STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1645

Michael Paul, et al.,
Appellants,

vs.

Wayne Holmgren
d/b/a Wayne W. Holmgren & Sons,
Respondent,

Noah Insurance, Inc.
d/b/a Noah Insurance Service,
Respondent,

Vineland-Huntsville Mutual Insurance Company,
Respondent.

Filed June 25, 2012
Affirmed in part, reversed in part, and remanded
Chutich, Judge

Polk County District Court
File No. 60-CV-10-1789

Steven L. Theesfeld, Michelle D. Hurley, Yost & Baill, LLP, Minneapolis Minnesota (for appellants)

Wayne Holmgren, Thief River Falls, Minnesota (pro se respondent)

Thomas R. Olson, Ann E. Miller, Jeffries, Olson & Flom, P.A., Fargo, North Dakota, (for respondent Noah Insurance, Inc. d/b/a Noah Insurance Service)

Christian A. Preus, Damon L. Highly, Andrew D. Deutsch, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent Vineland-Huntsville Mutual Insurance Company)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellants challenge the district court's judgment dismissing their negligence and contract claims against an insurance agency and insurer. Because we conclude that the district court properly granted summary judgment on the contract claims, but erred in granting summary judgment on the negligence claim against the agency, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS

In July 2009, the Pauls purchased a house for their daughter and son-in-law, the Helgesons. At the time of the purchase, the Pauls and the Helgesons (collectively "appellants") were aware that the foundation needed to be repaired or replaced.

Kelsey Helgeson (Helgeson) met with an insurance agent at Noah Insurance, Inc. (Noah) to obtain insurance to cover the house. Noah is an independent insurance agency that places insurance policies with several different insurance companies, including Vineland-Huntsville Mutual Insurance Company (Vineland). Helgeson initially requested a homeowners' policy, but because she and her husband did not own the house, they did not qualify for such a policy. Noah procured a renters' policy for the Helgesons and a "named perils" dwelling-owners' policy for the Pauls. Both policies were placed with Vineland. The dwelling-owners' policy included an "increase of hazard" provision,

stating that Vineland would "not pay for loss if the hazard is increased by any means within the control or knowledge of any insured."

In November 2009, the Helgesons hired Wayne Holmgren to move the house to a new foundation.[1] On December 23, 2009, the house fell from a dolly while it was being moved and was a total loss.

Following the loss, appellants discovered that Holmgren did not have proper insurance to cover moving the house. The Pauls then made a claim for the loss under the dwelling-owners' policy. Vineland denied coverage stating that the loss was not caused by a peril specifically covered by the policy. Appellants filed suit against Holmgren, Noah, and Vineland. They claimed that Holmgren was negligent and breached his contract. Appellants alleged negligence and breach-of-contract claims against Noah for failing to procure insurance to cover the house move. They also filed a breach-of-contract claim against Vineland for its denial of coverage under the dwelling-owners' policy.

Vineland and Noah moved separately for summary judgment and the district court granted both motions. The district court found that, by attempting to move the house, it was undisputed that appellants had increased the risk of hazard. The loss was therefore not covered by the policy. The district court also found that no genuine issues of material fact existed as to whether Noah breached its duty of care in procuring appellants' insurance policies.

[1] Holmgren is not a party to this appeal.

The Pauls and the Helgesons now appeal the entry of summary judgment, arguing that genuine issues of material fact remain as to whether Noah's agent breached his duty and whether the dwelling-owners' insurance policy should be reformed. Appellants also argue that the district court erred in denying coverage under the policy's increased risk exclusion.

D E C I S I O N

I. Standard of Review

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. To oppose a motion for summary judgment, the nonmoving party "must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05; *see also Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002) ("A nonmoving party cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial."). On appeal from the district court's grant of summary judgment, this court reviews de novo "whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC.*, 790 N.W.2d 167, 170 (Minn. 2010). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).

II. Negligence Claim

Appellants asserted a negligence claim against Noah for failing to provide coverage for moving the house. In a decision released after the district court issued its order, the supreme court explicitly recognized a claim for negligent procurement of insurance coverage. *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 116 (Minn. 2011); *see also Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). Such a claim requires the insured to prove "(1) that the agent owed a duty to the insured to exercise reasonable skill, care, and diligence in procuring insurance; (2) a breach of that duty; and (3) a loss sustained by the insured that was caused by the agent's breach of duty." *Graff*, 800 N.W.2d at 116. Although the district court did not have the benefit of the *Graff* opinion, it properly recognized the existence of a negligence claim against an insurance agent. The court ultimately dismissed the claim, however, because it found that no genuine issue of material fact existed as to whether Noah's agent breached his duty of care.

Appellants contend that the district court misapplied the law regarding an insurance agent's duty by requiring them to demonstrate that they requested coverage for moving the house. Specifically, the district court stated "[t]o establish a claim against Noah, the evidence must be sufficient for a jury to conclude that the Helgesons made a request for insurance coverage." Because appellants made no "specific or general request" for such coverage and no evidence showed any "special circumstances" creating an affirmative duty, the district court granted summary judgment for Noah regarding whether its agent breached his duty of care in procuring insurance.

