COURT OF APPEALS
DECISION
DATED AND FILED

September 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2203 **Cir. Ct. No. 2015CV16**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

WILLIAM T. BAKER AND CHARMAINE F. BAKER,

PLAINTIFFS-APPELLANTS,

V.

RURAL MUTUAL INSURANCE COMPANY AND SAMUEL SCOTT,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. William and Charmaine Baker appeal a summary judgment dismissing their insurance policy reformation claim against Rural Mutual Insurance Company and their negligence claim against insurance agent Samuel Scott.[1] We conclude there are genuine issues of material fact regarding both of the Bakers' claims. We therefore reverse the circuit court's grant of summary judgment and remand for further proceedings.

BACKGROUND

¶2 In 1989, the Bakers purchased a farm on Highway 64 near Medford. Rural Mutual insured the Highway 64 property from October 2001 until August 2005. The Bakers purchased their Rural Mutual policies through Scott. Each policy provided "FO-5" coverage for a calf barn on the Highway 64 property. FO-5 coverage is a "named peril" property coverage that insures against losses to farm buildings and structures caused by specified perils. However, FO-5 coverage does not insure against losses caused by the collapse of a structure due to the weight of ice and snow (hereinafter, snow load coverage). Losses of that type are instead insured under Rural Mutual's FO-6 coverage form.

¶3 In 2002, the Bakers purchased a farm located on Highway 13 near Medford from William Baker's parents. Shortly after purchasing that property, William Baker contacted Scott about obtaining insurance coverage for it. Rural Mutual subsequently issued the Bakers a policy covering the Highway 13 farm, which included FO-5 coverage for a calf barn on that property. The Bakers renewed their policy each year, and it remained in effect as of February 2014. At

[1] We refer to Rural Mutual and Scott, collectively, as "the defendants."

no point did the Bakers' policy provide snow load coverage for the Highway 13 calf barn.

¶4 On February 21, 2014, snow accumulated on the roof of the Highway 13 calf barn during a winter storm, causing the barn's roof to collapse. Rural Mutual denied coverage for the loss, asserting the Bakers' policy did not cover collapse caused by the accumulation of ice and snow. The Bakers therefore filed the instant lawsuit against Rural Mutual and Scott, alleging they told Scott in 2002 that they needed snow load coverage for the Highway 13 calf barn, but, due to "mutual mistake," their policy did not include that coverage. As a result, the Bakers contended they were entitled to "an equitable reformation of the policy to cover the damage to the barn on February 21, 2014." In addition to their reformation claim, the Bakers asserted a bad faith claim against Rural Mutual and a negligence claim against Scott.[2]

¶5 The parties subsequently stipulated to bifurcate the proceedings and stay the determination of the Bakers' bad faith claim pending the determination of their reformation and negligence claims. The defendants then moved for summary judgment, arguing the Bakers' reformation and negligence claims failed as a matter of law because: (1) there was no evidence the Bakers made a specific request for snow load coverage on the Highway 13 calf barn; and (2) the undisputed evidence showed that the Bakers failed to read their policy, which unambiguously indicated they did not have snow load coverage.

[2] The Bakers' complaint also included a breach of contract claim against Rural Mutual, in which the Bakers alleged they were entitled to coverage because the collapse of the Highway 13 calf barn was caused in part by wind, which is an enumerated peril under the FO-5 coverage form. The Bakers later voluntarily withdrew their breach of contract claim.

¶6 The circuit court granted summary judgment in favor of the defendants. With respect to the Bakers' reformation claim, the court concluded the evidence showed that William Baker told Scott he "wanted the property 'covered for everything,'" and "wanted the same coverage that his parents had," but there was no evidence of a "specific conversation where [Baker] specifically requested snow load coverage on the calf barn." The court further stated:

> I don't see a disputed issue of fact concerning the issue of the insured having read the policy. The record appears pretty plain to me that the insured did not read the policy, or if it could be argued inferentially that he may have read it, then he failed to do so in a manner that informed him of his coverage or he failed to take steps over a period of many years to add the remaining coverage. A mistake based on the failure of an insured to read the policy is not a mutual mistake entitling the insured to reformation according to [***Lenz Sales & Service, Inc. v. Wilson Mutual Insurance Co.***, 175 Wis. 2d 249, 499 N.W.2d 229 (Ct. App. 1993)].

