STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2184

Cascades Development of Minnesota, LLC,
d/b/a Anytime Fitness, et al.,
Appellants,

vs.

West Bend Mutual Insurance Company, et al.,
Respondents,

Jade Janina Benson, and her legal guardians
Jeffrey Arthur Benson and Janina Faye Benson,
Respondents.

Filed June 17, 2013
Affirmed
Hudson, Judge

Dakota County District Court
File No. 19HA-CV-09-6278

Rolf E. Sonnesyn, Matthew R. Smith, Tomsche, Sonnesyn & Tomsche, Golden Valley, Minnesota (for appellants)

Andrea E. Reisbord, David A. Wikoff, Peter G. Van Bergen, Cousineau McGuire Chartered, Minneapolis, Minnesota (for respondents)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

HUDSON, Judge

Appellants challenge the district court's summary judgment and dismissal of their claims seeking reformation of a workers' compensation policy with respondent insurer to reflect a policy date before an employee's accident, arguing that appellant insurance agent had apparent authority to orally bind coverage on the earlier date. Because the district court did not err by concluding that no genuine issue of material fact existed on the issue of the agent's apparent authority, we affirm.

FACTS

Appellant Cascades Development of Minnesota, LLC (Cascades), was formed for the purpose of opening a fitness club in Inver Grove Heights. Before the fitness club's opening date, which was set for late September 2006, Wayne Newton, a principal of Cascades, sought help in obtaining bonding and insurance for the club from his brother, appellant Nicholas Newton, the surety bond manager at appellant Associated Insurance Agents, Inc. (AIA). Nick Newton's primary background was selling surety bonds. He was also a licensed agent for property and casualty insurance, but that business made up only about ten percent of his work.

A fitness club, as a high-risk business, would generally be required to obtain insurance from a surplus lines insurer,[1] but respondent West Bend Mutual Insurance

[1] "The surplus lines market is a part of the insurance market for risks that licensed companies are unwilling to insure or only willing to insure at a very high premium, or with many exclusions, or with high deductibles, or with some combination of these

Company, a licensed insurance company in Minnesota, was able to offer fitness-club insurance through one of its divisions, respondent National Specialty Insurance (NSI). In April 2006, AIA entered an agreement with West Bend to act as an agent selling West Bend's policies, including those for fitness clubs. The NSI agents' manual provided that, except for certain specified programs, which did not include fitness-club insurance, agents did not have authority to rate and bind coverage unless they had received a prior quote and approval from NSI. West Bend's fitness-club coverage also required completion of a health-club questionnaire, which was intended to provide additional information beyond a standard ACORD[2] insurance application.

The brothers met on August 30, 2006 at Wayne Newton's home office to discuss obtaining insurance for the fitness club. In preparation for that meeting, Nick Newton learned that West Bend would write insurance for fitness clubs. He had orally bound new insurance with other carriers, but had not yet placed insurance with West Bend. Nick Newton either sent the health-club questionnaire to Wayne Newton or brought it to the meeting, as well as bringing ACORD applications for specific lines of insurance, including workers' compensation insurance.

Before the meeting, the brothers had discussed insurance requirements for the fitness club. Wayne Newton testified in his deposition that he told Nick Newton that the club had hired an employee who was starting on September 1, required coverage for her

---

constraints." 1 Jeffrey A. Thomas, *New Appelman on Insurance Law Library Edition* § 1.06(8) (2013).

[2] The ACORD application is a standard, preprinted application form used by multiple insurers in the insurance industry.

needed to be in place before her start date, and he understood that his brother would procure timely coverage for that employee. He also told Nick Newton that the remaining coverage needed to be effective before the club was scheduled to open in late September. Nick Newton recalled that he was told of the club's projected opening date, but that he became confused about the dates that different coverages were needed and forgot that workers' compensation insurance was required by the earlier date.

At the meeting, the brothers at least partially filled out West Bend's health-club questionnaire. That questionnaire stated in boldface, immediately above the signature line: "IF A QUOTE FOR WORKER'S COMPENSATION COVERAGE IS BEING REQUESTED PLEASE COMPLETE AN ACORD WORKER'S COMPENSATION APPLICATION." The signature block also states that the person signing the questionnaire "understand[s] completion of this questionnaire does not compel the company to provide coverage." Both brothers signed the document on August 30. Because the ACORD workers' compensation application required Wayne Newton to obtain additional information, such as federal tax and unemployment identification numbers, it was not completed at the meeting.