"An insurance agent has the duty to exercise the standard of skill and care that a reasonably prudent person engaged in the insurance business will use under similar circumstances." *Johnson v. Farmers & Merchs. State Bank of Balaton*, 320 N.W.2d 892, 898 (Minn. 1982). Generally, this duty has been seen as limited to acting in good faith and following the insured's instructions. *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989). The insurance agent's duty to act reasonably, however, is not contingent on a specific or general request from the insured for a certain type of coverage. If special circumstances exist, then "the insurance agent may possibly be under a duty to take some sort of affirmative action, rather than just follow the instructions of the client." *Id.* at 543–44; *see also Urie*, 405 N.W.2d at 890 ("[D]epending on existing circumstances, an insurance agent, on occasion, may have a common law duty to an insured to offer optional insurance coverages."); *see also Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985) (finding that facts may give rise to a duty to offer additional coverage).

An agent may thus have an affirmative duty to offer additional coverage when the agent is aware that the insured needs coverage from a specific threat. *See Osendorf v. Am. Fam. Ins. Co.*, 318 N.W.2d 237, 238 (Minn. 1982) (upholding a finding of negligence where the agent was aware that the insured engaged part-time employees but lacked liability coverage for such employees). Here, a factual dispute exists as to whether Noah's agent knew that the house was going to be moved. At summary judgment, the district court properly drew all inferences in favor of appellants and determined that Noah's agent was on notice that the house was going to be moved. The

district court further stated that it was "possible from [the agent's] viewpoint that the Plaintiffs had already obtained such coverage or were obtaining it elsewhere or not at all." While the district court's statement may be correct, it was improper for the court to make that determination on a motion for summary judgment. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) ("The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist."). Because a reasonable jury could find that Noah's agent knew appellants needed coverage for a specific threat, the district court erred by granting summary judgment on the negligence claim.

In addition, appellants submitted an expert affidavit of an insurance agent who had worked in the insurance industry for 38 years. *See Gabrielson*, 443 N.W.2d at 545 (stating that an expert affidavit is "important in establishing a standard of care"). The expert affidavit states the standard of care required Noah's agent to (1) tell appellants that Vineland's policy would not provide coverage for moving the house, (2) procure the necessary coverage for moving the house, or (3) inform Helgeson that he was not sure whether the dwelling-owners' or renters' policies would cover damage incurred from moving the house. Appellants have sustained their burden in opposing summary judgment by producing evidence concerning the standard of care governing an insurance agent in these circumstances. *See Atwater Creamery*, 366 N.W.2d at 279 (affirming the district court's dismissal where appellant failed to establish the duty of care through expert testimony).

Given the factual question that existed and the evidence regarding the pertinent standard of care, the district court erred in granting summary judgment on the negligence claim against Noah. Accordingly, we reverse the judgment in favor of Noah and remand to the district court the issue of whether Noah's agent met the standard of care required of an insurance agent under the circumstances presented here.

III. Contract Reformation

Appellants contend that the district court erred in refusing to re-write the insurance contract. Reformation of an insurance policy is appropriate where "(1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party." *Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 354 (Minn. 2000) (quoting *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980)). The party seeking contract reformation has an "onerous" burden. *Tollefson v. Am. Family Ins. Co.*, 302 Minn. 1, 7, 226 N.W.2d 280, 284 (1974).

Appellants argue that a fact issue exists as to whether there was a unilateral mistake regarding the scope of insurance coverage. We agree that there is evidence of unilateral mistake in the record, specifically, that appellants believed the policy would cover the move. To justify reformation, however, such evidence must be accompanied by evidence of fraud or inequitable conduct by the other party. *Leamington*, 615 N.W.2d at 354. Appellants point to no evidence in the record to demonstrate that Noah or its agent acted in an inequitable or fraudulent manner. Therefore, the district court correctly

concluded that no fact questions existed and appropriately awarded summary judgment in favor of Noah and Vineland on the contract claims.

IV. "Increased Risk" Exclusion

Finally, appellants argue that the district court abused its discretion by denying coverage under the policy's "increased risk" exclusion. Specifically, they contend that because Noah was aware that the house would be moved, moving the house was not an "increased risk" as defined by the policy. This argument is unpersuasive. The dwelling-owners' insurance policy provides the following condition:

> Increase of Hazard: We will not pay for loss if the hazard is increased by any means within the control or knowledge of any insured.

The "increased risk" exclusion is not based on an insurer's knowledge of the risk, but rather whether the insured's actions increased the risk. Moving the house was clearly a hazard "within the control or knowledge of [the] insured." The district court properly determined that "[s]uch an action so obviously increases the risk of hazard that it would be an inappropriate question for a jury to decide." The district court did not abuse its discretion in granting Vineland's motion for summary judgment because appellants' actions increased the risk of hazard and the policy did not cover the loss.

Affirmed in part, reversed in part, and remanded.