STATE OF MINNESOTA
IN COURT OF APPEALS
A10-734

Prairie Wild Enterprises, Inc.,
Respondent,

vs.

Gayle E. Bofferding, et al.,
Appellants,

Westfield Insurance Company,
Defendant.

Filed March 15, 2011
Reversed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-08-8397

Phillip Gainsley, Minneapolis, Minnesota; and

Debra McLain, Minnetonka, Minnesota (for respondent)

William A. Celebrezze, Jacob M. Tomczik, Aafedt, Forde, Gray, Monson & Hagar, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellants challenge the district court's determination that they were negligent in failing to procure insurance coverage for the mulch that respondent stored outside and the damages award. Because we conclude that the district court erred, we reverse.

FACTS

Respondent Prairie Wild Enterprises, Inc. is a Minnesota corporation; Jonathan Mohn (Mohn) and his wife, Melissa Mohn, are its only officers and shareholders. Mohn incorporated Prairie Wild to perform custom seeding, mowing, and harvesting of native grasses. In 2004, Prairie Wild began providing erosion-control services, a form of landscaping designed to prevent silt from leaving road-construction sites. Erosion control requires the use of mulch, which Prairie Wild stored outside in bales on unimproved land that Mohn acquired in his personal capacity from the Cottonwood Economic Development Authority in 2005 (the EDA land). Prairie Wild accounted for its mulch inventory on a whiteboard in its office.

Appellant Brown & Brown of Minnesota, Inc. is a property/casualty insurance agency. Appellant Gayle Bofferding joined Brown & Brown in October 2004. At that time, Bofferding was relatively new to the insurance industry. In late 2004 or early 2005, Bofferding and her supervisor made a "cold call" visit to Prairie Wild. During the visit, Mohn described the general nature of Prairie Wild's business, including "custom seeding" and the "erosion-control business." Mohn mentioned that some of Prairie Wild's recent projects required it to provide waivers of subrogation to the general contractors, which its

current insurance company was unable to provide. Bofferding told Mohn that obtaining the waivers through Brown & Brown would likely not be a problem.

Over the next few months, Mohn and Bofferding reviewed Prairie Wild's assets—including real property, buildings, vehicles, and equipment—and other information necessary for Brown & Brown to procure appropriate insurance coverage. Prairie Wild provided Bofferding with a copy of its existing insurance policy to facilitate placement of new coverage through Brown & Brown. The policy did not include the EDA land or identify mulch as insured property. On February 24, 2005, Bofferding toured and photographed Prairie Wild's buildings and storage facilities located on properties owned or rented by Prairie Wild.[1] Bofferding also visited the Mohn farm to photograph three buildings Prairie Wild identified during the application process.

During the review process, Bofferding concluded that Prairie Wild's existing coverage was inadequate. She prepared a prequalification checklist where she noted that Prairie Wild was not an "Educated Buyer" of insurance, that there were several gaps in Prairie Wild's existing insurance coverage, and that one fire "could wipe out" an entire year

[1] There is some dispute surrounding these events. Mohn testified that he traveled with Bofferding in his truck and pointed out the EDA land and provided Bofferding with a photocopy of a map identifying the various properties, including the EDA land. Bofferding testified that she traveled alone in her vehicle, which was depicted in some of the photographs. The district court credited Bofferding's testimony that she traveled alone, but also found that Mohn gave Bofferding a map that depicted, among other properties, the EDA land.

of work. Bofferding suggested to Mohn that he add coverage for business-income loss and products/completed operations and increase certain policy limits to fill the existing gaps.[2]

Appellants ultimately obtained insurance for Prairie Wild from Westfield Companies. The policy went into effect on July 1 for a one-year period; it did not list the EDA land or the mulch inventory. On August 9, Bofferding presented Mohn with a Statement of Values form. This document listed the locations of the buildings used by Prairie Wild so that the inventory located within these buildings would be included within the blanket-contents property coverage. The EDA land was not listed on the Statement of Values. Mohn reviewed and signed the form. On September 12, Bofferding delivered the complete policy to Prairie Wild and reviewed the coverage with Mohn. Throughout the year, Prairie Wild periodically provided Brown & Brown with copies of its subcontracts and requested that erosion-control equipment be added or removed from the policy.

