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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0672

State Farm Fire and Casualty Company,
Respondent,

vs.

Courtney Thompson,
defendant,

Gabriela Von Mende, et al.,
defendants/counterclaim plaintiffs/third party plaintiffs,
Appellants,

vs.

Mark F. Busch, et al., third party defendants,
Respondents,

Gerald Michael Stanke a/k/a Jerry Stanke of Jerry Stanke Insurance,
third party defendant,
Respondent.

Filed April 8, 2019
Affirmed in part, reversed in part, and remanded
Ross, Judge

Anoka County District Court
File No. 02-CV-17-467

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Jesson, Judge.

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

ROSS, Judge

A collision totaled Gabriela Von Mende's car two months after Gabriela's husband Heinrich told their State Farm agent that they wanted to insure the car, but the Von Mendes had not, by the time of the collision, paid the premium. State Farm and the Von Mendes each sought a declaratory judgment deciding coverage. The Von Mendes also filed a third-party complaint against their agent, Jerry Stanke Insurance, contending that the agency negligently failed to add the car to Heinrich's State Farm policy as Heinrich allegedly requested. The district court granted summary judgment against the Von Mendes on all claims. Because State Farm's declarations page on the policy covering Heinrich's car put the Von Mendes on notice that State Farm had not added Gabriela's new car to Heinrich's policy, any preliminary binder between State Farm and Heinrich terminated. We therefore affirm in part. But because the district court never addressed the Von Mendes' negligent procurement claim and Jerry Stanke Insurance's argument on appeal fails to include legal support for summary judgment on that claim, we reverse in part and remand.

FACTS

Before September 2015, Heinrich and Gabriela owned two cars, each insured under a separate State Farm automobile policy: Gabriela drove a 2006 Hyundai Tucson insured

under her name, and Heinrich drove a 2006 Hyundai Sonata insured under his name. In September 2015, Heinrich purchased a Nissan Pathfinder as a gift for Gabriela, trading in the Tucson. The Von Mendes did not immediately communicate with their State Farm agent about insuring the Pathfinder.

Three months after purchasing the Pathfinder, Heinrich telephoned their State Farm insurance agent, Jerry Stanke Insurance, and spoke with representative Mark Busch. Heinrich told Busch that he had purchased the Pathfinder in September, that the Pathfinder was replacing Gabriela's Tucson, and that the Pathfinder needed to be insured. According to Heinrich, Heinrich told Busch that he wanted the Pathfinder to be added to his policy, not to Gabriela's. Busch does not recall Heinrich making that request. Either way, Busch and Heinrich exchanged emails discussing coverage terms for the Pathfinder and coverage terms for the Sonata. The emails do not expressly indicate which of the Von Mendes' policies would cover the Pathfinder. But they do indicate that the new coverage for the Pathfinder and Sonata would require a higher premium than the coverage for the Tucson and Sonata. In one of those emails Heinrich specified his coverage preferences for the Pathfinder and the Sonata, and Busch communicated the request to State Farm.

Within two days after the telephonic and email communication between Busch and Heinrich, State Farm mailed three documents to the Von Mendes' home. The first two documents were addressed to Gabriela—a declarations page and a balance-due notice for the Pathfinder coverage that Heinrich had requested. The amount due was the difference between the lower premium the Von Mendes had paid for the Tucson policy and the higher premium necessary to cover the Pathfinder. The declarations page identified the Pathfinder

as the only covered vehicle under that policy and stated that the policy replaced the previous policy covering the Tucson. The balance-due notice indicated that the Pathfinder was insured in Gabriela's name and that the policy required a premium payment of $81.94 to be made to State Farm by January 10, 2016. The Von Mendes allege that they never received the Pathfinder's declarations page, but they do not dispute that they received the Pathfinder policy's balance-due notice. The third document was addressed to Heinrich—a declarations page for the Sonata. The Von Mendes do not deny receiving that document.

The Von Mendes did not immediately pay the premium due on the Pathfinder policy. State Farm sent Gabriela a cancellation notice on January 19, 2016, warning that the policy would be cancelled if the balance due was not paid by February 3. The Von Mendes deny receiving that notice. Jerry Stanke Insurance office manager Gary Nack sent an email to one of Heinrich's email addresses on January 19 also informing him of the pending cancellation. Heinrich denies reading the email, saying that it was sent to the address he uses to receive promotional material rather than the email address he uses for business correspondence like his recent email discussion with Busch. On February 3, when State Farm still had received no premium payment for the Pathfinder policy, it cancelled the policy.

