IN THE COURT OF APPEALS OF IOWA

No. 3-865 / 12-1955
Filed November 6, 2013

MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee,

vs.

BEECHER, FIELD, WALKER, MORRIS, HOFFMAN & JOHNSON, P.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

A law firm appeals from a district court decision finding it had failed to prove there was an oral agreement with the insurer to waive the deductible on a professional liability claim settlement. **AFFIRMED.**

John R. Walker, Jr., and Kate B. Mitchell of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

Patrick M. Roby and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

The law firm of Beecher, Field, Walker, Morris, Hoffman, and Johnson, P.C. (Beecher) appeals from a district court decision finding it had a contractual obligation to pay the deductible on a professional liability insurance policy following settlement of a lawsuit. It argues the district court erred in finding that it had failed to meet its burden of proving there was an oral agreement with the insurer to waive the deductible. We affirm.

I. Background Facts and Proceedings

The appellee, Minnesota Lawyers Mutual Insurance Company (MLM), is a professional liability insurer. MLM insured the appellant, the Beecher law firm, from August 10, 2008 to August 10, 2009. During this period, a third party, Julius Ashley, sued Beecher over a past debt, alleging violations of the Iowa Fair Debt Collection Practices Act, fraud, abuse of process, breach of contract and intentional infliction of emotional distress. The original damages claim was over $100,000. As Beecher's insurer, MLM retained Charles Litow to defend Beecher against Ashley's claim. John Walker was Beecher's primary contact regarding the case and Angela Hoppe, a claims attorney, was MLM's.

The insurance policy was a claims-made policy with coverage up to $3,000,000 and a deductible of $10,000 on each claim. The policy included the following terms:

> We have the exclusive right to investigate, negotiate and defend CLAIMS seeking DAMAGES against the INSURED for which this policy provides coverage. . . . There is no coverage under this policy to pay any part of a settlement of a CLAIM made without our consent.

> We will not settle a CLAIM without the written consent of the INSURED.
>
> . . . .
>
> The limit of liability will apply in excess of the deductible.
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> The deductible will be subtracted from the total amount of covered DAMAGES resulting from each CLAIM reported to US during the POLICY PERIOD.
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> The deductible is payable within 30 days of OUR written demand.
>
> . . . .
>
> The terms of this policy shall not be waived or changed, except by written endorsement provided by US.

At trial, Walker testified that he had not read the policy but he was aware there was a $10,000 deductible.

After a long discovery and pretrial period, Ashley reduced his settlement offer to $15,000. Walker expressed to Litow and Hoppe that he did not want to settle because he feared if Ashley received any settlement funds it would "open the flood gates" to nuisance lawsuits. On February 5, 2009, Hoppe sent an email to Litow requesting an update on the case. Litow responded that although he thought Beecher's risk of liability was small, the fees in defending the claim would certainly exceed $15,000, therefore, he would explore the possibility of settlement for around $10,000. Hoppe responded positively to the suggestion of settlement, but increased the expense reserve to $35,000. After Litow's and Hoppe's exchange very little effort was made to prepare the case for trial. Rather, the efforts shifted to settlement.

On March 29, 2009, Ashley offered to settle the suit for $12,000 so long as the payment was made by April 2, 2009. On April 1, Litow, Walker, and Hoppe exchanged a series of emails and phone calls. Walker spoke with Hoppe over the phone. Walker testified he informed Hoppe that although he was willing to

agree to the settlement offer, Beecher would not contribute anything to the payment made to Ashley, and he expected MLM to pay the entire settlement, including the $10,000 deductible. He testified, "[I]t was my understanding in that conversation that that was agreeable." Hoppe requested Walker give the requisite written consent to settle the case to Litow. Walker testified after speaking with Hoppe he called Litow and informed him he would send a written consent and that MLM was going to pay the $12,000. Walker then sent an email to Litow with the single statement, "We do consent to a settlement of the above captioned captioned [sic] case by payment of 12000 by min. mut." Walker believed the addition of the words "payment of 12000 by min. mut." conveyed his intention that MLM would pay the entire settlement, including the deductible.

