STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1813

Bradley J. Buscher,
individually and on behalf of the
Revocable Trust of Bradley J. Buscher, et al.,
Appellants,

vs.

Brown & Brown, Inc., et al.,
Respondents.

Filed August 25, 2009
Affirm in part, reverse in part, and remand
Kalitowski, Judge

Blue Earth County District Court
File No. 07-CV-06-2467

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

KALITOWSKI, Judge

Appellant Bradley J. Buscher challenges the district court's grant of summary judgment to respondents Brown & Brown Inc., Brown & Brown of Minnesota, Inc., and Thomas Rekstein, arguing that there are genuine issues of material fact that preclude summary judgment on appellant's claims of (1) breach of fiduciary duty; (2) negligence; (3) violation of the Minnesota Consumer Fraud Act; and (4) breach of contract. Appellant also argues that the district court erred in determining that appellant's claims are barred by collateral estoppel. We affirm in part, reverse in part, and remand.

D E C I S I O N

I.

Appellant owned a personal residence in Minnetonka valued at $4 million for insurance purposes for which he procured an insurance policy through respondent insurance agent Thomas Rekstein in 1996. Appellant requested that Rekstein procure the "best" coverage available. Rekstein procured a Metlife Pak II policy that contained a mold exclusion, which limited recovery of damages caused by mold to $5,000 in coverage. This policy was renewed annually for at least ten years.

Appellant also owned an office building in Mankato. Appellant again asked Rekstein to procure the "best" insurance coverage available for the office building. Rekstein procured a policy from Hawkeye Security Insurance that provided limited coverage for sewage back-ups.

In January 2001, Rekstein became employed by respondent Brown & Brown of Minnesota, Inc. Rekstein assured appellant that Rekstein would have access to national markets at the new company and that this would ensure that appellant would be able to obtain the most comprehensive insurance coverage available. Appellant then transferred his insurance accounts to Brown & Brown. During their business relationship, Rekstein was appellant's sole insurance agent, and he procured over 100 policies for appellant.

In 2002, appellant began to experience water-related problems in his Minnetonka residence that eventually caused mold damage. Appellant reported the damage to Metlife, his insurance provider. Metlife denied coverage for the mold damage, citing the $5,000 loss limit on mold damage caused by water intrusion. Appellant sued Metlife in federal district court to obtain coverage for the loss. The federal district court granted summary judgment for appellant, finding that the loss was not precluded by the mold exclusion and that the $5,000 limit in coverage was void because appellant did not receive adequate notice of the limit. *Buscher v. Econ. Premier Assurance Co.*, No. Civ. 05-544, 2006 WL 268781, at *7-8 (D. Minn. Feb. 1, 2006).

In June 2004, a rainstorm caused a sewer back-up in the Mankato office building, resulting in over $273,000 in damage. The Hawkeye policy provided only $10,000 in sewer back-up coverage.

In this action, appellant seeks damages from respondents, claiming that the acts and omissions of respondents caused appellant to be underinsured for the mold damage at his Minnetonka residence and the sewer back-up damage at the Mankato office building. Appellant contends that these acts and omissions required appellant to incur substantial

litigation costs and fees regarding the mold damage and to incur underinsured and uninsured losses at his properties.

The district court granted summary judgment to respondents dismissing appellant's four causes of action: (1) breach of fiduciary duty; (2) negligence; (3) violation of the Minnesota Consumer Fraud Act; and (4) breach of contract. We conclude that there are genuine issues of material fact precluding summary judgment on appellant's claims of breach of fiduciary duty and negligence.

Breach of fiduciary duty

The existence of a fiduciary duty is a question of law for the court. *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1 (Minn. 1989). The general rule is that "when confidence is reposed on one side and there is resulting superiority and influence on the other," a fiduciary relation exists. *Stark v. Equitable Life Assurance Soc'y of United States*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939). "An insurance agent's duty is ordinarily limited to the duties . . . to act in good faith and follow instructions." *Gabrielson*, 443 N.W.2d at 543. However, a fiduciary relationship may exist where there is a "[d]isparity of business experience and invited confidence." *Murphy v. County House, Inc.*, 307 Minn. 344, 352, 240 N.W.2d 507, 512 (1976). And an agent may create a fiduciary duty to "affirmatively advise an insured of the necessary coverage or to advise and inform potential clients of gaps [in the] coverage." *Louwagie v. State Farm Fire & Casualty Co.*, 397 N.W.2d 567, 570 n.1 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987). Additionally, special circumstances exist when "the insured asks the agent to examine the insured's exposure and advise the insured on the potential