After Nick Newton received that information and completed the required ACORD applications, an AIA employee submitted them online to NSI on September 7, requesting a quote and an effective policy date of September 21. An NSI underwriter told AIA that the completed health-club questionnaire, which had not yet been submitted, was also required. When the underwriter received the completed questionnaire, West Bend bound coverage to become effective September 21. Unfortunately, respondent Jade Benson, the

employee hired by Cascades in early September, was severely injured in a work-related accident on September 18.

West Bend refused to honor the workers' compensation claim, and appellant Westport Insurance Corporation, AIA's errors-and-omissions carrier, assumed responsibility for that claim. Cascades assigned its right to indemnification against West Bend to Nick Newton, AIA, and Westport. Cascades and Westport settled the employee's claim against Cascades. Nick Newton, Cascades, AIA, and Westport then sued West Bend in Dakota County district court, seeking reformation of Cascades' workers' compensation policy to reflect an effective date of September 1, 2006; indemnification for workers' compensation benefits paid; and breach-of-contract damages arising from West Bend's denial of coverage. West Bend sought removal of the case to federal district court. The Minnesota federal district court issued a sua sponte order to show cause why the case should not be remanded to state court for lack of subject-matter jurisdiction, but ultimately concluded that it had jurisdiction over the matter and granted summary judgment in favor of West Bend. *Cascades Dev. of Minn., LLC v. Nat'l Specialty Ins.*, Civ. No. 09-2812 (RHK/SER), 2011 WL 283918 (D. Minn. Jan. 25, 2011), *rev'd*, 675 F.3d 1095 (8th Cir. 2012). But the Eighth Circuit Court of Appeals reversed, concluding that because Nick Newton was a real party in interest, which destroyed diversity jurisdiction, the matter should be remanded to state court. *Cascades Dev. of Minn., LLC v. Nat'l Specialty Ins.*, 675 F.3d 1095, 1100 (8th Cir. 2012).

On remand, the Dakota County district court granted West Bend's renewed motion for summary judgment.[3] The district court concluded that no genuine issue of material fact existed on the issue of Nick's apparent authority to bind West Bend to workers' compensation coverage for Cascades' employee prior to the accident. The district court reasoned that, under Minnesota caselaw, no material factual issue existed on whether West Bend held out Nick Newton as having such authority; that Wayne Newton had actual notice that his brother may not have had authority to bind coverage; and that Minnesota statutory law did not grant general apparent authority to insurance agents based on their license to sell insurance. Because the district court concluded that no apparent authority existed, it did not address West Bend's alternative argument that the terms of the agency agreement between West Bend and AIA precluded West Bend's right to indemnification from Nick Newton. This appeal follows.

D E C I S I O N

This court asks, in reviewing summary judgment, whether: (1) genuine issues of material fact exist, and (2) the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review de novo whether there are genuine issues of material fact and whether judgment is appropriate as a matter of law. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). We view the evidence in the light most favorable to the nonmoving parties and draw all reasonable inferences in their favor. *Id.* But the nonmoving party must present evidence that is

[3] For ease of reference, appellants in this action will generally be referred to as "Cascades" and respondents as "West Bend."

"sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions" as to that party's claims. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I

Cascades acknowledges that, based on AIA's agency agreement with West Bend, Nick Newton had no actual or implied authority to issue the workers' compensation policy before its approval by West Bend. But Cascades argues that the district court erred by concluding that no material factual issue exists regarding Nick Newton's apparent authority to orally bind West Bend to workers' compensation coverage before the date West Bend approved coverage. "Whether an agent is clothed with apparent authority is a question of fact." *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