At trial Hoppe testified she did not remember Walker insisting Beecher would contribute nothing to the settlement and nothing to that effect was indicated in her notes. She also testified that MLM's policy is never to reduce a deductible, she had never done so, and she was not aware of any occasion when her superiors at MLM overruled her decision not to reduce or waive a deductible. She testified that if Beecher had tried to alter the terms of the policy regarding the deductible, the settlement would not have proceeded. Prior to MLM's demand that Beecher pay the deductible and Beecher's refusal to do so, Hoppe was unaware that Beecher did not intend to pay the deductible.

Litow testified he was aware Walker did not want to settle what he considered a nuisance suit, and if the case did settle, Walker did not want Beecher to pay any part of the settlement, including the deductible. Litow

testified he expected Hoppe and Walker to discuss the issue of the deductible and inform him of the outcome. Litow also testified Walker did not inform him of any agreement that MLM would pay the whole settlement. Litow read Walker's consent email as authorizing MLM to write the initial check to settle the case. He did not believe the words "payment of 12000 by min. mut." indicated anything about who would pay the deductible. After MLM and Beecher settled the case with Ashley, MLM sent Beecher an invoice requesting payment of the deductible. Beecher refused to pay and MLM filed its claim against Beecher on October 26, 2011. The district court held trial on August 29, 2012 and issued its ruling September 24, 2012.

The district court found that Beecher had a contractual obligation under the insurance policy to pay a $10,000 deductible on claims whether settled or litigated. The district court also found Beecher had the burden to prove that MLM agreed to waive the deductible and it failed to meet this burden. The district court further found that Walker's consent email did not constitute proof of a contract, but that such an agreement should have been more clearly defined and in writing.

Beecher appeals contending that the district court was wrong to frame the case as a dispute over whether an oral agreement varied the terms of the written insurance contract. Rather, Beecher contends, the dispute is whether MLM obtained a valid consent to the settlement of the Ashley case. Beecher further argues its consent to settle the Ashley case constituted a new agreement with MLM with an attached condition that Beecher would not pay the deductible on

the claim. On this basis Beecher further contends it did not manifest mutual assent with MLM to the terms of the settlement and the court should enforce the settlement agreement in conformity with the meaning attached to it by Beecher.

MLM argues Beecher failed to preserve error with respect to the claims it raises on appeal. MLM argues, even if error was preserved, the district court's conclusions were supported by substantial evidence. MLM also argues the written consent to settle was sufficient under the policy, and no new contract to approve the settlement was required in order to trigger Beecher's obligation to pay the deductible. MLM further argues the language of the written consent merely required MLM to pay the total settlement, but did not in any way waive the deductible.

II. Standard of Review

Our review of a case tried to the district court is for corrections of errors at law. *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 684 (Iowa 2012). The district court's findings of fact have the effect of a special verdict and are binding on us if supported by substantial evidence. *Id.* We view the evidence in the light most favorable to the trial court's judgment. *Miller v. Rohling*, 720 N.W.2d 562, 567 (Iowa 2006). Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). Evidence is not insubstantial merely because it would have supported contrary inferences. *Id.*

III. Analysis

A. Did the settlement agreement create a new contract between Beecher and MLM?

On appeal, Beecher correctly cites *Shirley v. Pothast*, 508 N.W.2d 712, 715 (Iowa 1993) for the proposition that "[s]ettlement agreements are essentially contracts." However, *Shirley* and the case to which it cites, *Waechter v. Aluminum Co. of America*, 454 N.W.2d 565 (Iowa 1990), involved third party plaintiffs suing insured persons and coming to a settlement agreement together. In both cases, the settlement contract was between the plaintiff and the insured in the suit, not between the insured and the insurer. Beecher apparently believes that its consent to the settlement was a separate agreement between itself and MLM. Beecher invokes the principles of contract formation to argue Beecher and MLM did not manifest mutual assent to the terms of the settlement of the Ashley case and, because MLM was aware that Beecher did not want to pay the deductible and failed to clarify the language of the written consent, the court should "enforce the settlement agreement in conformity with the meaning attached to it by Beecher."

