

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 24 1981

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CLERK SUPREME COURT

VAN BUREN MANUFACTURING CO. and
JEFFERSON INDUSTRIES CO.,

Plaintiffs-Appellants,

vs.

INSURANCE COMPANY OF NORTH
AMERICA and L. T. EVANS INSURANCE
AGENCY, INC.,

Defendants-Appellees.

Filed March 24, 1981

0-438
2-64385

Appeal from Van Buren District Court - Ira F. Morrison, Judge.

Plaintiffs appeal from judgment for defendant in an action involving an alleged contract to insure plaintiffs against fire loss. AFFIRMED.

Garold F. Heslinga of Heslinga & Heslinga, Oskaloosa, Iowa, for plaintiffs-appellants.

Thomas M. Walter of Barnes & Walter, Ottumwa, Iowa, for defendant-appellee L. T. Evans Insurance Agency, Inc.

John N. Moreland of Ottumwa, Iowa, for defendant-appellee Insurance Company of North America.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiffs appeal from judgment for defendant in an action involving an alleged contract to insure plaintiffs' property against fire loss or, in the alternative, the failure of defendant insurance agency to procure the coverage which plaintiffs had requested.

The plaintiffs' petition seeks recovery for the value of the contents of two buildings destroyed by fire. Defendants are a general insurance agency and a casualty insurance company. They will be referred to as defendant agency and defendant insurance company. The fire in question occurred on October 26, 1976 and virtually destroyed the two buildings and the contents thereof. The buildings were owned by plaintiffs and it was undisputed that at the time of the fire the defendant insurance company insured these structures against loss by fire. But nothing in the written contracts of insurance indicates that insurance coverage extended to the contents of these buildings. Defendant insurance company has at all times denied that contents coverage was provided at or prior to the date of the fire.

Plaintiffs' petition is in three counts. The first count alleges that there was a contract between plaintiffs and defendant insurance company for fire insurance on the contents of these buildings. The second count alleges that if there was no insurance coverage for the contents of these buildings, this was the result of the negligent failure of the defendant agency to procure the coverage which plaintiffs had requested. The third count urges that the failure of the fire insurance contract to protect against loss of the contents was the result of mutual mistake and seeks reformation of the contract so as to extend insurance coverage to the contents of the insured structures.

After a trial to the court, no relief was granted to plaintiffs under any of these theories. On appeal, plaintiffs' request that this court review the trial evidence *de novo* and reach a different result under the second and third counts. No claim for relief under the first count is asserted on appeal.¹

I. Scope of Review. The first matter which we must determine is whether, as plaintiffs suggest, all issues are in fact reviewable *de novo* in this court. The defendant agency asserts that the issue under count II of the petition was triable at law and therefore may not be reviewed *de novo* here. While the record is not entirely clear, we

¹ Actually, it appears from the record that the claims urged in count I may well have been abandoned by plaintiffs even prior to the trial. No mention of such claims is made in the opening statement of plaintiffs' trial counsel wherein he undertakes to advise the trial court of the issues to be determined.

believe that it supports plaintiffs' claim that both defendants agreed that all matters in the court below should be tried by equitable proceedings. It is clear that the trial court believed that this was the manner in which it was proceeding. It is the manner of trial in the court below which governs the scope of appellate review rather than the manner in which the case is docketed. Wyckoff v. A. & J. Home Benevolent Ass'n., 254 Iowa 653, 654, 119 N.W.2d 126, 127 (1963). For this reason we conclude that our review is *de novo* on all issues.

II. Negligence Claims. Under Iowa law, a general insurance agent owes to a client a duty to use such skill as is required to accomplish the object of employing the agent. Collegiate Mfg. Co. v. McDowell's Agency, 200 N.W.2d 854, 857 (Iowa 1972). Failure to exercise reasonable care, diligence and judgment to the extent of such skill may constitute actionable negligence. Id. In undertaking our *de novo* review of the evidence, we apply this standard for purposes of determining plaintiffs' negligence claim against the defendant agency.

No useful purpose would be served in reviewing all of the evidence presented in this action, but a fair summary of the respective claims, as testified to by the principals to the transaction, is as follows. In March of 1976, Robert Phipps, vice president of the defendant agency, met with the president of the plaintiffs and one of the directors of the plaintiffs to discuss the switching of plaintiffs' insurance business from a Des Moines insurance agency to the defendant agency. These discussions led to the defendant agency making application to the defendant insurance company for an extensive line of insurance for the plaintiffs.²

At the time of the March, 1976 meeting, existing coverages (through the Des Moines insurance agency) were discussed. At this time the plaintiffs had no facility in Keosauqua, but Phipps was then advised of the possibility that buildings in Keosauqua would subsequently be acquired by plaintiffs. Thereupon Phipps advised the president and director of plaintiffs to be sure and let him know when this occurred.

As a result of the circumstances thus described, the initial application to the defendant insurance company did not seek coverage for any type of insurance affecting facilities in Keosauqua. On May 7, 1976, the defendant agency was advised by an

² This included, in addition to the usual lines of casualty insurance, premises liability coverage and worker's compensation coverage. Products liability coverage was not included.

accountant and attorney representing plaintiffs that two buildings in Keosauqua had been acquired by plaintiffs. Another officer of the defendant agency testified that he received this message and specifically inquired if contents coverage on these buildings was necessary. He testified that he was told by both the accountant and the attorney that this was not required. Plaintiffs' accountant testified at the trial. He did not recall that inquiry had been made on May 7, 1976, as to whether contents coverage was desired. Neither did he testify that it had been requested. The attorney who called the defendant agency on May 7 on plaintiffs' behalf did not testify at the trial.