Gabriela drove the Pathfinder through a red light three weeks later, on February 24, 2016, colliding with another car. The collision severely damaged the Pathfinder.

Heinrich and Gabriela went to the Jerry Stanke Insurance office the day of the collision and spoke with Nack. Nack said that the Pathfinder's policy had been cancelled

due to nonpayment. The Von Mendes paid the premium, and State Farm reinstated the policy effective the following day.

This coverage lawsuit ensued. State Farm filed a civil complaint against the Von Mendes seeking a declaratory judgment that it has no duty to defend or indemnify the couple in any action arising from the collision. The Von Mendes filed a counterclaim seeking a declaratory judgment that State Farm must cover the collision. They based their counterclaim on theories of contract reformation, negligent failure to procure coverage, negligent misrepresentation, and fraud and misrepresentation. They filed a third-party complaint against Jerry Stanke Insurance and its principals, Busch, Nack, and Jerry Stanke, alleging failure to procure coverage, negligent misrepresentation, and fraud and misrepresentation.

The district court granted summary judgment to State Farm and the Jerry Stanke Insurance defendants, declaring that State Farm had no duty to defend or indemnify the Von Mendes because State Farm had cancelled the Pathfinder policy before the collision and that the Von Mendes offered no evidence of negligence or fraud.

The Von Mendes appeal.

ANALYSIS

The Von Mendes challenge the district court's summary judgment decision. We review summary judgment de novo, determining if there are genuine issues of material fact and if the district court correctly applied the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017); *see also* Minn. R. Civ. P. 56.01 (providing summary judgment standard). "We base our review on the undisputed facts and construe any

disputed evidence in favor of the nonmoving party." *Scheffler v. City of Anoka*, 890 N.W.2d 437, 443 (Minn. App. 2017), *review denied* (Minn. Apr. 26, 2017).

I

The Von Mendes argue that the district court erred by granting summary judgment to State Farm. They do not contend that the insurance policy actually issued by State Farm on the Pathfinder in Gabriela's name was in effect at the time of the collision. They argue instead that Heinrich's request that Busch add the Pathfinder to his policy triggered a preliminary insurance contract binding State Farm to provide coverage. An insurance binder is a preliminary contract between an individual and an insurer created by the individual's application for insurance. *Rommel v. New Brunswick Fire Ins. Co.*, 8 N.W.2d 28, 33–35 (Minn. 1943) (citing *Koivisto v. Bankers' & Merchs. Fire Ins. Co.*, 181 N.W. 580, 582 (Minn. 1921)). But a preliminary contract arising from an application for insurance is not permanent. It extends coverage only until either a written insurance policy memorializing the agreement is issued by the insurer or the insurer rejects the insurance application and expressly notifies the applicant of the rejection. *Id.*

The Von Mendes maintain that Heinrich directed Busch to secure State Farm insurance on the Pathfinder by adding the Pathfinder to his policy, not to Gabriela's. Based on this assertion, the Von Mendes argue further that the preliminary contract was between Heinrich and State Farm rather than between Gabriela and State Farm. And on these assertions they contend that State Farm's cancellation notices written to Gabriela, which were not also addressed to Heinrich, were ineffective. *See* Minn. Stat. § 65B.16 (2018) (requiring insurers to mail or deliver cancellation notices so as to notify "the named

insured" to be effective). The Von Mendes conclude that the Pathfinder's preliminary insurance contract therefore continued in force at the time of the collision, never having been properly cancelled under the statute.

State Farm counters by standing on the cancellation notice it sent to Gabriela. And the Jerry Stanke Insurance defendants counter by disputing whether Heinrich instructed Busch to add the Pathfinder to his policy and by disputing whether oral and email communications can ever establish a binder. We need not resolve the effect of the written cancellation notice mailed to Gabriela or the broader legal question of whether oral and email communications can establish a binder. This is because, even assuming that the informal communications did establish a binding preliminary insurance contract adding the Pathfinder to Heinrich's policy, the declarations page that State Farm addressed and mailed to Heinrich after his telephone and email discussion with Busch immediately terminated that alleged contract.

