STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2051

Premium Plant Services, Inc.,
Appellant,

vs.

Farm Bureau Property & Casualty Insurance Company
d/b/a Farm Bureau Financial Services,
Respondent,

Todd Sampson,
Respondent.

Filed August 27, 2018
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge

St. Louis County District Court
File No. 69HI-CV-16-874

Joseph J. Roby, Jr., Kevin C. Pillsbury, Johnson, Killen & Seiler, P.A., Duluth, Minnesota (for appellant)

Scott B. Lundquist, Lundquist Law Office, Lakeville, Minnesota (for respondent Farm Bureau)

Mark S. Brown, Stephen M. Warner, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent Sampson)

Considered and decided by Bratvold, Presiding Judge; Cleary, Chief Judge; and Smith, Tracy M., Judge.

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

CLEARY, Chief Judge

Appellant Premium Plant Services, Inc. (PPS) challenges the district court's grant of summary judgment in favor of respondent Farm Bureau Property & Casualty Insurance Company (Farm Bureau) and respondent Todd Sampson (Sampson), dismissing PPS's claims for reformation of contract, breach of contract, and negligent procurement of insurance. PPS argues that the district court misapplied the law and improperly resolved disputed facts in favor of Farm Bureau and Sampson. We affirm the district court's grant of summary judgment on the reformation-of-contract and breach-of-contract claims, but reverse and remand for trial on the merits on the negligent-procurement-of-insurance claim.

FACTS

PPS is an industrial cleaning service based in St. Louis County, Minnesota. PPS obtained a $1 million Farm Bureau business liability policy through Sampson, a licensed insurance agent, in 2009. The 2009 policy included motor vehicle coverage for PPS's fleet of vehicles. In 2010 or early 2011, PPS's owner and president, Mark Parenteau, met with Sampson to discuss increased insurance coverage. At his deposition, Parenteau explained that PPS was growing and some customers wanted PPS to have increased insurance coverage due to the potential damage that cleaning activities might cause or the potential for injury related to some of the cleaning methods. He also stated that he was concerned about PPS's exposure with respect to automobile coverage and asked about what sort of coverage he would need for "a bad situation" that would involve the fatality of two or three

employees in an accident traveling to or from a job site. Parenteau acknowledged that the scenario he described could be a workers' compensation situation, but reiterated that his concern was about "three people dying and having the company exposed." He instructed Sampson to get a quote or complete "whatever the necessary process you go through . . . to put in place a ten million umbrella." Parenteau stated that Sampson represented to him that the umbrella policy would mean that PPS would be "bubble-wrapped" with respect to the concerns they discussed. Sampson stated that he recalled talking with Parenteau about potential increases in liability coverage and obtaining an umbrella policy around that time, but denied making any reference to PPS being "bubble-wrapped."

In 2011, after further discussions with Parenteau, Sampson emailed Farm Bureau, relaying that Parenteau wanted to explore expanding coverage "for as high as 6,000,000 in total liability on autos and the GL. He then asked what a 10 million umbrella would cost." Sampson and Farm Bureau exchanged emails about the $10 million umbrella policy and Farm Bureau made it clear that no policy would be issued unless or until PPS obtained automobile liability coverage from a separate provider. Farm Bureau agreed to provide a quote for the $10 million umbrella policy once Sampson provided a certificate of other automobile insurance and after it issued the nonrenewal of the automobile liability policy. Farm Bureau explicitly stated to Sampson that the umbrella policy would "be without the Auto as underlying."

In 2011, Farm Bureau informed PPS directly that it would no longer provide automobile coverage under the general liability policy due to the amount of claims made by PPS. Farm Bureau sent notice of the termination of coverage to PPS, stating that the

general liability policy could only be renewed if the automobile coverage was excluded per its underwriting guidelines. Sampson testified that he informed Susan Laitinen—PPS's office manager in charge of insurance matters—of the change, presented her with the option to obtain automobile coverage through Progressive Corporation (Progressive), and obtained a $500,000 automobile coverage policy from Progressive.