¶7 The circuit court also concluded the Bakers' negligence claim against Scott failed as a matter of law because there was "no disputed issue of fact that [the Bakers] cannot cite a specific request for … snow load coverage on the calf barn." The court explained, "[Baker] just told the agent he wanted insurance for everything, and that is not sufficient to support a claim for agent negligence." Finally, the court held that, because the defendants were entitled to summary judgment on the Bakers' reformation and negligence claims, "the bad faith claim must also necessarily be dismissed." The Bakers now appeal.

STANDARD OF REVIEW

¶8 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).[3] When reviewing a circuit court's summary judgment ruling, we construe the facts and all reasonable inferences in favor of the nonmoving party. ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶32, 237 Wis. 2d 19, 614 N.W.2d 443. "Should the material presented on the motion be subject to conflicting interpretations or if reasonable people might differ as to its significance, then summary judgment must be denied." ***Oddsen v. Henry***, 2016 WI App 30, ¶26, 368 Wis. 2d 318, 878 N.W.2d 720.

DISCUSSION

I. Insurance policy reformation

¶9 To obtain reformation of an insurance policy, the party seeking reformation must show that, "because of fraud or mutual mistake, the policy does not contain provisions desired and intended to be included." ***Sprangers v. Greatway Ins. Co.***, 175 Wis. 2d 60, 70, 498 N.W.2d 858 (Ct. App. 1993), *aff'd* 182 Wis. 2d 521, 514 N.W.2d 1 (1994). Here, the Bakers assert they are entitled to policy reformation because their policy's failure to provide snow load coverage was the result of mutual mistake. To establish mutual mistake, the Bakers must show that they "made certain statements to the agent concerning the

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

coverage desired, but the policy issued does not provide the desired coverage." *See* ***Lenz Sales & Serv.***, 175 Wis. 2d at 257-58.[4]

¶10 Citing ***Sprangers*** and ***Williams v. State Farm Fire & Casualty Co.***, 180 Wis. 2d 221, 509 N.W.2d 294 (Ct. App. 1993), the defendants contend that, in order to establish mutual mistake under Wisconsin law, an insured must prove the existence of a "**specific** conversation about the desired coverage between the insured and the agent." The defendants argue the undisputed evidence in this case shows that the Bakers never specifically requested snow load coverage for the Highway 13 calf barn. The circuit court agreed there was no "evidence of a specific request sufficient to support a claim for reformation."

¶11 As the defendants observe, Scott testified during his deposition that he never discussed snow load coverage with the Bakers before the collapse of the Highway 13 calf barn in February 2014. The defendants also note William Baker testified during his deposition that he told Scott he wanted the Highway 13 property "covered for everything," he "needed good coverage," and he "want[ed] to protect [his] investment." Baker also testified he told Scott he wanted the same coverage that his parents had when they owned the Highway 13 property. We agree with the defendants that these general statements about the kind of coverage

[4] Our supreme court has clarified that, "[w]here the party applying for insurance states the facts to the agent and relies on him to write the policy, which will protect his interests, and the agent so understands, but fails by mistake to so write the contract, the mistake is considered mutual." ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 187, 148 N.W.2d 641 (1967) (quoting another source). Stated differently, "[a]n action for reformation is permitted … when there is a mistake by an agent even though the mistake is not technically mutual." ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶54, 244 Wis. 2d 802, 628 N.W.2d 876. "Even though the agent made the mistake, if the agent is an authorized agent of the insurer, the mistake is attributable to the insurer for purposes of reforming the policy." ***Scheideler v. Smith & Assocs., Inc.***, 206 Wis. 2d 480, 486, 557 N.W.2d 445 (Ct. App. 1996).

