STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0618

Thomas R. Blanck, et al.,
Appellants,

vs.

Rayvell Deprie Carter,
Defendant,
Ameriprise Auto & Home Insurance Company,
Respondent,
EAN Holdings, LLC, et al.,
Respondents.

Filed December 2, 2019
Affirmed
Florey, Judge

Ramsey County District Court
File No. 62-CV-18-3306

Marcy S. Wallace, St. Paul, Minnesota (for appellants)

Randall E. Gottschalk, Gottschalk Law, P.L.L.C., St. Louis Park, Minnesota (for respondent Ameriprise Auto & Home Ins.)

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Considered and decided by Florey, Presiding Judge; Cleary, Chief Judge; and Peterson, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

FLOREY, Judge

On appeal from an action arising from a motor-vehicle collision, appellants challenge the district court's grant of summary judgment for respondents, arguing that the district court erred in (1) relying on, as a business record under Minn. R. Evid. 803(6), an unsworn statement taken by an insurance adjuster; (2) determining that the at-fault driver was not a permissive user of the rental vehicle; (3) determining that respondent insurer is not estopped from asserting the defenses of defective process and defective service of process; (4) determining that appellants failed to properly serve the summons and complaint on respondent foreign insurance company; and (5) determining that the complaint could not be amended to correct a typographical error after the statute of limitations had run. We affirm.

FACTS

In May 2011, A.C. was in possession of a car rented from respondents-defendants Enterprise and EAN Holdings (together, Enterprise). In May 2011, A.C. learned that her daughter was injured at her daycare center. A.C. drove the rental car to her parents' home, parked it in the driveway and hung the keys from a hook inside. Then, she and her family went to the hospital to see her daughter. Later that day, defendant Rayvell Deprie Carter, a friend of A.C.'s brother who had been staying at A.C.'s parents' house, took the rental car. Carter used the rental car to transport narcotics. St. Paul Police attempted to stop and arrest him, and Carter led them on a high-speed chase on Rice Street in St. Paul. During the chase, Carter rear-ended appellant-plaintiff Thomas R. Blanck's car, which was pushed

off the road and flipped over. Carter was subsequently arrested. Within days of the crash, A.C. gave a recorded but unsworn statement to an Enterprise claims adjuster. A.C. stated that she had not given anyone permission to use the rental car and that she did not know Carter.

On May 11, 2017, Blanck and appellant-plaintiff Linda M. Bjorklund served Enterprise with a summons and complaint. Blanck and Bjorklund also attempted to serve their uninsured/underinsured insurance company. Blanck and Bjorklund, both Wisconsin residents, named "Ameriprise Auto & Home Insurance Company f/k/a IDS Property Casualty Insurance Company" ("Ameriprise") as the defendant and attempted substituted service via the Minnesota Secretary of State pursuant to a long-arm statute; specifically, Minn. Stat. § 5.25 (2016) as directed by Minn. Stat. § 303.13 (2016).

On May 25, 2017, "Ameriprise" filed its answer and identified IDS Property Casualty Insurance Company (IDS) as the entity underwriting Blanck and Bjorklund's UM/UIM policy.

One year later, Blanck and Bjorklund filed their complaint in district court. After attempting service of the complaint on Enterprise and "Ameriprise," Blanck and Bjorklund did not conduct discovery, answer interrogatories, notice any depositions, or generally engage in any of the normal litigation activities. Importantly, Blanck and Bjorklund did not move to amend their complaint to name IDS as a party, nor did they move to amend their complaint to address a typographical error in their claim for relief.[1]

[1] Blanck and Bjorklund claimed that "Ameriprise" provided "underinsured motorist coverage in the amount of One Hundred Thousand Dollars ($100,000) per person and

In September 2018, Enterprise moved for summary judgment, asserting that it was not liable because the rental car was driven without permission. Blanck and Bjorklund counterargued that A.C.'s unsworn statement that she did not give anyone permission to use the vehicle should not be considered and that because A.C. left the keys to the rental car in her relatives' home, she had given "implied consent" for someone else to use it.

