT

PLAINTIFFS HAVE NO COMPENSABLE DAMAGES

Appellants and the insurers agreed to have the home's value determined by an appraisal hearing. The hearing determined the value of the home was \$454,750. After a deduction of \$9,095 for depreciation pursuant to the terms of the contract, plaintiffs were paid and accepted a total of \$445,655. Appellants were fully compensated for their actual insurable loss. Minnesota applies the out-of-pocket rule in cases of misrepresentation as opposed to the benefit of the bargain rule. Strouth v. Wilkison, 301 Minn. 297, 224 N.W.2d 511, 513 (Minn. 1974). The

policy limits procured by the agent were adequate to cover the actual damages. Plaintiffs have no compensable damages.

THE EQUITABLE DOCTRINES OF WAIVER BY ELECTION OF
REMEDIES AND ESTOPPEL PRECLUDE RECOVERY

Appellants initially demanded that the insurers pay the full \$557, 300 limits. Upon learning that the insurers would not pay full limits, Appellants could have commenced an action to either reform the policy or to assert other claims seeking extra-contractual damages. However, by affirming the contract, proceeding with the appraisal process and accepting the appraisers award, Appellants elected their remedy and are now precluded from proceeding under any other theories.

Pursuant to the doctrine of estoppel, the acceptance of benefits from a contract, with knowledge of facts and rights creates estoppel barring further action. Bacich v. Northland Transp., 185 Minn. 5, 242 N.W. 379 (Minn 1932). Under the doctrine of election or estoppel by acceptance, a person may not both accept and reject a contract, or having availed themselves of the contract in part, reject the provisions of other parts. In re Beglinger Trust, 561 N.W.2d 130 (Mich. App. 1997).

AGENT MADE NO REPRESENTATIONS AS TO VALUE

The agent in this case was mandated, directed and authorized by the insurers to utilize the Marshall & Swift computer software program to determine the reconstruction cost of the property for underwriting purposes. The agent had

no discretion to determine the value of the property by any other method. As a result, the agent here made no personal representations of value whatsoever. Any representation of value was made by the software program itself, and the valuation determined thereby was ratified by the insurers when they issued a policy with the limits so determined.

THE AGENCY HAS NO INDEPENDENT LIABILITY FOR ITS
AUTHORIZED CONDUCT AS AGENT OF INSURERS

Even if the agent was somehow negligent in determining the value using the Marshall & Swift program, the agent cannot be held personally liable. If an insurer has authorized the agent to perform a particular function, then the agent has no personal liability to the insured as the agent is the alter ego of the insurer, and the acts of the agent are legally the acts of the insurers. Harding v. Ohio Casualty Ins. Co. of Hamilton Ohio, 230 Minn. 327, 41 N.W.2d 818, 823 (Minn. 1950). When the acts or conduct of the agent contractually binds the insurer, the other party to the transaction cannot hold the agent personally responsible. Paull v. Columbian National Fire Ins. Co., 171 Minn. 118, 213 N.W. 539 (Minn. 1927).

It is well settled that an insurer can be bound by an agent's acts or inactions, errors, negligence, or misrepresentations, if it is determined that the agent was acting within the scope of the agent's actual, apparent, express, ratified or implied authority. Eddy v. Republic National Life Insurance Co., 290 N.W.2d 174 (Minn 1980); Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640 (1966); Fingerhut Mfg. Co. v. Mack Trucks, Inc., 267 Minn. 201, 125 N.W.2d 734 (Minn

1964). Here, it was undisputed that Town and Country acted at all relevant times as agent of the insurers. Moreover, it was undisputed that the agent was expressly authorized to determine valuation, and was was mandated to use a specific software program in order to make that determination. Appellants' claims, if any, are limited to claims against the insurers.

NO EVIDENCE AGENT'S CONDUCT CAUSED ANY LOSS

An insurance agent cannot be liable for failing to procure proper insurance or sufficient limits unless it is established that such insurance and/or limits were actually available in the marketplace. Such proof is required in order to establish that the agent's acts or representations caused some loss. Johnson v. Urie, 405 N.W.2d 887, 891 (Minn. 1987). Here, Appellants did not address this argument and failed to present any evidence that any insurer would have issued a policy with limits of \$557, 300 for a home with a replacement value of \$454,750.

CONCLUSION

Appellants suffered no compensable damages. Appellants chose to have their damages determined and paid pursuant to contract, and, therefore elected their remedy. The agency made no personal representations of value. The agency acted as authorized and directed by the insurers in determining value, and, therefore the agency has no personal liability. There is no evidence presented that the agency's conduct and alleged misrepresentations caused any loss.

Respondents respectfully request that the appellate court affirm the trial court's decision upon the grounds relied upon by the trial court and upon the grounds raised by Respondents in their related appeal.

Dated June 15, 2011

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