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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1413**

AgCountry Farm Credit Services, ACA,
Respondent,

vs.

Richard Steven Elbert,
Appellant.

**Filed May 7, 2018
Affirmed
Reilly, Judge**

Renville County District Court
File No. 65-CV-16-111

Michael S. Dove, Rick J. Halbur, Gislason & Hunter LLP, New Ulm, Minnesota (for
respondent)

Markus C. Yira, Yira Law Office, LTD., Hutchinson, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Smith,
John, Judge.*

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

UNPUBLISHED OPINION

REILLY, Judge

Appellant-insured Richard Steven Elbert challenges the district court's grant of summary judgment in respondent-insurer AgCountry Farm Credit Services, ACA's (AgCountry) favor on appellant's negligence counterclaim arising out of a breach-of-contract action. Because there are no genuine issues of material fact regarding Elbert's negligence counterclaim and the district court did not err by declining to impose a heightened duty of care, we affirm.

FACTS

Appellant Richard Steven Elbert is a farmer in Olivia. Elbert purchased multi-peril crop insurance and hail insurance from AgCountry, successor-in-interest to United FCS, for his 2015 farming operation. When Elbert failed to make his crop insurance premium payment by the contractual deadline, AgCountry filed a civil action for payment of the crop insurance premium. Elbert filed an answer conceding that the insurance premium was due and owing, but counterclaiming that AgCountry's damages were the result of its own negligence. Specifically, Elbert asserted that AgCountry failed to include a 118.8-acre tract of Elbert's crop land in the insurance policy. Elbert was unable to harvest the crop grown on the 118.8-acre tract and claimed that, if the land had been properly covered under his insurance policy, he would have received an insurance reimbursement.

The district court granted summary judgment to AgCountry on its breach-of-contract claim and on Elbert's counterclaim. The district court found that Elbert submitted a crop-insurance application to his insurer in May 2015, detailing the acreage to be covered,

which did not include the 118.8-acre tract of land. In July 2015, the insurance company sent Elbert an insurance letter listing the identical acreage requested in the application. The insurance letter urged Elbert to carefully review the information and notify the insurer immediately of any errors. Elbert did not alert his insurer as to any unlisted acreage and, as a result, Elbert's 2015 crop-insurance policy did not include the 118.8-acre tract of land. The district court determined that there were no genuine issues of material fact to support Elbert's negligence counterclaim and dismissed it with prejudice. Elbert now appeals the district court's grant of summary judgment on his negligence counterclaim.

D E C I S I O N

I. The district court did not err in granting summary judgment on appellant's negligence counterclaim.

Summary judgment is properly rendered when “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 either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. We review a district court's summary judgment decision de novo to “determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment.” *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). The evidence is viewed in the light most favorable to the party against whom judgment was granted. *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 18 (Minn. 2009). Judgment will be affirmed “if no genuine issues of material fact exist and if the court below properly applied the law.” *Id.* Even if we “disagree with the district court's analysis of

some issues, summary judgment will be affirmed if it can be sustained on any grounds.” *Allianz Ins. Co. v. PM Servs. of Eden Prairie, Inc.*, 691 N.W.2d 79, 82-83 (Minn. App. 2005).

While Elbert did not name his individual insurance agent as a party, he argues that AgCountry is vicariously liable for the actions of his insurance agent under a principle-agent relationship. *See Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992) (explaining that doctrine of vicarious liability makes a principal liable for acts its agent commits in the course and scope of the agency that are not for a purpose personal to the agent). To establish a negligence claim against an insurer, a party must show (1) the existence of a duty; (2) a breach of the duty; (3) causation; and (4) damages. *See Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). An insurer has a duty to exercise the skill and care that a “reasonably prudent person engaged in the insurance business [would] use under similar circumstances.” *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989) (alteration in original) (quotation omitted). Absent an agreement to the contrary, the scope of this duty is limited to acting in good faith and following the insured’s instructions. *Id.* Thus, an insurer “is under no affirmative duty to take other actions on behalf of the client if the typical principal-agency relationship exists.” *Id.* The existence of the legal duty owed by an insurance company to its insured is a question of law for judicial determination. *Johnson*, 405 N.W.2d at 891 n.5. But “[t]he existence of that duty may turn upon the particular facts, which, if contradicted, may be submitted to the jury for resolution.” *Id.*

The undisputed facts show that in May 2015, Elbert submitted a crop-insurance application to AgCountry identifying the acreage he sought to have insured. Two months later, AgCountry sent Elbert a letter detailing his insurance coverage based on Elbert's crop-insurance application. The letter instructed Elbert to review the information and notify the company of any errors. Elbert did not alert AgCountry that the 118.8-acre tract of land was missing from the policy, and the final 2015 crop insurance policy did not include that parcel of land. The district court determined that there were no genuine issues of material fact pertaining to Elbert's negligence counterclaim because AgCountry satisfied its general duty of care to Elbert. We agree. Elbert did not produce competent evidence of negligence, and the undisputed facts reveal that AgCountry satisfied its duty of care by acting in good faith and by following Elbert's express instructions regarding his insurance coverage. *See Gabrielson*, 443 N.W.2d at 543.

Elbert argues that his affidavit stating that the acreage certification he submitted to the U.S. Department of Agriculture, Farm Service Agency (the FSA) included the 118.8-acre tract at issue, thus creating a genuine fact issue.¹ In July 2015, Elbert provided AgCountry with a certification of acreage contained in his FSA-578s, which included reference to the 118.8-acre tract. Elbert argues that copies of the FSA forms are "typically as a matter of course and custom and practice maintained in the insured's file." Elbert argues that a factual question exists regarding the extent to which AgCountry reviewed the information contained in his FSA forms and therefore summary judgment is inappropriate.