Prairie Wild renewed the policy in 2006 and 2007. Prior to each renewal, Bofferding reviewed the existing policy with Prairie Wild using a form entitled Additional Coverage Available, which facilitates review of the policy and analysis of additional exposures and new coverage options. Prairie Wild also completed new Statement of Values forms each year. The EDA land was never identified on these forms, and Prairie Wild never discussed its mulch inventory or the EDA land with Bofferding during the review meetings. Prior to renewing in May 2007, Melissa Mohn stated that she was not sure if the Statement of Values listed all the field properties and that she would have to review Prairie Wild's real estate tax statements. Bofferding encouraged her to sign the form and confirm the

[2] The new policy proposed increased limits on business personal property coverage to address seed inventory stored in Prairie Wild's buildings.

properties listed at a later time because additional production fields would not impact the Statement of Values given that undeveloped land was insured for general liability purposes only. Bofferding reviewed the 2007 policy with Prairie Wild in June. There was no discussion of the EDA land or the mulch inventory.

From 2005 to 2007, Prairie Wild's erosion-control business expanded, and the number of mulch bales stored on the EDA land increased from about 50-60 bales in 2005 to more than 2,000 bales in 2007. Prairie Wild did not discuss this expansion with appellants or request insurance coverage for the mulch inventory.

On September 7, 2007, a fire destroyed approximately 2,040 bales of mulch stored on the EDA land. When Mohn first reported the fire to Bofferding, she indicated that the loss was covered. As the post-fire investigation continued, it became evident that the EDA land was not covered and that Bofferding was not aware that the Mohns owned that particular parcel of land. And the policy specifically excluded coverage for hay, straw, and other crops located or stored outside of the insured buildings. Accordingly, Westfield denied coverage for the fire losses. Unable to fulfill its existing erosion-control contracts, Prairie Wild ultimately sold portions of its erosion-control business to competitors.

Prairie Wild commenced this action alleging that (1) appellants were negligent in failing to provide insurance coverage for the mulch stored on the EDA land, (2) Brown & Brown negligently supervised and trained Bofferding, and (3) appellants breached their contractual duty to obtain appropriate insurance. After a bench trial, the district court concluded that appellants did not breach a contractual duty but were negligent. The district

court determined appellants breached both the "special circumstances" and "ordinary" duties of care and awarded $331,761.41 in damages to Prairie Wild. This appeal follows.

D E C I S I O N

A district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In applying this rule, "we view the record in the light most favorable to the judgment" and "[i]f there is reasonable evidence to support the district court's findings, we will not disturb them." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). The existence of a legal duty is a question of law, which we review de novo. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007).

In a negligence action against an insurance agent, the plaintiff must show (1) the existence of a duty; (2) a breach of the duty; (3) causation; and (4) damages. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). Generally, an insurance agent has a duty to exercise the skill and care which a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989) (alteration in original) (quotation omitted). The scope of this duty is limited to acting in good faith and following the insured's instructions. *Id.* And an insured is generally responsible for informing himself about insurance coverage. *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987). But, if special circumstances exist, then the "agent may possibly be under a duty to take some sort of affirmative action, rather than just follow the

instructions of the client." *Gabrielson*, 443 N.W.2d at 543-44. Whether special circumstances create a heightened duty turns on the facts presented. *Id.* at 543 n.1.

I. The district court erred in imposing a heightened duty based on "special circumstances."

Appellants challenge the district court's determination that special circumstances existed between the parties, imposing a heightened duty on appellants. The special-circumstances doctrine is premised on the notion that "circumstances of the transaction and the relationship of the agent vis-a-vis the insured may, on occasion, result in creation of the duty" to "offer, advise or furnish insurance coverage." *See Urie*, 405 N.W.2d at 889-90. In analyzing whether special circumstances exist, the supreme court considers whether (1) the agent knew that the insured was unsophisticated in insurance matters, (2) the agent knew that the insured was relying on the agent to provide appropriate coverage, and (3) the agent knew that the insured needed protection from a specific threat. *See Gabrielson*, 443 N.W.2d at 544.

Based on *Gabrielson*, we have previously stated that special circumstances exist when "the insured asks the agent to examine the insured's exposure and advise the insured on the potential exposure" or where there is a "special circumstance or relationship or a long-term relationship" such that "the agent knows or should know that the insured is relying on the agent's judgment." *Scottsdale Ins. Co. v. Transp. Leasing/Contract, Inc.*, 671 N.W.2d 186, 196 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). Special circumstances also "may arise when the insured delegates decision-making authority to the agent and the agent acts as an insurance consultant." *Beauty Craft Supply & Equip. Co. v.*

State Farm Fire & Cas. Ins. Co., 479 N.W.2d 99, 101-02 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992).