Baker wanted do not constitute a specific request for snow load coverage and are therefore insufficient to support a claim for reformation of the Bakers' policy. *Cf.* ***Williams***, 180 Wis. 2d at 233-36 (holding insured's requests for "full coverage" and "no holes" coverage were insufficient to support insured's claim for reformation of an umbrella policy to provide coverage for a property purchased after the policy was issued).

¶12 However, the following exchange also occurred during Baker's deposition:

> [Defense counsel:] Did you talk with Sam Scott on just one or more occasions about the—transferring coverage to—after you purchased the [Highway 13] farm?
>
> [Baker:] I—more than once.
>
> [Defense counsel:] Uh-huh. Do you recall exactly how many times?
>
> [Baker:] No.
>
> [Defense counsel:] Do you have any documentation of any of these conversations?
>
> [Baker:] I don't.
>
> [Defense counsel:] *Do you recall what Sam Scott said to you—well, let me just back up. It's your position that you did ask Sam Scott to make sure that there was snow load coverage on the Highway 13 property after you purchased it; correct?*
>
> [Baker:] *Correct.*
>
> [Defense counsel:] And what did Sam Scott say to you after you told him that?
>
> [Baker:] I can't remember. I mean, he—you know, it should be taken care of, you know. You're insuring a building, he's your agent, you're talking to him, these are your needs. You would—you know.

(Emphasis added.) During the italicized portion of this exchange, Baker confirmed it was "[his] position" that he "did ask" Scott to make sure the Highway 13 property had snow load coverage. That testimony, if accepted by a factfinder, would permit a finding that Baker made a specific request for snow load coverage. Baker's testimony therefore raises a genuine issue of material fact with respect to the Bakers' claim for reformation of their insurance policy.[5]

¶13 The defendants argue the testimony quoted above is insufficient to create a genuine issue of material fact regarding the Bakers' reformation claim because Baker's "actual testimony shows that counsel asked him to confirm one of the allegations in his complaint. This **is not** proof of what Mr. Baker **in fact** said to Mr. Scott." We disagree with this characterization of Baker's testimony. Defense counsel did not expressly ask Baker whether the Bakers' complaint alleged that Baker asked Scott to make sure there was snow load coverage on the Highway 13 property. While that is one possible interpretation of counsel's question, the question could also reasonably be interpreted as asking whether Baker did, in fact, ask Scott for snow load coverage.

---

[5] The summary judgment record also contains Baker's response to the defendants' first set of interrogatories and requests for production of documents. Interrogatory No. 9 asked Baker to identify each communication he had with Scott regarding snow load coverage for the Highway 13 calf barn "from 2004 to the present." Baker responded:

> [Scott] and I discussed snow load coverage when I changed our coverage from that property [the Highway 64 farm] to our current residence [the Highway 13 farm] in 2004, as it had been removed from a barn I owned at my prior property. [Scott] told me that it could be added back on to the calf barn at the new property.

During his deposition, Baker clarified that this conversation occurred in 2002, rather than 2004. However, he did not deny that the conversation described in his response to Interrogatory No. 9 took place.

¶14 Moreover, immediately after Baker responded affirmatively when asked whether it was "[his] position" that he "did ask" Scott for snow load coverage on the Highway 13 property, defense counsel asked Baker what Scott said to him "after you told him that." This follow-up question suggests defense counsel understood that, by responding to the previous question in the affirmative, Baker was indicating he actually had asked Scott about snow load coverage. When reviewing a summary judgment motion, we are required to construe the facts in favor of the nonmoving party—here, the Bakers. *See* ***Strozinsky***, 237 Wis. 2d 19, ¶32. Under that standard, we conclude Baker's testimony would permit a finding that Baker specifically requested snow load coverage for the Highway 13 property.