After obtaining automobile coverage from Progressive, Sampson renewed discussions with Farm Bureau about the $10 million umbrella policy. In January 2011, Farm Bureau again advised Sampson that, because PPS's automobile coverage was canceled and because there were multiple PPS employees who were too risky to insure, "if an Umbrella portion is forthcoming, our umbrella portion of this risk cannot include the auto section." In his deposition, Sampson stated that he informed Laitinen that Farm Bureau was "not going to extend coverage from the umbrella to the automobile liability policy" and Laitinen relayed that information to Parenteau. Laitinen and Parenteau dispute that Sampson ever relayed that information to anyone at PPS.

Farm Bureau issued a $10 million commercial umbrella liability policy (the umbrella policy) to PPS in April of 2011. The umbrella policy contained numerous exclusions, including three exclusions related to automobiles: an "Auto Liability Exclusion"; an "Owned Auto Exclusion"; and an "Auto Leasing Exclusion." The "Auto Liability Exclusion" (automobile exclusion) provided that the umbrella policy "does not apply to 'bodily injury' or 'property damage' arising out of the ownership, maintenance, operation, use, loading or unloading of any 'auto' while away from the premises owned by, rented or leased to, or controlled by [PPS]."

In December of 2011, Melissa Schinderle, another PPS office manager, signed a policy renewal form that included an acknowledgment of the automobile exclusion. The umbrella policy was renewed for the 2012-13 and 2013-14 policy periods, and along with the renewals came additional copies of the automobile exclusion and references to it throughout. During this time, Sampson's agency issued multiple certificates of liability insurance to PPS, many of which mistakenly indicated that PPS had $1 million in automobile coverage and indicated that there was a $10 million umbrella policy. The certificates did not indicate that the umbrella policy excluded automobile coverage. Sampson did not provide an explanation for why the certificates listed an incorrect amount of automobile insurance.

In her deposition, Laitinen denied any knowledge of the automobile exclusion and claimed she never read the full umbrella policy. She stated that she only read the first page of the policy. Schinderle stated that she never read the umbrella policy and had no knowledge of the automobile exclusion. Parenteau stated that he never reviewed the full umbrella policy and if any person at PPS would have reviewed the full policy, it would have been Laitinen.

In 2013, a PPS vehicle driven by a PPS employee collided with another vehicle. The driver of the other vehicle was killed in the accident. The relatives of the decedent filed a wrongful death action. PPS submitted a notice of claim to Farm Bureau in connection with the accident, and Farm Bureau denied coverage, based on the automobile exclusion. Parenteau, Laitinen, and Schinderle stated that the denial letter was the first time they learned of the automobile exclusion. PPS settled the lawsuit for $1.7 million,

Progressive provided $481,381.57 toward the settlement, and PPS agreed to pay the outstanding $1.2 million.

PPS commenced suit against Farm Bureau and Sampson seeking reimbursement for the funds paid in the settlement. Specifically, PPS: (1) sought "a reformation judgment reforming the Umbrella Policy so that it did and does provide $10 million of motor vehicle umbrella liability coverage during its term;" (2) sought a declaratory judgment against Farm Bureau for the amount of the settlement under the reformed agreement; (3) claimed that Sampson acted negligently with respect to the lack of automobile coverage in the umbrella policy and that Farm Bureau was vicariously liable for Sampson's negligence; and (4) claimed that Farm Bureau breached its contract by denying coverage. Farm Bureau and Sampson moved separately for summary judgment and PPS moved for partial summary judgment on the issues of: (1) whether Sampson was acting as an agent of Farm Bureau; (2) whether the settlement in the underlying litigation was reasonable; and (3) a finding that "any failure of [PPS] to read or understand the policies procured by Mr. Sampson does not bar recovery."

The district court granted Farm Bureau's and Sampson's summary-judgment motions and declined to address PPS's motions for partial summary judgment. This appeal follows.

D E C I S I O N

I. Standard of Review

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P 56.01.

"The fact that the nonmoving party is unlikely to prevail at trial does not warrant granting summary judgment." *Writers, Inc. v. W. Bend Mut. Ins. Co.*, 465 N.W.2d 419, 422 (Minn. App. 1991). "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." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

On appeal from a grant of summary judgment, we review de novo: "(1) whether there exists a genuine issue of material fact; and (2) whether the district court erred in its application of the law." *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). "[W]e view the evidence in the light most favorable to the party against whom summary judgment was granted." *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) (quotation marks omitted).