Although Minnesota recognizes the special-circumstances doctrine, it is not well defined, and courts have found a factual basis for applying the doctrine in only a few cases. In *Osendorf v. Am. Family Ins. Co.*, the supreme court held that an agent had a duty to inquire about the insurance needs of an insured who was unable to read most of the insurance policy because of his limited education and with whom the agent had worked for ten years. 318 N.W.2d 237, 238 (Minn. 1982). In *Carlson v. Mut. Serv. Ins.*, the supreme court concluded that an agent had a common-law duty, based on special circumstances, to specifically offer underinsured-motorist coverage as a part of an automobile policy where there was a family relationship between the agent and insureds and the insureds purchased all of their insurance through the agent. 494 N.W.2d 885, 886-88 (Minn. 1993). By contrast, we declined to find special circumstances where an insured asked for "complete coverage" so that any loss would "be taken care of" because the insured did not delegate authority to the agent to determine what coverages the insured needed. *Beauty Craft*, 479 N.W.2d at 100-02.

Appellants contend that the record does not support the factual findings on which the district court based its special-circumstances determination. The district court found that appellants (1) knew that Prairie Wild was "unsophisticated" in insurance matters, (2) knew Prairie Wild was relying on appellants for advice, and (3) were aware that Prairie Wild needed coverage for the particular risk of fire. We address each finding of fact, including its legal sufficiency to establish special circumstances, in turn.

As to the first finding, appellants do not dispute that the Mohns are "not educated buyers of insurance." But they correctly observe that Mohn is a high school graduate with special training in his field and an extensive agricultural background, including service in various public positions. While we agree with the district court's observation that Mohn may not be "insurance savvy," the circumstances of this case are a far cry from those present in *Osendorf*, where the insured was unable to read most of the policy. 318 N.W.2d at 238. There is no evidence that the Mohns were unable to read the policy or the various forms they reviewed and signed during the application process. Accordingly, we conclude that Mohn's lack of sophistication with insurance matters does not create special circumstances.

With respect to the district court's second finding, Prairie Wild asserts that because Bofferding "led" the application process, she knew that Prairie Wild relied on her to obtain appropriate coverage. We rejected a similar argument in *Beauty Craft* where the insured requested "complete coverage" and specifically asked the agent for his recommendations. 479 N.W.2d at 100-02. The facts here do not support a different result. As in *Beauty Craft*, the record does not reflect that Prairie Wild "delegate[d] decision-making authority" as to its insurance needs to appellants. *See id.* at 101-02. Rather, Bofferding evaluated Prairie Wild's existing insurance coverage, informed Prairie Wild of gaps in its coverage, and advised of coverages that could be added. Prairie Wild purchased some, but not all, of the additional coverages. And it is undisputed that the Mohns obtained insurance for their personal needs from a different agent. *See Gabrielson*, 443 N.W.2d at 545 (stating "great reliance" not present where insured "did not place all of his insurance needs into the hands

of [one agent] but rather, used another insurance agent as well"). On this record, we conclude that any reliance by Prairie Wild did not rise to the level needed to create special circumstances. The district court distinguished *Beauty Craft*, noting that appellants had "significant and continuous access to" Prairie Wild while preparing and reviewing its coverage. We disagree. On this record, Bofferding's level of access alone does not give rise to a special-circumstances relationship. *Cf. Carlson*, 494 N.W.2d at 886-88 (finding special circumstances where agent and insured had familial relationship, celebrated holidays and family gatherings together, and insured relied on agent for all insurance needs and for insurance advice).

Finally, we consider the district court's third special-circumstances finding—that Bofferding was aware Prairie Wild needed insurance for the specific threat of fire. The district court found that appellants knew Prairie Wild used substantial quantities of mulch in the erosion-control portion of its business, knew about the EDA land, and "should have but did not know" there was no coverage for the mulch stored in that location. Appellants argue that the record does not support these findings. We agree. Although appellants were aware, from the beginning, that Prairie Wild performed erosion-control services, this awareness does not equate to knowledge of a parcel of land (and what was stored on it) that was never specifically discussed or mentioned by Prairie Wild in any material respect. It is undisputed that the EDA land was not covered by Prairie Wild's previous insurance policy. And because Mohn owned the EDA land in his personal capacity, it was not included in any property list Prairie Wild provided to appellants. There is no evidence that the Mohns informed Bofferding that Prairie Wild stored mulch used for erosion control on land the

Mohns personally owned. Further, because Prairie Wild accounted for the mulch it stored on the EDA land on a whiteboard in its office, the mulch was never included on any lists provided to appellants as product or inventory Prairie Wild desired to be insured under the Westfield policy.