"Amerprise" also moved for summary judgment. "Amerprise" argued that Blanck and Bjorklund did not properly serve process within the limitations period and did not properly identify Ameriprise; "thereby failing to provide [the district] court with jurisdiction." "Ameriprise" asserted that it is a foreign insurer, and that therefore Minn. Stat. § 60A.19, subd. 4 (2016), governs service of process and requires that substituted service be made on the Commissioner of Commerce. Ameriprise also asserted that IDS, the correct party, is also a foreign insurer licensed to do business in Minnesota, and must similarly be served in compliance with Minn. Stat. § 60A.19, subd. 4.

Blanck and Bjorklund counterargued that service upon "Ameriprise" under the long-arm statute was proper because neither Minn. Stat. § 60A.19 nor 60A.21 applied, that IDS was estopped from denying the adequacy of service because IDS intentionally used the "Ameriprise" name to confuse counsel about the proper entity to serve, and that IDS could properly be added by amendment pursuant to Minn. R. Civ. P. 15.03.

Three Hundred Thousand Dollars ($300,000) per accident and underinsured motorist coverage in the same amounts." The second "underinsured motorist coverage" should have read "uninsured."

The district court held a motion hearing and subsequently granted summary judgment to both Enterprise and "Ameriprise." The district court concluded that, with respect to Enterprise, the unsworn statement was admissible as a business record, that Carter did not have express or implied permission to use the rental car, and that even if he had, he exceeded the scope of that permission by fleeing from police.

Despite the representations made by Blanck and Bjorklund's counsel at the motion hearing that at no time was she attempting to serve IDS, but rather, to serve "Amerprise"; it appears the district court at least implicitly concluded that Blanck and Bjorklund intended to serve their UM/UIM carrier, regardless of the name of the entity, which is undisputedly IDS. The district court concluded that Blanck and Bjorklund "knew or should have known" that IDS "was the appropriate entity to include as a party to this suit since at least the time it received the answer in May 2017," and that they did not properly effect service on IDS pursuant to Minn. Stat. § 60A.19 and Minn. Stat. § 45.028, subd. 2. The district court also noted that, despite the answer from "Amerprise" identifying IDS as the correct entity, and despite the numerous documents that reflected that IDS was the correct entity, Blanck and Bjorklund did not move to amend their complaint or caption. The district court concluded that it lacked jurisdiction over "the proper defendant in this matter" and that even if Blanck and Bjorklund were allowed to relate back, there was no effective service date, and the statute of limitations had already run, rendering any amendment futile. This appeal follows.

D E C I S I O N

> On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law. We view the evidence in the light most favorable to the party against whom summary judgment was granted. We review de novo whether a genuine issue of material fact exists. We also review de novo whether the district court erred in its application of the law.

STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76 (Minn. 2002) (citations omitted). "[W]e may affirm a grant of summary judgment if it can be sustained on any grounds." *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

I. Summary Judgment for Enterprise

Blanck and Bjorklund's claim against Enterprise hinges on whether Carter had explicit or implied permission to use A.C.'s rental car. *Christensen v. Milbank Ins.*, 658 N.W.2d 580, 584 (Minn. 2004). The district court determined that Carter had neither explicit nor implied permission and that summary judgment was therefore proper.

A. Did the district court abuse its discretion by relying on an unsworn statement made to an insurance adjuster pursuant to Minn. R. Evid. 803(6)?

Blanck and Bjorklund assert that the district court erred by relying on A.C.'s unsworn statement to an Enterprise claims adjuster because the statement was taken in anticipation of litigation and was therefore inadmissible hearsay under Minn. R. Evid. 803(6). "Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion." *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). "A defendant claiming error in the district court's

reception of evidence has the burden of showing both the error and the prejudice resulting from the error." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009) (quotation omitted).

Minn. R. Evid. 803(6) states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

Here, the district court concluded that A.C.'s statement was a business record because "it was made at or near the time by a person with knowledge and done so in the course of a regularly conducted business activity." The district court also noted that while A.C.'s statement "was not acknowledged to have been made under the penalty of perjury," A.C. stated that she understood the questions and that her answers were true and correct to the best of her knowledge. The district court also noted that Blanck and Bjorklund "presented no evidence that is contrary to the assertions made in [A.C.'s] recorded statement" and that A.C.'s statement "is the only evidence regarding whether she granted [Carter] permission to use the vehicle." Additionally, the district court noted that Blanck and Bjorklund "failed to produce *any* admissible evidence as to whether Carter's use of the vehicle was permissive and rest on the allegations of their Complaint, many of which are

not supported by the record," and that Blanck and Bjorklund "merely provide speculation that [A.C.] *might* have given someone permission despite her recorded statement to the contrary." Finally, the district court noted that mere speculation is "insufficient to create a factual dispute to survive summary judgment." *Fuchness v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