¹ According to appellant's brief, an FSA-578 contains a report of commodities farm and tract detail listings and acreage reports.

Elbert's bare allegations are insufficient to defeat summary judgment. The record does not contain the FSA-578 forms or any evidence supporting Elbert's "custom and practice" argument. The party opposing summary judgment "may not establish genuine issues of material fact by relying upon unverified and conclusory allegations." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). The bare conclusions in Elbert's affidavit cannot sustain his negligence counterclaim and do not create a fact issue for trial.²

Lastly, Elbert argues that the district court's summary-judgment order was improper because he asserted a colorable claim of negligent procurement of insurance. A negligent-procurement claim requires the claimant to prove: "(1) that the agent owed a duty to the insured to exercise reasonable skill, care, and diligence in procuring insurance; (2) a breach of that duty; and (3) a loss sustained by the insured that was caused by the agent's breach of duty." *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 116 (Minn. 2011). *Graff* is inapposite. In that case, an insurer advised the claimant to purchase a particular insurance policy. *Id.* at 114. The claimant purchased the policy recommended by the agent, but later discovered that the policy did not provide the correct coverage because the agent had not arranged for the necessary endorsement. *Id.* The supreme court held that "an insurance agent may be held independently liable for negligent procurement of insurance coverage." *Id.* at 117. This case is factually distinct. Elbert provided AgCountry

² Elbert also argues that AgCountry failed to process an extension of Elbert's insurance period and failed to inform Elbert that his insurance period was ending. Elbert has not cited to any persuasive authority suggesting that AgCountry had a duty to proactively offer an extension of the insurance period.

with a crop insurance application, which was used to place the insurance policy. AgCountry sent Elbert an insurance letter and asked him to carefully review the information to ensure its accuracy. Elbert has not articulated a claim for negligent procurement of insurance.

II. The district court did not err by declining to impose a heightened duty of care based on special circumstances.

Generally, insurance consumers are responsible for educating themselves in matters concerning their insurance coverage. *See Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn. App. 1986), *review denied* (Minn. Feb. 13, 1987). However, under special circumstances an insurer may have a “duty to take some sort of affirmative action, rather than just follow the instructions of the client.” *Gabrielson*, 443 N.W.2d at 543-44. The facts of each case dictate whether special circumstances create this extra duty. *Id.* at 543 n.1; *see also Johnson*, 405 N.W.2d at 889 (holding a duty to “offer, advise or furnish insurance coverage” may arise from the “circumstances of the transaction and the relationship of the agent vis-a-vis the insured”). Factors to consider in determining whether special circumstances exist include whether: (1) the insurer knew the insured was unsophisticated in insurance matters; (2) the insurer knew the insured relied upon the insurer to provide appropriate coverage; and (3) the insurer knew the insured needed protection from a specific threat. *Gabrielson*, 443 N.W.2d at 544. The existence of a heightened duty is a question of law. *Id.* at 543 n.1.

Elbert claims that AgCountry owed him a heightened duty of care because of “special circumstances” present in the relationship. Elbert argues that special

circumstances existed due to the length of the parties' relationship and Elbert's "actual reliance" on AgCountry to provide comprehensive insurance coverage. The district court rejected this argument, determining that Elbert failed to submit evidence demonstrating the existence of a heightened duty under *Gabrielson*.

We agree with the district court. Elbert argued that he relied on AgCountry to provide appropriate crop insurance coverage. To create a special circumstance under this *Gabrielson* factor, the record would have to reflect that Elbert "delegate[d] decision-making authority" to AgCountry for his insurance needs. *Beauty Craft Supply & Equip. Co. v. State Farm Fire & Cas. Ins. Co.*, 479 N.W.2d 99, 101-02 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). But we have determined that "great reliance" is not present where an insured did not place all of his insurance needs into the hands of one insurance provider but rather, used other insurance providers as well. *Gabrielson*, 443 N.W.2d at 545; *see also Carlson v. Mut. Serv. Ins.*, 494 N.W.2d 885, 886-88 (Minn. 1993) (determining special circumstances exist where familial relationship existed and insured relied on agency for all insurance needs). Here, the record shows that AgCountry does not offer common insurance policies such as auto insurance, health insurance, or homeowner's insurance. Thus, Elbert could not have placed all of his insurance needs into AgCountry's hands. Moreover, Elbert has not presented sufficient evidence demonstrating that he was "unsophisticated in insurance matters" or needed protection from a "specific threat."

Gabrielson, 443 N.W.2d at 544. Based on our review of the record, we conclude that the district court did not err by declining to recognize a special circumstance, and we affirm.³

Affirmed.

³ The insurer argues for the first time on appeal that the court lacks subject-matter jurisdiction over Elbert's negligence counterclaim because the claim is preempted by the Federal Crop Insurance Act, 7 U.S.C. § 1506(l) (2016); 7 C.F.R. § 400.352 (2017), and because the dispute should have been resolved through arbitration pursuant to the terms of the crop insurance policy. Because the insurer raised these arguments for the first time on appeal, we deem them forfeited. *See Vaughn v. Nw. Airlines, Inc.*, 558 N.W.2d 736, 745 n.9 (Minn. 1997) (refusing to address untimely preemption argument).