While the district court found that Mohn gave Bofferding a map that included the EDA land in February 2005, we agree with appellants that this finding cannot be reconciled with the crediting of Bofferding's testimony as to the relevant events. Mohn testified that he gave Bofferding the map when he and Bofferding returned to Prairie Wild's main office after traveling to and touring Mohn's farm together in his truck. But this is inconsistent with Bofferding's credited testimony that she photographed buildings at Prairie Wild's main office and then traveled to the farm alone in her vehicle, without returning to the office. Moreover, possession of the map would not support a finding that Bofferding knew Prairie Wild stored mulch on the EDA land. Finally, although Prairie Wild notes that Bofferding explicitly referred to the risk of fire while evaluating Prairie Wild's insurance needs, a general fire risk does not equate to awareness of a "specific threat" of fire destroying mulch stored on the EDA land.

Based on our careful review of the record, we conclude that the district court clearly erred in finding that Bofferding knew that Prairie Wild needed coverage for the specific risk that resulted in the loss. We also conclude that the district court's findings regarding the Mohns' lack of sophistication regarding insurance and their reliance on Bofferding do not support the legal determination that special circumstances existed. Accordingly, the district court erred in imposing a heightened duty of care on appellants.

II. Appellants did not breach the ordinary duty of care.

We next address the district court's determination that appellants breached the ordinary duty of care toward Prairie Wild. The duty of an insurance agent is limited to acting in good faith and following the insured's instructions. *Gabrielson*, 443 N.W.2d at 543; *see also Scottsdale Ins. Co.*, 671 N.W.2d at 196 ("Unless there is a special circumstance or relationship, the agent's duty is to act in good faith and to simply follow the instructions of the insured."); *Higgins ex rel. Higgins v. Winter*, 474 N.W.2d 185, 188 (Minn. App. 1991) (stating that when special circumstances do not exist, an insurance agent's duty is "no greater than accomplishing what [the clients] specifically instructed it to do"), *review denied* (Minn. Oct. 7, 1991).

There is no evidence and no allegation that appellants failed to act in good faith. Accordingly, we focus on whether Bofferding followed Prairie Wild's instructions. The district court did not find that Bofferding failed to follow Prairie Wild's instructions. Instead, the district court's determination that appellants breached the ordinary duty of care is premised on the findings that appellants were "not sufficiently familiar with agricultural operations and insurance coverages appropriate" for Prairie Wild's needs and that "three possible endorsements" could have been added to insure the mulch on the EDA land.

Our review of the record reflects that Bofferding followed Prairie Wild's explicit instructions. She procured insurance coverage for real properties, equipment, and inventory that Prairie Wild identified and requested. She provided waivers of subrogation when requested and modified the policy terms to add or remove equipment as Prairie Wild

instructed. In short, the evidence does not support a finding of breach based on failure to follow Prairie Wild's instructions.

Prairie Wild also argues that appellants were negligent because they were not aware of available coverage that would have covered the mulch on the EDA land. But whether Bofferding or Brown & Brown knew of other potential coverage is immaterial to whether they complied with the ordinary duty of care. Appellants' duty to Prairie Wild was limited to following instructions, and the record shows that Prairie Wild never instructed appellants to obtain insurance for the EDA land or for the mulch Prairie Wild stored outside on the EDA land. Accordingly, we conclude that the district court erred in finding that appellants breached the ordinary duty of care.[3] Because we reverse the district court's liability determination, we do not address the damages award.

Reversed.

[3] Because Prairie Wild failed to establish that Bofferding breached the ordinary duty of care, the vicarious-liability claim against Brown & Brown based on respondeat superior fails as a matter of law. *See Stanger v. Thompson*, 153 Minn. 488, 491, 190 N.W. 897, 898 (1922). Moreover, the district court's findings that Brown & Brown "negligently failed to train and supervise" Bofferding run contrary to Minnesota law. *See Johnson v. Peterson*, 734 N.W.2d 275, 277 (Minn. App. 2007) (stating that "current Minnesota law does not recognize a cause of action for negligent training," and without physical injury, "[e]conomic harm alone is not enough to support negligent-supervision actions").