IN THE COURT OF APPEALS OF IOWA

No. 1-535 / 11-0117
Filed October 5, 2011

MICHELE M. PITTS,
Plaintiff-Appellant,

vs.

FARM BUREAU LIFE INSURANCE COMPANY and DONALD SCHIFFER,
Defendant-Appellees.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley, Judge.

A plaintiff appeals a district court order granting defendants' motion for summary judgment on claims of negligence, negligent misrepresentation and respondeat superior. **AFFIRMED.**

Christopher C. Fry of O'Connor & Thomas, P.C., Dubuque, for appellant.

Terri L. Combs, Nicole Nicolino Nayima, and Ryan P. Howell of Faegre & Benson, L.L.P., Des Moines, for appellees.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ. Mullins, J., takes no part.

VAITHESWARAN, J.

Michele Pitts filed several tort claims against her husband's insurance agent and insurer for failing to designate her as the sole beneficiary on his life insurance policy. The district court granted summary judgment in favor of the defendants. On appeal, Pitts asserts that genuine issues of material fact precluded summary judgment.

I. Background Facts and Proceedings

Michele married Thomas Pitts. At the time of the marriage, Thomas had a son and a daughter from prior relationships. Thomas paid child support for his daughter and maintained a life insurance policy for her benefit through Farm Bureau Life Insurance Company.

Thomas initially told his insurance agent, Donald Schiffer, to pay the first $50,000 of insurance proceeds to his daughter, and the balance, if any, to Michele. Later, he changed the amounts, directing that only the first $35,000 go to his daughter and the balance go to Michele.

When Thomas's child support obligation ended, Michele alleges that Thomas told Schiffer to change the beneficiary designation so that she would receive all of the insurance proceeds. She further asserts that Thomas and Schiffer separately told her this change was made.

Thomas died. Following his death, Michele went to Schiffer's office with her parents. She asserts Schiffer again told her she would receive the full amount of the insurance proceeds, but, while she was completing the paperwork, Schiffer received a phone call in which he learned that Thomas's daughter would

in fact receive the first $35,000 of Thomas's insurance proceeds. Michele received the remaining $74,000.

Michele filed a petition alleging claims of negligence, breach of fiduciary duty, and negligent misrepresentation against Schiffer and naming Farm Bureau under a theory of respondeat superior. She later decided not to pursue the breach of fiduciary duty claim.

The defendants moved for summary judgment on the remaining claims. The district court granted the motion, concluding "Thomas Pitts could only change the beneficiary designation if he submitted a written, signed request as the owner of the policy" and "[i]t is undisputed that Mr. Pitts did not execute a written request to make Plaintiff the primary beneficiary." The court subsequently denied Michele's motion to enlarge the findings and conclusions, and this appeal followed.

II. Analysis

We must determine whether the record establishes "'no genuine issue as to any material fact'" and whether "'the moving party is entitled to a judgment as a matter of law.'" *Virden v. Betts & Beer Constr. Co.*, 656 N.W.2d 805, 806 (Iowa 2003) (quoting Iowa R. Civ. P. 1.981).

A. Negligence Claim

Michele's petition alleged that Schiffer was negligent in several respects, including "in failing to take action to change the beneficiary designation upon Thomas J. Pitt's request" and "in representing to Thomas J. Pitts and Michele M. Pitts that the designation had been changed." Michele now asserts Schiffer owed her a duty of care and genuine issues of material fact exist as to whether

he was negligent in exercising that duty. Michele's argument that she is a third-party beneficiary is premised exclusively on tort theories. She does not raise contract theories to support her claim for relief.

We believe some background on the duty question and the scope of the duty in the tort context would be helpful. In *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), the Iowa Supreme Court altered the general analysis of duty in negligence cases. The court there disapproved of the use of forseeability in the duty analysis. *Thompson*, 774 N.W.2d at 835.

Thompson does not provide the framework for analysis of duty here "[b]ecause the duty analysis in this case is based on agency principles and involves economic loss." *See Langwith v. Am. Nat'l Gen. Ins. Co.*, 793 N.W.2d 215, 221 n.3 (Iowa 2010), *overruled on other grounds by* Iowa Code § 522B.11(7); *see also Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503–04 (Iowa 2011) (explaining general rule that "a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable" but citing *Langwith* for the proposition that "when the duty of care arises out of a principal-agent relationship, economic losses may be recoverable"). The framework under these circumstances has evolved.