II. Reformation of Contract

PPS challenges the district court's grant of summary judgment on its reformation-of-contract claim, arguing that the district court resolved factual issues and misapplied the law by failing to consider extrinsic evidence and by finding that PPS was bound to know the contents of the umbrella policy. The district court found that the legal requirements for reformation of the contract were not met because: (1) the automobile exclusion was plain and unambiguous; (2) there was no mutual mistake as to the automobile exclusion; and (3) there was no evidence "of an actual agreement contrary to the policy issued."

General contract principles govern the construction of insurance policies. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). "When the language of an insurance contract is unambiguous, it must be given its plain and ordinary meaning." *Id.*

at 880. Ambiguities must be resolved in favor of the insured and "[i]nsurance contract exclusions are construed strictly against the insurer." *Id.* "Where there is no ambiguity in an insurance policy, there is no room for construction." *Cincinnati Ins. Co. v. Franck*, 644 N.W.2d 471, 473 (Minn. App. 2002).

"Where an agent has allegedly made a mistake in obtaining insurance, the insured's remedy is generally reformation of the contract." *Wood Goods Galore, Inc. v. Reinsurance Ass'n*, 478 N.W.2d 205, 208 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). "Reformation is an equitable remedy that is available when a party seeks to alter or amend language in a contract so that the contract reflects the parties' true intent when they entered into the contract." *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011). The party seeking reformation must prove that:

> (1) [T]here 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. Assoc., 615 N.W.2d 349, 354 (Minn. 2000) (quotation omitted). These facts must be supported by "clear and consistent, unequivocal and convincing" evidence. *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980). The party seeking reformation of the contract bears an "onerous" burden. *Tollefson v. Am. Family Ins. Co.*, 302 Minn. 1, 7, 226 N.W.2d 280, 284 (1974).

PPS does not allege any fraud or inequitable conduct on the part of Farm Bureau or Sampson and focuses solely on mutual mistake. "[I]n order to have a mutual mistake, it is

necessary that both parties agree as to the content of the document but that somehow through a scrivener's error the document does not reflect that agreement." *Nichols*, 294 N.W.2d at 734. "Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation." *Id.*

Summary judgment was proper because PPS failed to show that the inclusion of the automobile exclusion was the product of a mutual mistake. Reformation is proper where there is a drafting error that is the product of the "mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party." *Id.* Here, there is no evidence of a drafting error or any mutual mistake. Farm Bureau's direct communications with PPS establish that Farm Bureau intended to extend the umbrella policy only if that policy excluded automobile liability coverage. The automobile exclusion is plain and unambiguous: the policy "does not apply to 'bodily injury' or 'property damage' arising out of the ownership, maintenance, operation, use, loading or unloading of any 'auto' while away from the premises owned by, rented or leased to, or controlled by [PPS]." Nothing in the record indicates that the automobile exclusion was incorporated into the umbrella policy as a result of a drafting error or that Farm Bureau was mistaken as to the contents of the umbrella policy.

Any mistake related to the umbrella policy and its automobile exclusion was PPS's alone. PPS failed to read the umbrella policy. And "[u]nless [an insured] has been misled by some act of the insurer, a person who accepts and retains possession of an insurance policy is bound to know its contents." *Lane v. Parsons, Rich & Co.* (*In re Millers' & Mfrs.' Ins. Co.*)., 97 Minn. 98, 116, 106 N.W. 485, 493 (1906). "The law only relieves [the

insured] therefrom in cases of fraud, mistake, waiver, or estoppel." *Id.* at 116-17, 106 N.W. at 493. Here, PPS was bound to know the contents of the umbrella policy it accepted and renewed. There is no evidence nor any allegation of fraud on the part of Farm Bureau or Sampson. The evidence establishes that PPS alone was mistaken as to the content of the umbrella policy due to its failure to review the policy and in the absence of fraud or inequitable conduct, such unilateral mistake does not give rise to a claim for reformation of contract.[1]

In sum, PPS has failed to demonstrate that the automobile exclusion was the product of a mutual mistake. Accordingly, the district court correctly concluded that PPS was not entitled to reformation as a matter of law and appropriately granted summary judgment in favor of Farm Bureau and Sampson.