¶15 The defendants emphasize that Baker has not provided "the times, dates, or methods by which he communicated with Mr. Scott regarding the scope of coverage on the Highway 13 calf barn," nor has Baker specified "how many times he spoke with Mr. Scott" about that coverage. The defendants assert these are "basic facts the Bakers must establish to continue past the summary judgment stage."

¶16 We disagree. The fact that Baker could not recall specific details regarding the time, place, and manner of his conversations with Scott during his deposition fourteen years later does not render Baker's testimony that he specifically asked Scott for snow load coverage incredible as a matter of law. At most, these potential deficiencies go to the weight and credibility of Baker's testimony, which issues we are not permitted to decide on summary judgment.

See ***Hardscrabble Ski Area, Inc. v. First Nat'l Bank of Rice Lake***, 42 Wis. 2d 334, 345, 166 N.W.2d 191 (1969).[6]

¶17 The defendants argue that, even if there is a genuine dispute of material fact as to whether the Bakers made a specific request for snow load coverage, summary judgment was nevertheless appropriate because the undisputed facts show that the Bakers failed to read their insurance policy, and that failure bars their reformation claim as a matter of law. The circuit court similarly concluded it was "pretty plain" that the Bakers did not read their policy, and "a mistake based on the failure of an insured to read the policy is not a mutual mistake entitling the insured to reformation."

¶18 Contrary to the circuit court's statement, Wisconsin law does not hold that an insured's failure to read the policy necessarily bars the insured from obtaining policy reformation to correct a mutual mistake. In fact, prior to 1976, the Wisconsin Supreme Court consistently held that an insured's failure to read his or her policy *did not* bar the insured's policy reformation claim. *See, e.g.*, ***Jewell v. United Fire & Cas. Co.***, 25 Wis. 2d 509, 516, 131 N.W.2d 276 (1964); ***Jeske v. General Accident Fire & Life Assurance Corp.***, 1 Wis. 2d 70, 92, 83 N.W.2d 167 (1957); ***Barly v. Public Fire Ins. Co.***, 203 Wis. 338, 343-44, 234 N.W. 361

[6] Because we conclude there is a genuine dispute of material fact regarding whether the Bakers made a specific request for snow load coverage, we need not address the Bakers' alternative argument that reformation is appropriate in the instant case even absent a specific request for coverage. *See* ***Vandenberg***, 244 Wis. 2d 802, ¶55 (reformation "may be justified when the insured can demonstrate that there was an understanding regarding the desired coverage based on prior dealings, even in the absence of an express request for coverage"); *see also* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

(1931); ***Journal Co. v. General Accident, Fire & Life Assurance Corp.***, 188 Wis. 140, 147-50, 205 N.W. 800 (1925).

¶19 Our supreme court subsequently qualified its prior holdings regarding the effect of an insured's failure to read the policy on the insured's reformation claim in ***International Chiropractors Insurance Co. v. Gonstead***, 71 Wis. 2d 524, 238 N.W.2d 725 (1976). There, the court concluded the insured had failed to demonstrate he was entitled to policy reformation because there was no prior oral agreement between the parties that, due to mistake or negligence, the written policy did not express. ***Id.*** at 528-29. The court also noted the policy's failure to provide coverage was due to a mistake the insured made on his insurance application, and the ability to remedy that mistake was completely within the insured's power. ***Id.*** at 529.