The declarations page has a practical effect that compels our conclusion. A declarations page defines the scope of an individual's insurance coverage. 16 *Williston on Contracts* § 49:25 (4th ed. 2014). And it is the insured party's responsibility to read the insurance policy. *See Hubred v. Control Data Corp.*, 442 N.W.2d 308, 311 (Minn. 1989). The declarations page that State Farm provided Heinrich just after his discussion with Busch about insuring the Pathfinder identifies the Sonata, not the Pathfinder, as the only vehicle covered on the policy held in Heinrich's name. By omitting the Pathfinder, the declarations page had the same practical effect as the rejection notice discussed in *Koivisto* and *Rommel*, ending any preliminary contract. If Heinrich in fact made the request to Busch

that he alleges, State Farm's declarations page promptly notified Heinrich that State Farm had rejected his request. This renders immaterial the Von Mendes' theories arising from their allegedly not having read the notices that State Farm mailed to Gabriela or the notice sent to Heinrich by email; those purportedly overlooked or unrelated communications are merely corroborative, but not essential, to our conclusion that State Farm's contractual duty to cover the Pathfinder terminated before Gabriela's collision.

II

We reach a different conclusion as to the Von Mendes' argument that the district court erred by granting summary judgment to State Farm and the Jerry Stanke Insurance defendants based on the agency's alleged negligent procurement of insurance by securing the Pathfinder's coverage under the wrong policy. To succeed on this claim, the Von Mendes must show that the Jerry Stanke Insurance defendants owed them a duty "to exercise reasonable skill, care, and diligence in procuring insurance," that they breached that duty, and that the breach caused damages. *See Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 116 (Minn. 2011). The Von Mendes argue that they presented evidence on each element, the defendants presented no argument addressing any of the elements during the summary judgment proceeding, and the district court inadequately addressed the claim by erroneously rejecting the affidavits the Von Mendes submitted to oppose summary judgment. The record supports the argument.

The record is at best thin on the matter of the Von Mendes' negligent procurement claim. The Jerry Stanke Insurance defendants offered no brief in support of their motion for summary judgment, choosing instead to rely on State Farm's memorandum. The

difficulty is that State Farm's memorandum did not address negligent procurement, arguing instead that State Farm was entitled to summary judgment because it validly cancelled Gabriela's policy on the Pathfinder after the Von Mendes failed to timely pay the premium. State Farm's memorandum did not discuss whether the Jerry Stanke Insurance defendants owed the Von Mendes a duty to exercise reasonable care and diligence in procuring insurance, or whether they breached that duty, or whether the alleged breach caused the Von Mendes any damages. And neither counsel for State Farm nor counsel for the Jerry Stanke Insurance defendants addressed these elements during the summary judgment hearing.

By contrast, in contesting summary judgment the Von Mendes submitted and relied on their own affidavits outlining the alleged communication between Heinrich and Busch. They also provided the affidavit of an expert witness who opined that, based on those discussions and the industry standards, the Jerry Stanke Insurance defendants had (and breached) a duty to secure insurance for the Pathfinder specifically under Heinrich's policy rather than under Gabriela's. The Von Mendes' memorandum presented their case for damages, focusing on their lack of insurance at the time of the collision.

The district court based summary judgment in part on a rationale that we do not endorse. It observed that the affidavits the Von Mendes submitted were written from a third-person perspective and that they included factual descriptions identical to those found in the Von Mendes' supporting memorandum. From the illeistic syntax and verbatim statements, the district court concluded, apparently as a matter of law, that the affidavits could not have been written on the affiants' personal knowledge. *See* Minn. R. Civ.

P. 56.03(d) (stating that "an affidavit used to support or oppose a motion [for summary judgment] must be made on personal knowledge"). The district court therefore rejected the affidavits and granted summary judgment on that ground, saying, "[T]he affidavits signed by Heinrich Von Mende, Gabriel[a] Von Mende and [their] alleged expert, Debra M. McLain, JD, CPCU, all fail to satisfy the requirements of [rule] 56.05, and cannot form the basis of any alleged dispute as to any material facts."

But third-person syntax is merely a style of communication, and it might or might not indicate third-person origin. Richard Nixon himself announced, for example, "You [w]on't have Nixon to kick around anymore," while Bob Dole recounted, "That was Bob Dole's early life, and I'm proud of it." And nothing in rule 56.05 suggests that an affiant's sworn factual statement is invalid if it is pasted into (or from) a corresponding brief or another affidavit. The practice might reflect a drafter's lack of carefulness without necessarily reflecting the affiant's lack of personal knowledge. The practice violates no authority cited by the district court or the respondents. During the summary judgment hearing, counsel for the Jerry Stanke Insurance defendants referenced the affidavit of the Von Mendes' expert witness by making comments critical of her qualifications as an expert in the insurance field. But he never formally sought her disqualification nor offered any expert testimony or other evidence contesting her opinion that the agency breached a duty of care in procuring insurance for the Pathfinder. And the district court never disqualified her expert opinion on the merits.