In *Collegiate Manufacturing Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854, 857 (Iowa 1972), the Iowa Supreme Court stated,

> Generally an agent owes his principal the use of such skill as is required to accomplish the object of his employment. If he fails to exercise reasonable care, diligence, and judgment in this task, he is liable to his principal for any loss or damage occasioned thereby.

The court further stated this rule could be altered to limit or enlarge the duties by agreement of the parties. *Collegiate Mfg.*, 200 N.W.2d at 857.

In *Sandbulte v. Farm Bureau Mutual Insurance Co*., 343 N.W.2d 457, 464 (Iowa 1984), the Iowa Supreme Court reiterated that insurance agents owe a general duty "to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured." The court further stated that a greater duty could be owed "when the agent holds himself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured." *Sandbulte*, 343 N.W.2d at 464.

In December 2010, the Iowa Supreme Court overruled *Sandbulte's* characterization of the scope of the duty owed by an insurance agent to a client. The court stated:

> The defendants have advanced no reason, nor have we identified one, that would justify the limitations placed on the circumstances that might be considered in determining the duty undertaken by an insurance agent, as stated in *Sandbulte.* Therefore, we hold it is for the fact finder to determine, based on a consideration of all the circumstances, the agreement of the parties with respect to the service to be rendered by the insurance agent and whether that service was performed with the skill and knowledge normally possessed by insurance agents under like circumstances. Some of the circumstances that may be considered by the fact finder in determining the undertaking of the insurance agent include the nature and content of the discussions between the agent and the client; the prior dealings of the parties, if any; the knowledge and sophistication of the client; whether the agent holds himself out as an insurance specialist, consultant, or counselor; and whether the agent receives compensation for additional or specialized services.

Langwith, 793 N.W.2d at 222 (citations omitted). This portion of the opinion, however, was legislatively overturned effective July 5, 2011. *See* 2011 Iowa Acts S.F. 406 § 45. The new provision, amending Iowa Code section 522B.11, states:

> 7. a. Unless an insurance producer holds oneself out as an insurance specialist, consultant, or counselor and receives compensation for consultation and advice apart from commissions paid by an insurer, the duties and responsibilities of an insurance producer are limited to those duties and responsibilities set forth in *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457 (Iowa 1984).
>
> b. The general assembly declares that the holding of *Langwith v. Am. Nat'l Gen. Ins. Co.*, (No. 08–0778) (Iowa 2010) is abrogated to the extent that it overrules *Sandbulte* and imposes higher or greater duties and responsibilities on insurance producers than those set forth in *Sandbulte*.

Id. Based on this legislative change, the scope of Schiffer's duty to his clients was "to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured" unless he held himself out as an insurance specialist, consultant, or counselor and received separate compensation for these services. *Sandbulte*, 343 N.W.2d at 464.

The district court issued its summary judgment ruling approximately three weeks before *Langwith* was decided. Therefore, had the court analyzed the scope of Schiffer's duty of care, it would have operated under *Sandbulte*, the same law that currently applies.

Returning to the facts of this case, there is no dispute that Thomas Pitts was a client of Schiffer's. With respect to the scope of Schiffer's duty to Thomas, the summary judgment record does not reveal that Schiffer held himself out as an insurance specialist, consultant, or counselor and received compensation for consultation and advice apart from commissions paid by an insurer. Accordingly, Schiffer owed Thomas Pitts the general duty of care articulated in *Sandbulte.*

The question remains whether Schiffer owed a similar duty to Michele. The Iowa Supreme Court has not directly addressed the question of whether an

insurance agent owes a duty to an intended beneficiary of a life insurance policy. Michele acknowledges this. She notes, however, that the court has addressed an analogous question of whether an attorney owes a duty to a beneficiary of a will. *See Schreiner v. Scoville*, 410 N.W.2d 679, 682–83 (Iowa 1987). She asks us to extend *Schreiner* to her circumstances.

In *Schreiner*, the court held that an attorney "owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instructions." *Id.* at 682. The court carefully circumscribed its holding, stating:

> [A] cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized.

Id. at 683. The court continued,

> If the testator's intent, as expressed in the testamentary instruments, is fully implemented, no further challenge will be allowed. Thus, a beneficiary who is simply disappointed with what he or she received from the estate will have no cause of action against the testator's lawyer.

Id.