¶20 Relying on ***Jeske***, the insured argued his "failure to read the policy and discover the mistake [was] no bar to reformation." ***International Chiropractors***, 71 Wis. 2d at 530. The supreme court rejected that argument for two reasons. First, the court stated the rule announced in ***Jeske*** only applied "where the company or its agent made the original error, not the insured." ***International Chiropractors***, 71 Wis. 2d at 530. Second, the court stated ***Jeske***'s holding was "based upon the fact that most insurance policies are 'couched in technical terms and often complicated and involved.'" ***International Chiropractors***, 71 Wis. 2d at 530 (quoting another source). In contrast, the court stated the policy at issue in ***International Chiropractors*** was "a one-page document, in fairly simple language" and the mistake was "on the front of the page, and in a very prominent position." ***Id.*** The court concluded, "Given the source of the mistake, and its prominence in the policy over a four-year period, it

must be concluded that [the insured] had a duty to read the policy and rectify this glaring error." ***Id.***

¶21 In ***International Chiropractors***, the undisputed facts showed that the insured, rather than the insurer or its agent, was responsible for the mistake in the policy. Conversely, as discussed above, there is a disputed issue of material fact in this case as to which party is responsible for the lack of snow load coverage in the Bakers' policy. While Scott testified he never discussed snow load coverage with the Bakers before the loss, William Baker's deposition testimony can be reasonably construed as indicating that Baker specifically asked Scott in 2002 to obtain snow load coverage for the Highway 13 calf barn. Thus, unlike in ***International Chiropractors***, the undisputed evidence here does not demonstrate that the Bakers were responsible for the alleged mistake in their policy.

¶22 This case is also distinguishable from ***International Chiropractors*** because, unlike the policy at issue in that case, the Bakers' policy is not similar to a single-page document with the alleged mistake prominently displayed on the front of that single page. *See* ***id.*** Instead, the Bakers' policy is seventy-three pages long. The defendants assert that, in order to determine they did not have snow load coverage, the Bakers need only have read the FO-5 coverage form, which is slightly over two pages long. However, the defendants ignore the fact that the FO-5 coverage form begins on the forty-seventh page of the Bakers' policy. Moreover, even if the Bakers had located and read the FO-5 coverage form and discovered it did not provide snow load coverage, they may have assumed that coverage was set forth in another portion of the lengthy policy.

¶23 The defendants also rely on ***Lenz Sales & Service*** in support of their argument that the Bakers' reformation claim is barred by the Bakers' failure to

read their policy. In ***Lenz Sales & Service***, Jerome and Shirley Lenz operated an auto sales and service business and also ran a gift shop out of the same building. ***Lenz Sales & Serv.***, 175 Wis. 2d at 252. In August 1985, Jerome Lenz contacted an insurance agent and requested insurance to cover the full replacement cost of the building's contents. ***Id.*** The agent obtained a policy through Wilson Mutual Insurance Company providing coverage for the value of the building's contents, with a limit of $18,500. ***Id.*** at 252-53. At the time of issuance, the policy was adequate to cover the full replacement value of the building's contents; however, the Lenzes' business grew substantially in subsequent years, and they did not request an increase in their policy limit. ***Id.*** at 253. The building and its contents were destroyed in a fire in August 1991, causing approximately $200,000 in damages. ***Id.*** Wilson Mutual paid the policy limit of $18,500. ***Id.***

¶24 The Lenzes argued on appeal that their policy should be reformed to reflect their belief they had requested and purchased "full replacement coverage for the entire contents of their building without limits." ***Id.*** at 257. We concluded the circuit court properly granted Wilson Mutual summary judgment on the Lenzes' reformation claim because "the facts indicate[d] that in 1985 [the] agent gave the Lenzes full replacement cost coverage," which was precisely what Jerome Lenz had requested. ***Id.*** at 258. We continued:

> Furthermore, Jerome Lenz testified in his deposition that he never actually read the policy, and if he had, he would have understood that there was an $18,500 limit for contents replacement which he knew would have been totally inadequate. Thus, while the Lenzes may have believed that they had purchased unlimited coverage, this was a mistaken belief which could have been prevented had they read the policy in subsequent years. We therefore cannot conclude there was a mutual mistake requiring that the policy be reformed.

Id.