exposure." *Scottsdale Ins. Co. v. Transport Leasing/Contract, Inc.*, 671 N.W.2d 186, 196 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003); *see also Beauty Craft Supply & Equip. Co. v. State Farm Fire & Casualty Ins. Co.*, 479 N.W.2d 99, 101-02 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992) (stating that special circumstances "may arise when the insured delegates decision-making authority to the agent and the agent acts as an insurance consultant").

Appellant argues that there are special circumstances that justify the imposition of a fiduciary duty on respondents. In opposition to summary judgment, appellant presented evidence of (1) his ten-year business relationship with Rekstein, a Certified Insurance Specialist, resulting in over 100 policies for appellant; and (2) his undisputed continuing requests for the "best" and "most comprehensive coverage available"; and (3) Rekstein's assurances that he had obtained the "most comprehensive coverage available" for appellant's policies. We conclude that there is a genuine issue of material fact regarding the existence of special circumstances based on appellant's requests for the "best" and "most comprehensive coverage available."

Respondents argue that no fiduciary relationship exists because a request for "full coverage" does not delegate authority to the agent to determine insurance coverage because "full coverage" constitutes coverages consistent with the currently held insurance policy. *See Beauty Craft*, 479 N.W.2d at 101 (stating that "[f]ull coverage here seems to mean only coverages consistent with the [insured's current insurance coverage] policy"). But here, appellant's request for the "best" and "most comprehensive" coverage indicates that appellant sought insurance coverage that would best suit his needs, regardless of

whether the best coverage was available in his currently held policy or another policy. And we have held that special circumstances exist when "the insured asks the agent to examine the insured's exposure and advise the insured on the potential exposure." *Scottsdale Ins. Co.*, 671 N.W.2d at 196. Appellant submitted evidence that there were at least three other insurance companies that may have been able to provide more comprehensive mold coverage for appellant's personal residence, and one insurance company that could have provided more comprehensive sewer back-up coverage for appellant's office building. Appellant also submitted evidence indicating that Rekstein failed to seriously pursue policies through those other insurance carriers. Appellant's act of requesting the best and most comprehensive coverage available indicates appellant's concern regarding exposure, and supports our conclusion that there is a fact issue as to whether special circumstances exist.

We reject respondents' argument that appellant's failure to disclose that the personal residence had mold damage in 2002 constituted "changed circumstances," thereby negating respondents' fiduciary duty to appellant regarding insurance for the residence. Appellant is not arguing that the policy should have been updated due to the mold problems, but rather that the policy should have covered mold damage in 1996, before the circumstances changed.

We conclude that the district court erred in granting summary judgment to respondents on appellant's breach-of-fiduciary-duty claim because the evidence presented to the district court created a genuine issue of material fact regarding whether

appellant's request for the "best" and "most comprehensive" coverage available created a fiduciary duty in respondents.

Negligence

In determining whether an insurance agent acted negligently towards his insured, the four traditional elements of negligence must be established: (1) the existence of a duty; (2) breach of that duty; (3) causation; and (4) damages. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). Insurance agents have a legal duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Johnson v. Farmers & Merchants State Bank of Balaton*, 320 N.W.2d 892, 898 (Minn. 1982).

In establishing a standard of care for affirmative duties of an insurance agent, the Minnesota Supreme Court has implicitly recognized that there may be an affirmative duty to inform an insured of gaps in insurance coverage. *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985). And in *Johnson*, the supreme court held that depending upon the existing circumstances, an insurance agent may have a common-law duty to inform the insured of necessary coverage. 405 N.W.2d at 889-90.

In support of his negligence claim, appellant submitted evidence that, despite several requests over the years for the best and most comprehensive coverage available, Rekstein did not provide him with adequate insurance coverage to protect against mold damage or sewer back-up and that Rekstein failed to explain the gaps in coverage to appellant. We conclude that this evidence is sufficient to create a genuine issue of material fact.