The district court does offer an alternative basis for summary judgment, adding that, "[e]ven if the affidavits were in compliance with the rules, nothing contained in [them]

creates a genuine issue as to any material fact." The district court does not mention "negligent procurement," and it seems to attempt to address the claim only by stating, "Even if Heinrich had requested that he be listed as the named insured, the Von Mendes received notice that Gabriela *was* the named insured." The district court does not explain how it is applying this fact to any of the elements of the negligent procurement claim. The Von Mendes do not dispute that Gabriela became the named insured; they argue that Busch failed in his duty to make Heinrich the named insured. The district court seems to further address the negligent procurement claim by resolving a fact dispute *against* the Von Mendes rather than in their favor:

> While Heinrich argues that he told Mr. Busch to put the [Pathfinder] on his policy for the Sonata, the record is void of evidence regarding a date through which the premium had been paid on the Sonata policy (and likewise, when such additional amounts owed would have been added to the "next six month insurance period"). It is clear that the discussion presumed a policy would issue replacing the Tucson policy—not that the [Pathfinder] would be added to the Sonata policy.

(Emphasis omitted.) By deeming it "clear" that Heinrich's discussion with Busch "presumed a policy would issue replacing the Tucson policy—not that the [Pathfinder] would be added to the Sonata policy," the district court relied on a negative implication from the documents to draw an inference contrary to Heinrich's express allegation in his affidavit. The district court construed the primary disputed fact against the Von Mendes and then granted summary judgment against them. This approach was improper, because courts considering summary judgment must resolve all factual inferences in favor of the nonmoving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981).

The Jerry Stanke Insurance defendants argue that it would have been unlawful and contrary to industry practice for State Farm to have added the Pathfinder to Heinrich's policy rather than Gabriela's because this would have essentially terminated Gabriela's policy merely on a phone call from Heinrich. We need not consider the accuracy of the premise because the argument does not address the Von Mendes' contention that Busch was negligent. Their theory is that Busch was negligent either by failing to procure the insurance in the manner Heinrich requested or by agreeing to procure the insurance in a manner that State Farm could not provide. And the Jerry Stanke Insurance defendants do not address, even on appeal, any of the elements of negligent procurement, rendering further proceedings in the district court necessary. They focus instead entirely on what they consider to be the sole question, "Was there a policy of auto insurance in force on [the day of the collision]?" They then declare that "[t]his is a very simple case" and fail even to refer to "negligent procurement" anywhere in their brief on appeal. The Jerry Stanke Insurance defendants insist that "there are simply no material facts [that] defeat the policy expiration on February 23, 2016 [the day before the collision]," but they fail to address the Von Mendes' theory that, but for the Jerry Stanke Insurance defendants' negligence, the Von Mendes would have taken the steps necessary to maintain the coverage.

The Jerry Stanke Insurance defendants assume that Heinrich and Gabriela, as a married couple, were each constructively notified through the various documents addressed to the other, and the district court seems implicitly to have decided the case based on that same assumption. But no one has analyzed the premise or provided authority for it. We will not analyze it *sua sponte*, leaving it and other undeveloped issues and arguments

to be presented and addressed first in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

We do not suggest that the record reveals a clear path to success at trial on the attenuated negligent procurement theory. Among other things, the Von Mendes will have to prove that the insurance-procurement discussion occurred as Heinrich alleges and that the industry standards imposed a professional duty for Jerry Stanke Insurance to have added the Pathfinder to Heinrich's policy or informed Heinrich otherwise. They will also have to prove that the breach of that duty directly caused damages to the Von Mendes in the face of Heinrich's and Gabriela's potential negligence in failing to investigate after Heinrich received the declarations page and after Gabriela was sent the cancellation notice. In our error-correcting role, we conclude only that the district court did not properly dispose of the negligent procurement claim by summary judgment. And we conclude that the respondents have not offered a sufficient argument why we, in our de novo review, should affirm that decision.

We therefore affirm the district court's summary judgment decision except to the extent it dismisses the Von Mendes' claim of negligent procurement of insurance.

Affirmed in part, reversed in part, and remanded.