The record, including the timing of A.C.'s statement to Enterprise (which occurred within days of the accident), as well as the fact that it was Enterprise and not an insurance company or attorney who made the statement, supports the conclusion that this was a business record, not prepared in anticipation of litigation. It is reasonable that, after an accident occurred, an Enterprise claims adjuster would want to take a statement from the person who had rented the vehicle. And it is reasonable that a car-rental company would take such statements as part of their regular course of business. Further, A.C.'s statement is the only and best evidence on the issue of permission. Based on the record, we conclude that the district court did not abuse its discretion by considering the statement.

B. Did the district court err in its conclusion that the at-fault driver was not a permissive user of the rental car?

There is no support in the record for Blanck and Bjorklund's position that Carter was granted explicit permission to use the rental car. The only remaining issue, therefore, is whether A.C. granted implicit permission, and if so, whether Carter's conduct exceeded the scope of that permission.

The district court concluded that no "reasonable finder of fact could conclude that leaving keys on the hook in a house grants implied permission to any person within that

home to drive the car for any conceivable purpose," but noted that such a determination may be "an impermissible balancing of evidence." The district court noted that "while the grant of implied permission may be a disputed fact, it is not material" because even if Carter had been granted implied permission, his "subsequent conduct exceeded that which the implied permission allowed."

Blanck and Bjorklund contend that A.C.'s act of leaving the keys to the rental car on a hook inside her relatives' home was a grant of implied permission, which makes Enterprise vicariously liable. They offer no record evidence or caselaw to support this assertion. The record reflects that Carter is a friend of A.C.'s brother and was unknown to A.C.. Carter may have been staying at the relative's home, but for no more than a few days. Additionally, the record reflects that A.C. left the keys to the rental car inside the home after arriving to pick up family members and visit her hospitalized daughter. A.C. did not reside in the home, nor did she routinely leave her car in the driveway or leave her keys inside. There is no evidence to suggest that A.C.'s brother or anyone else was in the habit of borrowing her car. Blanck's and Bjorklund's mere assertion that A.C. leaving the keys in the house amounts to implied permission is not sufficient to overcome summary judgment, because it does not rise to the level of a genuine dispute of material fact. Because we conclude that Carter was not a permissive user of the rental car, we affirm the district court's grant of summary judgment for Enterprise.

II. Summary Judgment for "Ameriprise"

Blanck and Bjorklund assert that they properly effected service upon "Ameriprise" and that they are therefore entitled to amend their complaint and caption to proceed with their UM/UIM claim against IDS—the correct defendant in this matter.

A. Did the district court err in its conclusion that Blanck and Bjorklund failed to properly serve the summons and complaint on "Ameriprise" and IDS?

Service in a manner not authorized by a rule or statute is ineffective. *Tullis v. Federated Mut. Ins*, 570 N.W.2d 309, 311 (Minn. 1997). Whether service of process is effective is a question of law. *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 382 (Minn. 2008).

In Minnesota, service of process upon foreign insurance companies is governed by Minn. Stat. § 60A.19, subds. 3, 4 (2016), and Minn. Stat. § 60A.21 (2016). Minn. Stat. § 60A.19 applies to insurance companies authorized to do business in Minnesota, while Minn. Stat. § 60A.21 applies to those that are not authorized to do business in Minnesota but do so anyway. Both Minn. Stat. § 60A.19 and § 60A.21 provide that insurance companies should be served "in compliance with section 45.028, subd. 2." Minn. Stat. § 45.028, subd. 2 (2016), states that service of process should be made on the commissioner of commerce, and that service is

> not effective unless: (1) the plaintiff, who may be the commissioner in an action or proceeding instituted by the commissioner, sends notice of the service and a copy of the process by certified mail to the defendant or respondent at the last known address; and (2) the plaintiff's affidavit of compliance is filed in the action or proceeding on or before the

> return day of the process, if any, or within further time as the court allows.