The *Atwater* court concluded that in determining the standard of care to be applied to the insurance agent, the question to be addressed was "whether an insurance agent, generally authorized to procure insurance for a business, has an ongoing affirmative duty to carefully check over the current coverage, to notify the business of gaps, and to search out insurance to fill those gaps." 366 N.W.2d at 279. The supreme court held that because the issue in the case went beyond what the agent should do when clearly requested and goes to the broader issue of affirmative duties where no clear request for specific coverage has been made, that the standard of care needed to be established by expert testimony. *Id.*

Here, appellant's request for the "best" and "most comprehensive coverage" was broad and did not specifically indicate a desire to obtain mold or sewer back-up coverage. Thus, as in *Atwater*, the request went beyond what Rekstein was explicitly asked to provide and instead goes to the broader issue of Rekstein's affirmative duties. But unlike *Atwater*, appellant here disclosed an expert witness who was expected to testify about respondents' duties and breach of those duties.

In addition, under *Johnson*, an insurance agent is allowed to accept the burden of informing his or her insureds of gaps in their coverage. 405 N.W.2d at 889-90. Here, the parties submitted conflicting evidence regarding what appellant expected Rekstein to do to fulfill appellant's request for the "best" and "most comprehensive" coverage available and what respondents believed Rekstein's duties were to appellant because of appellant's request. Because this evidence creates a genuine issue of material fact, we conclude that

the district court erred in granting summary judgment to respondents on the negligence claim.

Minnesota Consumer Fraud Act

Appellant contends that there is a genuine issue of material fact concerning his Minnesota Consumer Fraud Act (MCFA) claim because respondents made several misrepresentations or material omissions regarding the policies at issue. In addition, appellant argues that the MCFA applies because respondent Rekstein misrepresented to appellant the extent of insurance coverage available in order to receive contingent commissions.

The MCFA provides:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable . . . ."

Minn. Stat. § 325F.69, subd. 1 (2008). In order to sue under the MCFA for remedies other than an injunction, a private party must show that he or she was injured by an MCFA violation and that the action will benefit the public. Minn. Stat. § 8.31, subd. 3a; *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (holding that Minn. Stat. § 8.31 "applies only to those claimants who demonstrate that their cause of action benefits the public"). And a claimant must prove a "causal relationship between the alleged injury and the wrongful conduct," as well as prove that he or she relied on the false, misleading

or deceptive conduct, to satisfy the causation requirement. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001).

We conclude, with regard to the alleged misrepresentations and omissions, that the district court properly determined that the MCFA does not apply. These allegations are based on one-on-one transactions that do not incur a public benefit when litigated. And the district court correctly determined that "[e]ach of these alleged misrepresentations or omissions are specific to the questions, concerns, and desires of [appellant] and fail to establish public protection concerns."

We further conclude that the district court properly determined that appellant did not show how Rekstein's failure to disclose his receipt of contingent commissions creates a genuine issue of material fact. In support of this claim, appellant submitted evidence that: (1) respondents had contingent commission agreements with Metlife and Hawkeye; (2) respondents did not disclose these contingent commission agreements until 2003; (3) Hawkeye paid over $60,000 in contingent commissions to respondents from 2001-2005; and (4) appellant received insufficient insurance coverage from both Metlife and Hawkeye. But the district court correctly concluded that appellant "failed to provide the [c]ourt with sufficient evidence, even indirectly," that failure to disclose the commissions caused appellant's alleged damages.

Because appellant failed to submit evidence establishing a causal relationship between his damages from the lack of sufficient mold and sewer coverage and respondents' contingent commission arrangement, the district court did not err in granting summary judgment on this claim.

Breach of contract

Appellant argues that he set forth sufficient evidence to create a factual issue about whether there was an oral contract between the parties. We disagree.

A binding contract requires offer and acceptance. *Tatter v. Bd. of Educ. of Indep. Sch. Dist. No. 306*, 490 F. Supp. 494, 497 (D. Minn. 1980), *aff'd*, 653 F.2d 315 (8th Cir. 1981). An oral contract can be created by an insurance company agent "who acts with actual, apparent, or implied authority." *St. Paul Sch. Dist. No. 625 v. Columbia Transit Corp.*, 321 N.W.2d 41, 45 (Minn. 1982). The terms of a contract must be definite and certain. *Greenfield v. Peterson*, 141 Minn. 475, 480, 170 N.W. 696, 698 (1919).