Apparent authority requires that: (1) the principal has either "held the agent out as having authority, or . . . knowingly permitted the agent to act on its behalf"; (2) the third party has "actual knowledge that the agent was held out by the principal as having such authority or [was] permitted by the principal to act on its behalf"; and (3) "proof of the agent's apparent authority [is] found in the conduct of the principal, not the agent." *Hockemeyer v. Pooler*, 268 Minn. 551, 562, 130 N.W.2d 367, 375 (1964). Because "no agent by his own act can create evidence of authority," apparent authority must be founded on the actions of the principal. *W. Concord Conservation Club, Inc. v. Chilson*, 306 N.W.2d 893, 897 (Minn. 1981). "In determining whether apparent authority exists, the court may consider any statements, conduct, lack of ordinary care, or manifestations

of the principal's consent, such that a third party might be justified in concluding that the agent acted with apparent authority." *Powell*, 626 N.W.2d at 457.

Cascades argues that the nature of the insurance industry—specifically, the commonplace practice of oral binder by insurance agents—and Nick Newton's status as an agent designated to sell insurance for West Bend, constituted West Bend's manifestation to third parties that he had apparent authority to bind coverage. *See id.* at 458–60 (upholding the district court's judgment on an employee's breach-of-contract claim, concluding that a corporate president had apparent authority to contract with the employee to redeem stock at a specified price). In *Powell*, this court noted that the president's position as the company's top-ranking executive provided a manifestation of the corporation's consent to his actions. *Id.* at 459 (citing Restatement (Third) of Agency § 2.03 (Tentative Draft No. 1, 2000)).

We agree with West Bend that, unlike the executive in *Powell*, Nick Newton did not occupy a corporate position that would contribute to leading a third party to reasonably believe that he had authority to conduct all transactions on behalf of that company. *Cf. id.* at 459. Nonetheless, we may consider the Restatement (Third) of Agency, which has since been adopted, as persuasive authority in considering this issue. *See Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 117 n.4 (Minn. 2011) (referring to Restatement (Third) of Agency (2006)); *see also Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000) (describing section 611 of Restatement (Second) of Torts (1976) as "persuasive"). According to that restatement, two separate but related factual questions address the existence of apparent authority:

"whether a reasonable person in the position of a third party would believe that an agent had the authority or the right to do a particular act" and "whether such a belief is traceable to a manifestation of the principal." Restatement (Third) of Agency § 2.03 (2006), cmt. d. If a principal has provided an agent with general authority to engage in a class of transactions, but has placed undisclosed limits on that authority, a third party may reasonably believe that the agent is authorized to conduct those transactions. *Id.*, § 3.03, cmt. b. But "[a] third party should give considerable weight to written statements from the principal specifying what the agent is authorized to do." *Id.*, § 2.03, cmt. d.

To support its argument on apparent authority, Cascades also cites Minnesota caselaw supporting the general proposition that an insurer may be bound by the oral representations of its agent. *See, e.g.*, *Nehring v. Bast*, 258 Minn. 193, 203, 103 N.W.2d 368, 375–76 (1960) (concluding that an oral promise by an insurance agent that workers' compensation coverage would automatically renew was binding on insurer when insured was never informed that insurer had refused to renew policy); *Rommel v. New Brunswick Fire Ins. Co.*, 214 Minn. 251, 261, 8 N.W.2d 28, 34 (1943) (concluding that an oral contract between an insurance agent and an applicant for fire insurance bound the insurer, when the agent informed the applicant that insurance would be effective immediately and sent the application to the insurer); *Kansel v. Minn. Farmers' Mut. Fire Ins. Ass'n*, 31 Minn. 17, 21, 16 N.W. 430, 430 (1883) (concluding that an agent's statement of incorrect facts on an application was chargeable to the insurer, based on the apparent authority with which insurance companies clothe agents). Cascades maintains that, under this line

of cases, Nick Newton's position as an insurance agent appointed by West Bend clothed him with apparent authority to bind workers' compensation coverage.

But Minnesota caselaw does not compel the conclusion that every insurance agent appointed by an insurer to solicit coverage has apparent authority to bind the insurer as a matter of law. Rather, the existence of apparent authority presents a question of fact. *Powell*, 626 N.W.2d at 457. And in order to create a genuine issue of material fact on the issue of Nick Newton's authority to orally bind West Bend before approval of the insurance application, Cascades was required to present facts tending to show that, because of West Bend's manifestations, Nick Newton had that authority, such that a reasonable person in Wayne Newton's position would have been justified in relying on it. *See id.*; Restatement (Third) of Agency § 2.03. cmt. d.