¶25 The defendants argue that, similar to the insured in ***Lenz Sales & Service***, William Baker "testified unequivocally that if he had read the policy, he would have understood that the calf barn did not have snow load coverage." However, our review of Baker's deposition transcript indicates his testimony on that issue was far from unequivocal. During his deposition, Baker conceded he received either declarations pages or full policies from Rural Mutual each year. Defense counsel asked Baker whether he could tell, by looking at the declarations pages, whether the Highway 13 calf barn had FO-5 or FO-6 coverage. Baker responded, "Now I can, yeah. Before, it wouldn't have mean—meant nothing. Nobody explained them to me." Defense counsel then asked, "[A]re you saying that that information wasn't on—that information wasn't on the declaration pages? Or you just didn't understand or look at them?" Baker replied, "I would say, if it was there, I wouldn't—what would it mean to me? You know. I had my trust in my agent." Defense counsel continued, "Did you ever notice that those declaration pages said there was only FO-5 coverage on the calf barn at Highway 13?" Baker responded, "If I seen it, I wouldn't know what it meant anyway. So—you know … versus the FO-6 at the time. Now, yes; then, no."

¶26 Later on during Baker's deposition, the following exchange occurred:

> [Defense counsel:] If there was a problem with the snow load coverage in this time between 2002 and 2014, you could have figured that out and asked Sam Scott about that; correct?
>
> [Baker:] What do you mean?
>
> [Defense counsel:] You had the policy and the declaration pages available to you for over ten years to look at; correct?
>
> [Baker:] I had them, yes.

> [Defense counsel:] And if you had read both of those documents, you would have figured out that there was not snow load coverage on the—on the Highway 13 calf barn; correct?
>
> ….
>
> [Baker:] *I would have had to read them very closely.*
>
> [Defense counsel:] And since the loss that happened in 2014, I'm presuming that you have read them closely; correct?
>
> [Baker:] Correct.
>
> [Defense counsel:] And you do now—you now understand the difference?
>
> [Baker:] Oh, yes.
>
> [Defense counsel:] So, again, if you had read them fair—it's fair to say that, if you had read both of those documents very closely before 2014, you would have asked Sam Scott about the lack of snow load coverage on the calf barn?
>
> [Baker:] *I still might have not quite understood it until someone pointed it out to me, the difference.* I had every coverage but that. So …

(Emphasis added.)

¶27 Defense counsel subsequently directed Baker to the FO-5 coverage form in the policy. Counsel stated, "So I don't think we need to go through, you know, and read all of this, but it's fair to say that you had the information at your disposal where you could figure out what FO-5 coverage meant, essentially; correct?" Baker responded, "Yeah, with the help of somebody." Defense counsel later asked, "So fair to say that if you read these, we'll say, two and a quarter pages, you would have an answer to what kind of coverage FO-5 provides; correct?" Baker responded, "Yes."

¶28 The defendants seize on this last response as an unequivocal admission that Baker would have understood he did not have snow load coverage for the Highway 13 calf barn had he read his policy. However, in so doing, the defendants ignore Baker's prior testimony that: (1) before the loss, he would not have understood the difference between FO-5 and FO-6 coverage; (2) no one explained that distinction to him; (3) he would have had to read the policy and declarations page "very closely" to determine he did not have snow load coverage; (4) even if he had read those documents "very closely," he still might not have understood the difference between FO-5 and FO-6 coverage unless someone pointed it out to him; and (5) he could have figured out what FO-5 coverage meant by reading the policy "with the help of somebody." Considered in its entirety, Baker's deposition testimony does not amount to an unequivocal admission that, had he read the policy, he would have understood it did not provide snow load coverage for the Highway 13 calf barn. This case is therefore distinguishable from ***Lenz Sales & Service***, where the insured expressly testified that, had he read his policy, he would have noticed the alleged mistake.[7] ***Id.*** at 258.