The settlement agreement was not, however, a contract between Beecher and MLM but was between Beecher and Ashley. Beecher and MLM had an existing contract—the insurance policy. By the terms of that contract, Beecher was obligated to pay MLM a $10,000 deductible for each claim paid by MLM in excess of the deductible, whether settled or litigated. The contract did not provide any method of placing conditions on the consent. It only required written

consent from the insured. Any additional agreements or conditions between Beecher and MLM varying the terms of the insurance policy would not be a new agreement as Beecher argues, but would be an effort to modify the insurance policy, subject to the rules of contract modification. *S. Hanson Lumber Co. De Moss*, 111 N.W.2d 681, 684 (Iowa 1961) (observing that "agreements made after the written contract which modify it or add to it or are collateral to it are valid and enforceable"). The consent email provided the necessary written evidence of consent to the terms of the settlement for Litow to conclude the case and for MLM to make the settlement payment. Conveying this consent triggered the terms of the insurance contract providing for payment of the deductible. The consent did not constitute a new contract between Beecher and MLM.

B. Was the contract modified such that MLM waived the deductible on the claim?

A written contract may be modified by a subsequent oral agreement having the essential elements of a contract. *Roth v. Boies*, 115 N.W. 930, 932 (Iowa 1908). The burden is on the party asserting the modification "to establish such change by at least a fair preponderance of the evidence." *Id.*; *Moody v. Bogue*, 310 N.W.2d 655, 660 (Iowa Ct. App. 1981); *see Siebring v. Carlson*, 70 N.W.2d 149, 152 (Iowa 1955). The district court found Beecher had the burden to prove the contract was modified by agreement with MLM, and Beecher failed to meet that burden. The insurance policy states that there is a $10,000 deductible on each claim. Walker claimed Hoppe verbally agreed to waive the deductible. Walker also claimed his written consent stating "payment of 12000

by min. mut" was evidence of the oral agreement. The court noted there is no other written correspondence regarding the waiver of the deductible. Hoppe testified that she did not recall any discussion about waiving the deductible and she did not take any notes indicating that she had agreed to waive the deductible. To the contrary, she testified that MLM's policy was not to waive or reduce deductibles and she had never done so. Litow also testified he was not aware of any agreement waiving the deductible and did not understand the consent email to indicate anything regarding the payment of the deductible. Beecher had the burden of proving the modification by a preponderance of the evidence. *Roth*, 115 N.W. at 932. It did not meet that burden. Consequently, substantial evidence supports the district court's findings, and there are no errors of law in the court's reasoning. The contract was not modified.

C. Additional Issues

This court has said, "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Kramer v. Bd. of Adjustment*, 795 N.W.2d 86, 93 (Iowa Ct. App. 2010). Following bench trial, the district court is required to make all findings in writing. Iowa R. Civ. P. 1.904(1). If the court fails to address an issue raised, a party may file for enlargement or amendment of the findings. Iowa R. Civ. P. 1.904(2). A party on appeal may challenge the sufficiency of the evidence to sustain any finding made by the district court without having made such a motion. *Id.* However, "[w]hen a district court *does not rule* on an issue

properly raised, a party must file a motion requesting a ruling in order to preserve error for appeal." *Tetzlaff v. Camp*, 715 N.W.2d 256, 259 (Iowa 2006).

Beecher argues MLM owed a fiduciary duty to Beecher, Beecher's consent was subject to a condition, and the court improperly shifted the burden of proof. On the issue of whether the court improperly shifted the burden, we have already ruled that the district court applied the correct law, by placing the burden of proof on the party alleging the modification of a contract. On the issue of whether the consent was subject to a condition, we have already ruled that the imposition of a condition on the consent, if it existed, constituted a modification of the existing policy. We have also found substantial evidence supports the district court's conclusion Beecher failed to prove such a condition was attached to its consent statement.

Beecher argues it was not required to raise the fiduciary issue because the district court's failure to consider the "well-settled" fiduciary obligation of an insurer to an insured in the handling of a third party claim is the reason for the appeal. It is true that "a clear fiduciary duty arises which places an affirmative duty on the insurer to investigate the claim and take additional affirmative action as is required in the best interests of its insured." *Pirkl v. Nw. Mut. Ins. Ass'n*, 348 N.W.2d 633, 635 (Iowa 1984). However, Beecher did not raise the issue at trial and it failed to file a motion to enlarge or amend the findings to obtain a ruling. Therefore, the issue was not preserved for appeal and we need not address it.

IV. Conclusion

Because we find the district court's findings were supported by substantial evidence, and there are no errors of law, we affirm the judgment of the district court in favor of MLM.

AFFIRMED.