Cascades argues that a reasonable person in Wayne Newton's position would have relied on Nick Newton's representation that workers' compensation coverage would be timely obtained. We disagree. It is undisputed that West Bend's coverage for a fitness club was high-risk insurance, requiring specialized underwriting and the completion of a health-club questionnaire. That questionnaire, which both brothers signed on August 30, contained boldface language stating West Bend's requirement that a workers' compensation application must be submitted to obtain a quote for that coverage. It also stated that the applicant "understand[s] completion of this questionnaire does not compel the insurer to provide coverage." Because the principal specified this written limitation, which Wayne Newton acknowledged by signing the questionnaire, we agree with the district court that Cascades has raised no genuine issue of material fact as to whether

Nick Newton had apparent authority to orally bind West Bend to coverage before the application was submitted and approved.

Cascades maintains that the disclaimer in the questionnaire relates only to West Bend's right to subsequently decline coverage, not to whether Nick Newton had apparent authority to bind the insurer. Although Minnesota appellate courts have not considered this issue, we note that appellate courts in other jurisdictions have determined that such a disclaimer gave notice to a potential insured of limitations on an agent's authority to bind coverage. *See, e.g., Citizens Prop. Ins. Co. v. European Woodcraft & Mica Design, Inc.*, 49 So. 3d 774, 777–78 (Fla. Dist. Ct. App. 2010) (concluding that a potential insured, who signed an application explicitly limiting agent's authority to bind coverage, was on inquiry notice of that limitation); *Broughton v. Dona*, 475 N.Y.S.2d 595, 597 (N.Y. App. Div. 1984) (concluding that when an insured signed an application, which stated in boldface that it was "subject to approval by the Company's Home Office," the insured was put on notice of the agent's lack of authority to bind the insurer and could not recover for breach of a warranty of authority). And although Minnesota requires that Cascades, as an employer, carry workers' compensation insurance, Minn. Stat. § 176.181, subd. 2 (2012), we cannot conclude that the mandatory character of workers' compensation insurance requires a different result. *See, e.g., Guarantee Ins. Co. Ltd. Mut. v. Indus. Accident Comm'n*, 139 P.2d 905, 908 (Cal. 1943) (concluding that evidence failed to support finding of completed contract for workers' compensation insurance when soliciting agent lacked authority to write policies and failed to timely submit policy application).

Cascades also maintains that the presence of West Bend's logo on the questionnaire creates a material fact as to whether the company was expressing a manifestation of intent to be bound by Nick Newton's action as its agent. But in view of the signed disclaimer, the presence of the logo does not create a material factual issue on this question. Finally, although West Bend has acknowledged that it would have provided coverage had Cascades' application been timely submitted, we conclude that this factor alone does not create a genuine issue of fact on the issue of apparent authority.

II

Cascades argues in the alternative that Nick Newton had apparent authority as a matter of law to bind West Bend to coverage for its employee, based on a comparison of the statutory language of Minn. Stat. § 60K.31-.32 (2012) and that of Minn. Stat. § 60K.49 (2012). On appeal from summary judgment, statutory interpretation presents a legal issue, which we review de novo. *Burck v. Pederson*, 704 N.W.2d 532, 534 (Minn. App. 2005), *review denied* (Dec. 13, 2005).

To determine a statute's meaning, this court first examines its plain language, "draw[ing] from [its] full-act context." *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. App. 2002), *review denied* (Minn. May 28, 2002); *see* Minn. Stat. § 645.16 (2012) (setting forth plain-meaning rule). "If, on its face and as applied to the facts, a statute's meaning is plain, judicial construction is neither necessary nor proper." *Occhino*, 640 N.W.2d at 359. A statute is ambiguous, permitting interpretation, if its language has more than one reasonable interpretation. *Id*. at 60 (citing Minn. Stat. § 645.16).

