COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1135 **Cir. Ct. No. 2003CV89**

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

CASSONDRA PEARSON, BY HER GUARDIAN AD LITEM, MICHAEL P. WAGNER, AND PAULINE PEARSON,

PLAINTIFFS,

V.

JOSHUA M. PRISSEL AND KATY M. PRISSEL,

DEFENDANTS-APPELLANTS,

WESTPORT INSURANCE CORPORATION,

THIRD-PARTY DEFENDANT-RESPONDENT,

WISCONSIN MUTUAL INSURANCE COMPANY AND STEVEN J. HELLSTERN,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Katy Prissel and her son Joshua appeal a summary judgment granted to Westport Insurance Corporation, the omissions and errors insurer for the Erickson Agency, and an order dismissing Westport from the case. Prissel claims Erickson had or gratuitously assumed a duty to advise her on the adequacy of the policy limits she had selected for her automobile insurance policy, then negligently performed that duty. The trial court had determined Erickson was not liable as a matter of law. We agree with the court and we therefore affirm the judgment and order.

Background

¶2 From 1992 through 1997, Prissel's first husband purchased insurance through the Erickson Agency and another company. Prissel did not recall who sold her insurance in 1998 and 1999, but it was not Erickson. After Prissel's first husband died, she met Steven Hellstern. Hellstern had used Erickson since 1987 and had automobile policy limits of $250,000/$500,000. In the spring of 2000, Hellstern encouraged Prissel to obtain her automobile insurance through Erickson.

¶3 Prissel met with Selene Lehman, an agent at Erickson, for the first time on May 11, 2000. Lehman provided quotes for various levels of automobile coverage. Prissel told Lehman she had $100,000/$300,000 insurance limits at the time. Lehman drew up a policy with the same coverage, and Prissel signed both an application for the policy and a document acknowledging the coverage to be adequate.

¶4 Later that summer, Prissel called Lehman and informed her that she and Hellstern were engaged. On September 19, 2000, Lehman sent Prissel a quote

for an automobile policy with limits of $250,000/$500,000 with Prissel and Hellstern and all their vehicles insured. Prissel never acted on that quote.

¶5 On September 28, Prissel and Hellstern met with Lehman to discuss homeowner's coverage. There was evidently no discussion regarding automobile insurance at that meeting. Prissel was ultimately added as an authorized driver on Hellstern's policy in January 2003, but her vehicle was never added to his policy.

¶6 On February 2, 2003, Prissel's son Joshua was in a single car accident, severely injuring his passenger, Cassondra Pearson. Pearson's claim for injuries well exceeds Prissel's $100,000/$300,000 policy limits. Prissel and Joshua brought a third-party action against Westport, arguing that Erickson was negligent for not advising her to purchase a policy with greater limits similar to Hellstern's and for not advising her to combine her family's policies into one.

¶7 Westport moved for summary judgment, alleging Erickson was not negligent as a matter of law. The court granted the motion. Prissel appeals.

Discussion

¶8 We review summary judgments de novo, using the same methodology in the same manner as the circuit court. ***Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.***, 181 Wis. 2d 565, 571, 511 N.W.2d 849 (1994). To sustain her claim for negligence, Prissel must show Erickson owed her some duty. *See* ***Poluk v. J.N. Manson Agency, Inc.***, 2002 WI App 286, ¶13, 258 Wis. 2d 725, 653 N.W.2d 905. The question of an insurance agent's duty is a question of law. ***Id.*** "An insurance agent has the duty to act in good faith and carry out the insured's instructions[,]" but absent special circumstances, there is no duty to advise a client regarding availability or adequacy of coverage. ***Id.***

¶9 Prissel has two main theories for establishing Erickson's liability. First, she asserts she had a special relationship with Erickson, creating a heightened duty for it to advise her on the adequacy of her coverage. Second, Prissel claims that Erickson gratuitously assumed a heightened duty independently of any special relationship. In both cases, Prissel asserts that Erickson negligently failed to give her proper advice, and she contends there are factual disputes as to both theories, rendering summary judgment inappropriate.

¶10 For an insurance agent to have a heightened duty to the insured, a special relationship must exist between them. In evaluating whether such relationship exists, we evaluate: (1) whether the agent held itself out to the public as a skilled insurance advisor or consultant; (2) whether the agent took it upon itself to actually advise the policyholder on the coverages the policyholder should have beyond the usual relationship of agent and policyholder; (3) whether the policyholder relied on the agent's expertise; (4) whether an additional fee was paid to the agent for special consultation and advice; and (5) whether there was a long established relationship of entrustment between the agent and the insured. *See* WIS JI—CIVIL 1023.6 (1995). Contrary to Prissel's assertions, however, the facts of record fail to support any inference, much less a fairly debatable inference, that she and Erickson had a special relationship.

¶11 First, Prissel argues that Erickson's advertisements in the newspaper and phone books establish it held itself out as a skilled advisor. She relies on the agency's tag line, "Low Rates/Great Service." Great service, she argues, implies the company "may help customers with questions relating to insurance." But this does not necessarily mean Erickson held itself out as a skilled advisor.