Here, it is undisputed that Blanck and Bjorklund did not comply with any of these requirements when attempting to serve "Amerprise." Rather, Blanck and Bjorklund attempted substituted service through the secretary of state pursuant to Minn. Stat. § 5.25 (2016), as directed by Minn. Stat. § 303.13 (2016). Blanck and Bjorklund contend that at the time of service, "Ameriprise" was not a foreign insurance company authorized to do business because it was not registered with the Department of Commerce. Blanck and Bjorklund also contend that there is "no evidence" that "Ameriprise" was a foreign insurance company unauthorized to do business in Minnesota, but was doing so anyway. Thus, they argue, service under the long-arm statute via the secretary of state was proper.

Blanck and Bjorklund assert that *Hunt v. Nevada State Bank* stands for the proposition that the long-arm statute can be used to sue foreign insurance companies when Minn. Stat. §§ 60A.19 and .21 do not apply. 172 N.W.2d 292, 307-08 (Minn. 1969) ("[I]t can be inferred that if § 60A.21 doesn't apply (and it would not when the insurance company has contacts not related to insurance), then § 303.13 does."). The district court correctly noted that *Hunt* contemplates service pursuant to the long-arm statute when an "insurance company has contacts not related to insurance," such as the tort claims asserted in that case. *Id.* at 308. The district court concluded that Blanck and Bjorklund "erroneously concluded that § 60A.21 does not apply" because they are asserting insurance-related claims "against [their] insurance company." We agree. Counsel for Blanck and Bjorklund asserts that service was attempted on "Ameriprise" because she

believed, based on the letters captioned with both "Ameriprise" and IDS, that the companies had merged. Based on this speculation, counsel created a fictitious legal entity, "Ameriprise," which she attempted to serve via the long-arm statute. But the evidence in the record and the information available to the parties do not provide a reasonable basis for this assumption or course of action. Blanck and Bjorklund were in possession of the policy declaration page which clearly listed IDS as the policy underwriter for their UM/UIM insurance. And in its answer, "Ameriprise" was clear that IDS was the proper defendant in this matter. Thus, despite Blanck's and Bjorklund's assertions, there is no support in the record for their argument that they were attempting to serve "Ameriprise" or that they did so properly. The record shows that Blanck and Bjorklund were attempting to serve their UM/UIM insurer, which is IDS. It is undisputed that IDS was not properly served pursuant to § 60A.19, subd. 2. The district court noted that Blanck and Bjorklund "knew or should have known that IDS Property Casualty Insurance was the appropriate entity to include as party to this suit since at least the time it received the Answer in May of 2017." We agree. Accordingly, we affirm the district court's conclusion that service was ineffective and that summary judgment was appropriate. Because we conclude that service was improper, we need not address Blanck's and Bjorklund's contention that the district court erred in concluding that amending their complaint is "futile" because there is not an effective date of service to relate-back to.

B. Did the district court err in its conclusion that IDS is not estopped from asserting defenses of defective process and service of process?

Blank and Bjorklund contend that IDS is estopped from asserting the defenses of defective service because its conduct made it confusing for them to determine which entity to sue. The district court concluded that IDS was not estopped from claiming a defense of ineffective service because Blanck and Bjoklund did not prove that IDS "made representations or inducements, upon which [Blanck and Bjorklund] reasonably relied" or that Blanck and Bjorklund "will be harmed if the claim of estoppel is not allowed." *Northern Petrochemical Co. v. US Fire Ins.*, 277 N.W.2d 408, 410 (Minn. 1979). "Estoppel is an equitable doctrine addressed to the discretion of the court" and is "ordinarily a fact question." *Id.*

The district court noted specifically that the correspondence between Blanck and Bjorklund and their insurance company came on letterhead stating "Ameriprise Auto & Home Insurance" that also had an address block that read "IDS Property Casualty Insurance Company." Each letter from a claims representative indicated "IDS Property Casualty Insurance Company" in the signature block. The district court concluded that the perceived inconsistencies "could have easily been cleared up through an email or phone call" and that there "is no evidence that [Blanck and Bjorklund] attempted to seek any clarification for their confusion regarding the status of the insurance entity that issued their policy."

The district court's conclusion is well-supported by the record. We affirm the district court's grant of summary judgment with respect to "Ameriprise" and its conclusion that IDS is not estopped from asserting the defense of defective service.

Affirmed.