As a result of the May 7, 1976 communications from plaintiffs' accountant and attorney, Phipps and the president of the defendant agency went to Keosauqua later that day and inspected the two buildings to be insured. It is undisputed in the record that at this time both buildings were completely devoid of contents. After this inspection, the amount of insurance coverage for the structures was discussed with plaintiffs' accountant by Phipps. When the amount of this coverage was agreed upon, the pending application to the defendant insurance company was amended to include the Keosauqua buildings. No mention was made in the application as to coverage on the contents.

In early August, 1976, the completed policy of insurance on all of plaintiffs' properties was delivered to the defendant agency. It clearly shows that while the structures in Keosauqua were insured, the contents were not. Phipps testified that on August 18, 1976, he personally delivered the policy to the president of the plaintiffs, and had an item-by-item review with him of all of the coverages provided. The plaintiffs do not deny receiving the policy on or about this date, but the president of the company did deny in his testimony that this item-by-item discussion of coverages occurred. He did testify as follows, however, with respect to the initial application for coverage on the Keosauqua buildings:

Q. And you would not have wanted to have insurance on the contents at that point, is that correct, if there weren't any? You wouldn't have wanted to have contents coverage if there were no contents? A. I don't think you can.

Q. And you wouldn't want it?

MR. HESLINGA: I object to this as incompetent. The record will show this is a reporting system, and it wouldn't make any difference.

THE COURT: He may answer subject to the objection.

A. If we have contents, we want coverage on them. If we don't have contents, there is no coverage.

Q. And you don't want to pay a premium for contents coverage if you don't have any contents, isn't that right?

A. That's right.

Q. At that point, did you have some determination as to when you were going to start moving things into the building and start manufacturing? A. Not really, no. We had an idea, but an exact date, no.

Considering the foregoing testimony, the evidence summarized prior thereto, and all other facts and circumstances shown by the record, we agree with the trial court that the plaintiffs failed to establish by a preponderance of the evidence that the defendant agency was negligent in failing to procure insurance coverage on the contents of the Keosauqua buildings. At the time of the application for insurance at Keosauqua, it is undisputed that no insurance coverage on contents was needed. There is absolutely no evidence that Phipps or any other person at the defendant agency was thereafter advised prior to the occurrence of the fire on October 26, 1976 that contents had been placed in these buildings. Plaintiffs' only claim in this regard is that a worker's compensation claim was filed incident to work performed by an employee of plaintiffs at the Keosauqua facility in July of 1976. It is not entirely clear from the record that this occurred. But even if it did, the record reflects that the defendant agency was only a conduit to transmit such claims to the regional office of the defendant insurance company. As such, the agency personnel had no reason to search such claim for such facts, if any, as would indicate that contents had been placed in the Keosauqua buildings. Plaintiffs' negligence claim is only lodged against the defendant agency. We affirm the trial court's determination that no negligence of the defendant agency has been established.

III. Reformation. We next consider plaintiffs' claim for reformation of their contract with defendant insurance company so as to extend coverage to the contents of the buildings in Keosauqua which were destroyed by fire on October 26, 1976. Plaintiffs, in their brief on appeal, concede that they must establish this claim by clear, satisfactory and convincing evidence. See Iowa R. App. P. 14(f)(11),

As we discern plaintiffs' theory in this regard, it is as follows: plaintiffs' desired insurance on the contents of the Keosauqua buildings and believed that they had such coverage; the defendant insurance company would have gladly provided such coverage had they known of this desire; therefore, it is urged, that there has been a mutual mistake which will support a reformation of the contract to provide such coverage. We totally reject this argument.

The type of mistake required to support a claim of reformation must be one occurring at the inception of the agreement. We can only conclude from the record that the contract of insurance at issue here properly reflects what was wanted and needed at the time of the application upon which the policy was based. This finding leaves plaintiffs in the position of having to urge that as a result of subsequent occurrences, the initial agreement should be deemed to have been amended so as to expand the coverage provided (a claim lodged in count I of the petition that later abandoned) or that such action should have been taken but was not (the claim adjudicated in division II of this decision). No basis for reformation has been made to appear.

IV. Evidence of Transactions After the Fire. Finally, we wish to note our position on the rather extensive evidence offered by the plaintiffs as to occurrences after the date of the fire on which their claim is based. It appears from the record that immediately following the fire the defendant agency unequivocally took the position that there was no insurance coverage on the contents of the Keosauqua buildings and there never had been. Later, after some notice of claim had been received by the errors and omissions liability insurance carrier for the defendant agency, as a result of claimed negligence by that agency in handling this transaction, a certain scenario was played out. This scenario developed by the errors or omissions carrier, the defendant agency, or both, envisioned the filing of inventory reports which would have been required for the Keosauqua buildings had contents coverage actually existed. Had such coverage existed, the time for filing the inventory report for the month of October, 1976, had not yet passed. Such a report was accordingly filed within the time period provided for the filing of such reports. This inventory report showed the amount of the inventory lost in the October 26, 1976 fire.

Thereafter, the correspondence from the defendant agency to the defendant insurance company took a different tone. Coverage on the contents of these buildings was presumed to be present and rapid processing of the claim was demanded. In addition, correspondence from the defendant agency to the attorney representing plaintiffs in this action expressed the hope that based upon these reports, the defendant insurance company would mistakenly charge a premium for the contents coverage for the month of October and that such circumstance would be of assistance to plaintiffs' attorney in making claim against the defendant insurance company. Whatever else may be said of these transactions after the fact, we deem it clear that they are of

significance, if at all, only to the claim asserted in count I of plaintiffs' petition which has since been abandoned. This type of evidence relates only to the theory that there was coverage on the contents effected retroactively. It does not support either the claim for reformation or the claim for negligence.

We have considered all issues presented and agree with the result reached in the trial court's decision and judgment.

AFFIRMED.