¶12 Indeed, in ***Lisa's Style Shop***, one of the agent's advertisements actually used the word "advice," but never stated the agent was an expert or that he would advise clients on appropriate levels of coverage. ***Id.*** at 574. Even a television commercial stating that independent agents "offer you expert advice" was insufficient for the supreme court to find the agent held himself out as a skilled insurance advisor or consultant. ***Id.*** at 574-75. The advertisement in ***Tackes v. Milwaukee Carps. Dist. Council Health Fund***, 164 Wis. 2d 707, 715, 476 N.W.2d 311 (Ct. App. 1991), more closely resembles Erickson's, stating "after the sale it is the service that counts." There, we concluded the advertisement did not represent the agent as an expert. ***Id.*** Similarly, Erickson's tagline does not suggest Erickson is a "highly-skilled insurance expert" to a sufficient degree to implicate the special relationship standard.

¶13 Second, Prissel shows no facts to indicate Erickson assumed a duty to advise her "beyond the usual relationship." Prissel asserts Erickson undertook a duty to advise her when Lehman reviewed her policy, sent a quote for new automobile coverage levels, and then met with her on September 28 to discuss a new homeowner's policy. We disagree. In ***Meyer v. Norgaard***, 160 Wis. 2d 794, 801, 467 N.W.2d 142 (Ct. App. 1991), we noted the agent "recommend[ed] coverage based on his individual assessment of his client's needs and periodically review[ed] those needs. However, these facts reflect a standard insurer-insured relationship …." Lehman's review, whether she discussed it with Prissel or not, was no different. Moreover, Prissel contacted Erickson to set up the September 28 meeting for the purpose of obtaining the new homeowner's policy; Lehman did not ask Prissel to come in.

¶14 Third, Prissel asserts she relied upon Erickson and expected them to be knowledgeable. But "[t]he mere allegation that a client relied upon an agent

and had great confidence in him is insufficient to imply the existence of a duty to advise." ***Nelson v. Davidson***, 155 Wis. 2d 674, 684, 456 N.W.2d 343 (1990). Moreover, there is no evidence Prissel ever communicated her expectations that Erickson would advise her if it thought she needed more coverage. Our supreme court has held that an insurer has no duty to anticipate the liabilities an insured expects will be covered when the insured fails to articulate his or her expectations. ***Poluk***, 258 Wis. 2d 725, ¶¶15-16 (citing ***Sprangers v. Gateway Ins. Co.***, 182 Wis. 2d 521, 514 N.W.2d 1 (1994)).

¶15 Fourth, it is undisputed that Prissel paid no additional fee to Erickson for its services. We have noted that while nothing prevents an agent from taking on the duty of an advisor, "[t]he hallmark of such an undertaking … is the normal currency of commerce: consideration …." ***Tackes***, 164 Wis. 2d at 712.

¶16 Fifth and finally, we cannot say Prissel had a particularly long established relationship with Erickson. While her first husband purchased insurance from it from 1992 through 1997, there is no indication Prissel herself ever dealt with the company. Thus, she was at best an indirect customer for those years. Moreover, the Prissels did not rely exclusively on Erickson for their insurance needs at the time. While Prissel stresses that Hellstern had a long relationship with Erickson, going back to approximately 1987, his relationship with it prior to meeting Prissel cannot fairly be used as the basis of Prissel's relationship with Erickson.

¶17 With no special relationship established, Erickson had only the standard duty to act in good faith and execute Prissel's instructions. She does not claim it acted otherwise.

¶18 Prissel alternatively asserts that Erickson gratuitously assumed a duty to advise her regarding the adequacy of her coverage. *See* ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶23, 251 Wis. 2d 171, 641 N.W.2d 158. She argues that Erickson gratuitously assumed the duty when Lehman sent her the quote for new policy levels and when Lehman evidently reviewed all of Prissel's policies, according to a form in the record, prior to the September 28 meeting. Westport asserts that the gratuitously assumed duty doctrine cannot form the basis of liability for an insurance agent.

¶19 Assuming without deciding that we can apply the gratuitously assumed duty rule, Prissel's argument fails for the same reason as her special relationship argument. First, she offers absolutely no authority suggesting that sending a quote for a different policy creates a duty above and beyond the standard duty. Moreover, when she reviewed Prissel's policies, Lehman did exactly what the agent in ***Meyer*** did; ***Meyer*** held that such a review was merely part of the standard relationship.

¶20 Finally, we note that part of Prissel's complaint is that, while Lehman sent her a quote for a policy with higher limits, Erickson never advised Prissel why she should combine policies. Prissel asserts Erickson should have told her it was unusual for married couples to maintain separate policies. However, Hellstern had multiple claims against him and Prissel thus wanted to separate their driving records. Also, both Prissel and Hellstern were individually insuring their own children. Finally, Prissel had set up electronic payment of her premiums while Hellstern continued to mail his payments. Thus, it is undisputed that Prissel wanted to keep the policies separate. Indeed, the fact that she never responded to the September 19 quote suggests as much.

¶21 We are mindful of the predicament in which Prissel finds herself as the result of her son's accident. However, her insurance agent assumed no special duty to advise her beyond the normal agent-policyholder relationship and Prissel had acknowledged her $100,000/$300,000 limits to be adequate when she purchased them. What Prissel really seeks is "the opportunity to insure after the loss." *See* ***Tackes***, 164 Wis. 2d at 712 (citation omitted). Neither the law nor public policy permits that option.

By the Court.—Judgment and order affirmed.

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