¶29 On the record before us, we cannot conclude, as a matter of law, that the Bakers' reformation claim is barred by their failure to read their policy. Because genuine issues of material fact exist regarding whether the Bakers are entitled to reformation of their policy in order to provide snow load coverage, the

[7] This case is also distinguishable from ***Lenz Sales & Service, Inc. v. Wilson Mutual Insurance Co.***, 175 Wis. 2d 249, 499 N.W.2d 229 (Ct. App. 1993), because the alleged mistake in that case—the existence of an $18,500 policy limit—would have been easy to discover and understand had the insureds read their policy. Whether the Bakers' policy provided snow load coverage is a significantly more complex issue of insurance policy interpretation.

circuit court erred by granting Rural Mutual summary judgment on the Bakers' reformation claim.

II. Negligence

¶30 The Bakers also assert the circuit court erred by granting Scott summary judgment on their negligence claim. "The negligent failure of an insurance agent to issue a policy, pursuant to an agreement relied upon by the applicant, renders the agent liable in tort for loss resulting therefrom." ***Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 804, 519 N.W.2d 674 (Ct. App. 1994) (quoting another source). Here, the Bakers allege they asked Scott to obtain snow load coverage for the Highway 13 calf barn, and he negligently failed to do so.

¶31 The circuit court concluded Scott was entitled to summary judgment because there was no evidence the Bakers made a specific request for snow load coverage on the Highway 13 calf barn. As discussed above, we conclude there is a genuine issue of material fact as to whether the Bakers specifically requested snow load coverage. *See supra* ¶¶12-16. In light of this factual dispute, the circuit court improperly granted summary judgment to Scott on the Bakers' negligence claim.

¶32 Citing WIS JI—CIVIL 1023.6 (2016) ("Negligence of Insurance Agent"), the defendants argue the Bakers' failure to read their policy is "relevant to" their negligence claim. That instruction provides, in relevant part:

> **[If contributory negligence is an issue, then give the following:**
>
> An insured, such as (plaintiff), has a duty to use ordinary care when purchasing an insurance policy. Ordinary care is

> that degree of care that a reasonably prudent person would use under the same or similar circumstances.
>
> When purchasing a policy, an insured must advise his or her agent of the type of insurance wanted, including the limits of the policy to be issued. An insured must read the policy once it is delivered to determine whether it provides the insurance coverage requested. However, an insured is not bound to comprehend every term and condition in the policy. An insured is only required to act as a reasonably prudent person would act under the same or similar circumstances.

Id.

¶33 Based on this instruction, we agree with the defendants that the issue of whether the Bakers read their policy will ultimately be "relevant to" their negligence claim against Scott. However, on the record before us, the instruction does not provide a basis for us to conclude, as a matter of law, that the Bakers cannot prevail on their negligence claim. Notably, while the instruction states an insured has a duty to read his or her policy, it also indicates an insured is not "bound to comprehend every term and condition in the policy." ***Id.*** As discussed above, the summary judgment record in this case does not definitively establish that, had the Bakers read their policy, they would have understood they did not have snow load coverage for the Highway 13 calf barn. *See supra* ¶¶25-28. In other words, there is a dispute of material fact as to whether the Bakers' failure to read their policy was a *cause* of the relevant harm—i.e., the policy's lack of snow load coverage. We therefore cannot conclude, as a matter of law, that the Bakers' alleged contributory negligence in failing to read their policy outweighs Scott's alleged negligence in failing to obtain snow load coverage. Accordingly, we reject the defendants' assertion that the Bakers' failure to read their policy provides an

alternative basis to affirm the circuit court's dismissal of the Bakers' negligence claim against Scott.[8]

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[8] The circuit court concluded that, because the defendants were entitled to summary judgment on the Bakers' reformation and negligence claims, "the bad faith claim must also necessarily be dismissed." Because we conclude the court erroneously granted the defendants summary judgment on the reformation and negligence claims, we also reverse the court's decision to dismiss the bad faith claim.