Minn. Stat. § 60K.32 provides that an insurance producer's "license itself does not create any authority, actual, apparent, or inherent, in the holder to represent or commit an insurance carrier." *See also* Minn. Stat. § 60K.31, subd. 6 (defining an "insurance producer" as "a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance"). Minn. Stat. § 60K.49, subd. 4, however, provides a specific procedure for an insurer to appoint a producer as that insurer's agent. *See also* Minn. Stat. § 60A.02, subd. 7 (2012) (defining "insurance agent" as "an insurance producer licensed under sections 60K.30 to 60K.56 acting under express authority from, and an appointment by, an insurer . . . .").[4] Cascades argues that, because the legislature has specified that having a producer's license does not create authority to act on behalf of a specific insurer, *see* Minn. Stat. § 60K.32, but it has also provided that an insurer may appoint a producer as its agent, *see* Minn. Stat. § 60K.49, subd. 4, these sections must be read together to mean that once an insurer has taken the step of appointing a producer as an agent, that agent is clothed with apparent authority to act on behalf of that insurer as a matter of law. Cascades maintains that any other interpretation would render Minn. Stat. § 60K.49 meaningless.

We reject this argument. These statutes address different, although related, subject matters: Minn. Stat. § 60K.32 deals with licensing requirements for insurance producers;

[4] Minn. Stat. § 60K.49, subd. 1, also provides that "[a] person performing acts requiring a producer license under this chapter is at all times the agent of the insurer, and not the insured." The parties note that the supreme court has recognized that, while earlier Minnesota caselaw drew a distinction between an insurance agent, who acted on behalf of an insurance company, and a broker, who acted on behalf of a prospective insured, "this distinction appears to have been superseded by statute." *Graff*, 800 N.W.2d at 118–19 n.5 (citing Minn. Stat. § 60K.49 (2010)) (other citation omitted).

on the other hand, Minn. Stat. § 60K.49 deals with appointments of licensed producers to act as agents for an insurer. By their plain language, their meaning is not inconsistent with each other, and we decline to read Minn. Stat. § 60K.49 as granting apparent authority as a matter of law to an insurance agent, simply by virtue of an agent's appointment under that provision.[5]

We also conclude that Cascades' argument relating to additional insurance-related statutes is inapposite because those statutes are irrelevant in this context. *See* Minn. Stat. § 72A.03 (2012) (providing that an agent who negotiates a contract of insurance acts as the insurer's agent for the purpose of collecting and securing payment); Minn. Stat. § 65A.14 (2012) (providing, with respect to fire insurance policies, that when an insurer issues or renews a policy, the person who solicits and procures the application acts as the insurer's agent). These statutes have no application here, and, therefore, the district court did not err by concluding that Cascades' statutory-interpretation argument fails as a matter of law.

Finally, Cascades points out that, on summary judgment, the facts must be taken in the light most favorable to the non-moving party and argues that disputed fact issues remain, including the veracity of Nick Newton's testimony. But even if such disputed facts exist, they are insufficient to raise a genuine issue of material fact as to Nick Newton's apparent authority to bind West Bend. *See Musicland Grp., Inc. v. Ceridian*

[5] We also note that this argument relates more directly to a claim of actual authority, which was negated by the terms of the NSI agents' manual. *See* Minn. Stat. § 60A.02, subd. 7 (stating that an insurance agent may act on behalf of an insurer "when so authorized by the insurer").

Corp., 508 N.W.2d 524, 531 (Minn. App. 1993) (stating that "[a] material fact is one which will affect the result or the outcome of the case depending on its resolution"), *review denied* (Minn. Jan. 27, 1994).

It is undisputed that AIA did not submit the ACORD workers' compensation application to West Bend until September 7. It is also undisputed that after that date, West Bend requested the completed health-club questionnaire before it would provide a quote for fitness-club insurance. Under principles of contract law, the application did not become binding until it was accepted by the insurer. *See Olson v. Am. Cent. Life Ins. Co.*, 172 Minn. 511, 515, 216 N.W. 225, 227 (1927) (stating that "[w]here an application provides that the insurance shall not take effect until the approval of the application by the insurer, no contract of insurance exists prior to such approval"). The district court did not err by granting summary judgment in favor of respondents.

Affirmed.