III. Negligent Procurement of Insurance

PPS argues that the district court erred in granting summary judgment on its negligent-procurement-of-insurance claim. We agree. To establish a claim for the negligent procurement of insurance, an insured must 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 v. Robert Swendra Agency, Inc.*, 800 N.W.2d 112, 116 (Minn. 2011). An insurance agent "has the duty to exercise the standard of skill and care

[1] Because PPS is not entitled to a reformed contract that includes automobile liability coverage, its claim for breach-of-contract fails as a matter of law. Farm Bureau's denial of coverage was proper under the terms of the umbrella policy and the automobile exclusion.

that a reasonably prudent person engaged in the insurance business will use under similar circumstances." *Johnson v. Farmers & Merchs. State Bank*, 320 N.W.2d 892, 898 (Minn. 1982). "An insurance agent's duty is ordinarily limited to the duties imposed in any agency relationship, to act in good faith and follow instructions." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989). "Absent an agreement to the contrary, an agent has no duty beyond what he or she has specifically undertaken to perform for the client." *Id.* When there is "conflicting evidence" concerning the insured's instructions to the insurance agent regarding the coverage requested, such that there is a basis for finding that the agent failed to follow the insured's instructions, a genuine dispute of material fact exists. *See Scottsdale Ins. Co. v. Transp. Leasing/Contract, Inc.*, 671 N.W.2d 186, 196 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003).

The district court concluded that PPS failed to establish that Sampson breached the duty owed to PPS because Sampson followed PPS's directions in obtaining an umbrella policy covering general liability, workers' compensation, and employer liability through Farm Bureau and automobile coverage through Progressive. PPS argues that this finding resolved a dispute of material fact. We agree. There is conflicting evidence about what PPS's instructions to Sampson were and whether Sampson followed those instructions.

Prior to the accident that gave rise to this litigation, PPS had three separate insurance policies through Sampson: a general liability policy through Farm Bureau, an automobile policy though Progressive, and an umbrella policy through Farm Bureau. Prior to renewing or obtaining any of these policies, Parenteau testified that he directed Sampson to undertake "whatever the necessary process you go through . . . to put in place a ten million umbrella"

that covered "a bad situation" that would involve "three people dying and having the company exposed" related to an accident that occurred while the employees were traveling to or from a job site. Parenteau testified that Sampson told him that if he had an umbrella policy, he would be "bubble-wrapped" with respect to his concerns about fatalities. Each PPS employee testified that they had no knowledge of the automobile exclusion and that Sampson never informed them of its existence.

It was improper for the district court to consider this testimony and determine that Parenteau instructed Sampson to obtain umbrella coverage in only three particular areas. Viewing the evidence in the light most favorable to PPS, Parenteau's instructions to Sampson cannot be limited to only those areas. If Sampson did receive directions to "put in place" an umbrella policy that extended to coverage of automobile-related liability, and if Sampson knew the policy he obtained a quote for did not provide that coverage, then there is a basis for finding that he failed to follow PPS's instructions. *See Scottsdale Ins. Co.*, 671 N.W.2d at 196. Because a reasonable jury could find that PPS instructed Sampson to "put in place" an umbrella policy that included automobile coverage, the district court erred in granting summary judgment on the negligent-procurement-of-insurance claim.

In addition to Parenteau's testimony, PPS submitted an expert affidavit of an insurance agent with forty years of experience. An expert affidavit is "important in establishing a standard of care." *Gabrielson*, 443 N.W.2d at 545. The expert states that the applicable standard of care required Sampson to: (1) inform PPS that the umbrella coverage contained the automobile exclusion; (2) procure umbrella coverage that would cover automobiles; (3) conduct business in a timely fashion and accurately reflect the

coverage amounts in place on each certificate of insurance. PPS has sustained its burden in opposing summary judgment by producing evidence concerning the standard of care of a reasonably prudent insurance agent in these circumstances. *See Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985) (affirming district court's dismissal where plaintiff failed to establish the duty of care through expert testimony).

Given the factual question that existed and the evidence regarding the requisite standard of care, the district court erred in granting summary judgment on PPS's negligent-procurement-of-insurance claim. Accordingly, we reverse the judgment in favor of Farm Bureau and Sampson and remand to the district court the issue of whether Sampson met the standard of care required of an insurance agent under the circumstances presented here.

Affirmed in part, reversed in part, and remanded.