In subsequent opinions, the court reaffirmed the narrow scope of the holding in *Schreiner*. In *Carr v. Bankers Trust Co*., 546 N.W.2d 901, 903 (Iowa 1996), trustees of a trust individually sued the custodian and attorney of the trust for negligence in connection with the misappropriation of trust funds by an investment advisor. The court concluded the custodian and attorney owed no duty to the trustees in their individual capacities. *Carr*, 546 N.W.2d at 907. In reaching the conclusion, the court noted the limited nature of the holding in

Schreiner. *Id.* at 906. Similarly, in *Holsapple v. McGrath*, 521 N.W.2d 711, 713 (Iowa 1994), an opinion which recognized a third-party suit against a lawyer arising out of the preparation of non-testimonial instruments, the court nonetheless stated, "the dangers inherent in an overbroad recognition of liability are as real in this case as they are in a testamentary disposition case, and any recognition of a claim in these circumstances must be tempered accordingly."

We conclude *Schreiner* does not provide authority for declaring a new duty owed by an insurance agent to an intended beneficiary of a life insurance policy. For that reason, we further conclude the defendants were entitled to judgment as a matter of law on Michelle Pitts's negligence claims.

In reaching this conclusion, we acknowledge that other jurisdictions have explicitly recognized a duty owed by an insurance agent to a third-party beneficiary. *See Parlette v. Parlette*, 596 A.2d 665, 670–71 (Md. Ct. Spec. App. 1991) ("We hold that an intended beneficiary can recover from another's insurance agent if the intended beneficiary can prove that intent to benefit him, or her, was a direct purpose of the transaction between insured and agent and the other elements of negligence."); *see also Jones v. Hartford Life & Accident Ins. Co.*, 443 F. Supp. 2d 3, 6 (D.D.C. 2006) ("[T]his court concludes that an insurer owes an independent duty of care to an intended beneficiary of a life insurance policy, given that the primary purpose of such a policy is necessarily to benefit the intended beneficiary."). Given the state of our law, we see no reason to adopt the reasoning of these jurisdictions.

B. Negligent Misrepresentation Claim

In her petition, Michele Pitts alleged that "Schiffer represented to Thomas J. Pitts and Michele M. Pitts that the beneficiary designation on Thomas J. Pitts's life insurance policy had been changed such that Michele M. Pitts would be the sole beneficiary, provided she survived Thomas J. Pitts." She further alleged the representation was material and false and Schiffer was negligent in making it. The district court granted summary judgment for the defendants on this claim. Michele Pitts contends this was error.

The Iowa Supreme Court has recognized the tort of negligent misrepresentation and has defined the tort as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 124 (Iowa 2001) (quoting Restatement (Second) of Torts § 552(1), at 126–27 (1977)); *accord Barske v. Rockwell Int'l Corp.*, 514 N.W.2d 917, 924 (Iowa 1994). The tort does not apply to the failure to provide information, but only the disclosure of information. *Sain*, 626 N.W.2d at 128.

In at least one jurisdiction, this tort has been applied to a similar fact pattern as we have here. *See Merrill v. William E. Ward Ins.*, 622 N.E.2d 743, 748 (Ohio Ct. App. 1993). In *Merrill*, the court held that intended beneficiaries of a life insurance policy were part of "a limited class of individuals for whose benefit the representations were made and whose reliance on the information was

specifically foreseen by" the insurance agent.[1] However, the tort has not been applied in Iowa under these circumstances. In the absence of direction from the Iowa Supreme Court, we decline to adopt the rationale of the Ohio court and we conclude the defendants were entitled to judgment as a matter of law on the negligent misrepresentation claim. In light of our conclusion, we find it unnecessary to address the respondeat superior claim against Allied.

III. Disposition

We affirm the district court's grant of summary judgment on the negligence and negligent misrepresentation claims.

AFFIRMED.

[1] That court reasoned as follows:

> In the present case, plaintiffs presented evidence indicating that the insured, Samuel English, sought information from his insurance agent regarding the identity of his beneficiaries. Ward's duty of care, acting in his capacity as an insurance agent for his client, Samuel English, was to exercise reasonable care to provide accurate representations about existing information which was ascertainable by him. At the time of the request, defendants knew that plaintiffs were named beneficiaries on all four of the life insurance policies of their father. Thus, defendants were also aware that plaintiffs, as a clearly defined group, stood to be effected by any changes made to the policies in reliance on the requested information, *i.e.*, defendants knew that Samuel English sought the information about his beneficiaries with the purpose of influencing a decision regarding the beneficiaries. There is no dispute that the information provided in the August 22, 1988 letter was incorrect as to the beneficiaries of the Jackson National policy.

Merrill, 622 N.E.2d at 748–49.