The district court noted that appellant offered conflicting evidence regarding how the alleged oral contract was formed. In appellant's complaint, he alleged that respondents offered to assist appellant in procuring and reviewing insurance policies. But in his response to respondents' summary judgment motion and at the summary judgment hearing, appellant stated that he offered respondents the opportunity to procure the "best" and "most comprehensive" insurance coverage available, in exchange for the payment of premiums.

The district court properly concluded that appellant failed to establish definite and certain terms of the contract. Because it is unclear whether an oral contract was formed, and if it was, what the terms of the contract included, the district court did not err in granting summary judgment to respondents on this claim.

II.

In a summary judgment order from a previous action, the Hennepin County District Court granted summary judgment against appellant, finding that appellant had notice of the mold problems in his personal residence in 2002 and, therefore, the statute of limitations barred his claims. The facts and circumstances regarding the mold problems are discussed in detail in *Buscher v. Montag Dev. Inc.*, ___ N.W.2d ___ (Minn. App. Aug. 4, 2009). Here, the district court relied on the summary judgment order to determine that collateral estoppel barred appellant's four causes of action. We disagree with the district court.

Because we have determined that the district correctly granted summary judgment on the alleged violation of the MCFA and appellant's breach-of-contract claim, we need only address the district court's determination that appellant's claims for breach of fiduciary duty and negligence are barred by collateral estoppel.

Whether collateral estoppel precludes litigation of an issue is a mixed question of law and fact that we review de novo. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). If collateral estoppel is available, this court will not reverse a district court's decision to apply the doctrine absent an abuse of discretion. *Pope County Bd. of Comm'rs v. Pryzmus*, 682 N.W.2d 666, 669 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Collateral estoppel prevents a party from relitigating issues if: (1) the issue is identical to an issue raised in a prior litigation; (2) there was a final judgment on the merits; (3) the estopped party was a party in the prior litigation; and (4) there was a full

and fair opportunity to be heard on the issue. *In re Trust Created by Hill*, 499 N.W.2d 475, 484 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). In addition to these four factors, a court applying collateral estoppel must be convinced that its application is fair. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 651-52 (1979). Collateral estoppel applies to issues "actually litigated, determined by, and essential to a previous judgment." *In re Application of Hofstad*, 376 N.W.2d 698, 700 (Minn. App. 1985) (quotation omitted). Collateral estoppel is not rigidly applied and the focus is on whether its application would work an injustice on the estopped party. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 905 (Minn. 1996).

Collateral estoppel is applied on an issue-by-issue basis; it is not required that every single issue in a dispute align with every single issue in a previous proceeding. *Hauschildt*, 686 N.W.2d at 837. And the doctrine of collateral estoppel applies, even if it is based upon a different cause of action, when it affirmatively appears that the issue involved has already been litigated. *Art Goebel, Inc. v. Arkay Constr. Co.*, 437 N.W.2d 117, 120 (Minn. App. 1989).

Breach of fiduciary duty

Regarding the breach-of-fiduciary-duty claim, appellant argued to the district court that respondents breached their fiduciary duty to him by not acquiring the best insurance coverage available for his personal and business residences. In support of his breach-of-fiduciary-duty claim, appellant introduced evidence of the parties' relationship, his several requests to Rekstein for the "best" and "most comprehensive coverage" available, and Rekstein's assurances that he had obtained the most comprehensive coverage

available. Thus, the fact issue in the previous litigation—when appellant knew of mold damage to his personal residence—is not identical to the fact issue in the present cause of action. Nor is the fact of when appellant had notice of mold damage determinative of whether Rekstein procured the best and most comprehensive coverage available for appellant.

Negligence

Appellant asserted to the district court that respondents negligently failed to procure the best and most comprehensive insurance coverage available, failed to inform him of gaps in his insurance coverage, and appellant introduced evidence to support these contentions. These fact issues are distinct from the fact of when appellant had notice of mold damage in his personal residence. And notice of mold damage is irrelevant to appellant's negligence claim.

We conclude that the district court erred in applying collateral estoppel to bar appellant's claims of breach of fiduciary duty and negligence.

Affirmed in part, reversed in part, and remanded.