STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0992

Western National Mutual Insurance Company,
Appellant,

vs.

Prospect Foundry,
Respondent

Filed April 16, 2018
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-16-3476

James T. Martin, Gislason, Martin, Varpness & Janes, P.A., Edina, Minnesota (for appellant)

Christopher H. Yetka, Barnes & Thornburg, LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's order denying its motion for a new trial, arguing that: (1) the district court erred in refusing to set aside the jury's special-verdict finding that the respondent was not in breach of contract, (2) the district court erred in

refusing to set aside the jury's special verdict finding that appellant was in breach of the implied covenant of good faith and fair dealing, (3) the district court's instructions were substantially prejudicial, and (4) the district court's evidentiary rulings were an abuse of discretion. We affirm.

FACTS

Appellant Western National Mutual Insurance Company (Western National) sold three workers' compensation insurance policies to respondent Prospect Foundry (Prospect) between 2011 and 2014. Each policy included a plan where Prospect's premiums could be returned as a dividend if a certain loss-ratio was met. The loss-ratio was determined on June 1 of the following year, ten months after the final date of each policy.

In the spring of 2013, Prospect's president discussed the 2011-2012 policy's claims with John Mares, Western National's insurance agent. Prospect's president later testified that Mares said there were still two open claims under the policy, but they would be closed by June 1. If these claims had closed before June 1, 2013, Prospect would have received a dividend for the 2011-2012 policy.

But Prospect did not receive a dividend and when Prospect's president asked Mares why, Mares replied that Prospect's loss-ratio was too high. Prospect looked into the matter and discovered that the two claims were still open. When asked why these claims did not close in time, Mares said the person in charge of adjusting the claims was on vacation.

In addition, Prospect believed that it was never paid a dividend for the 2012-2013 policy. Similarly, Prospect disputed Western National's dividend calculation with respect

to the 2013-2014 policy. Western National also asserted that Prospect owed money for unpaid premiums.

Western National eventually sued Prospect for breach of contract. Prospect counterclaimed, alleging that Western National breached its contract and violated the implied covenant of good faith and fair dealing. Before trial, Western National objected to the district court's proposed jury instructions concerning the implied covenant of good faith and fair dealing, proposing its own version of the instruction. The district court determined that Western National's proposed instruction did not "accurately reflect the current state of the law" and instead supplied its own version of the instruction.

The jury found that, (1) Prospect did not breach its contracts with Western National; (2) Western National breached its contracts with Prospect, but Prospect was not entitled to damages; and (3) Western National violated the implied covenant of good faith and fair dealing, and Prospect was entitled to $53,300 in damages. Although the jury found that Prospect did not breach its contracts with Western National, when confronted with the special verdict's question asking how much money Western National should be awarded in damages for Prospect's breach, the jury answered $101,407.64.

The district court entered judgment in favor of Western National in the amount of $101,407.64 and in favor of Prospect in the amount of $53,300. Western National moved for a new trial and alternatively for judgment as a matter of law. Prospect moved to amend or correct the district court's judgment, arguing that the jury did not intend to award Western National any damages.

The district court denied Western National's motions but granted Prospect's motion. The district court found that the jury appropriately followed the verdict form's instructions by awarding a hypothetical judgment but the jury "did not intend for the Court to grant the amount to [Western National] in an award." The district court vacated its judgment in favor of Western National and entered judgment only in favor of Prospect for $53,300. This appeal followed.

D E C I S I O N

Western National argues that the district court erred by declining to set aside the jury's findings that Prospect did not breach its contracts and that Western National breached the implied covenant of good faith and fair dealing. "An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons." *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010) (quotation omitted). "The test is whether the special verdict answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences. If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotations and citation omitted). "Review [of a special verdict] is particularly limited when the jury finding turns largely upon an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the jury and the [district] court and the latter has approved the findings made." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662-63 (Minn. 1999).

Breach of Contract

Western National argues that the jury's special verdict finding that Prospect did not breach its contacts was against the greater weight of the evidence, and the district court erred by not setting aside the verdict.[1] Specifically, Western National argues that Prospect's own statements acknowledge that it breached the insurance contracts. Generally, a party who first breaches a contract cannot use the other party's later breach to avoid liability. *Space Ctr., Inc. v. 451 Corp.*, 298 N.W.2d 443, 451 (Minn. 1980). Here, the district court acknowledged evidence that Prospect stopped paying its premiums, but wrote that the jury found that Western National breached first by failing to close the two open claims and failing to pay Prospect its due dividend. On that basis, the district court concluded that the jury's finding was consistent with the evidence and declined to set aside the jury's answer on the special-verdict form.

Western National challenges the district court's reasoning, arguing that there were three separate insurance contracts spanning policy terms from 2011-2014 and that it was only suing Prospect for breach of the last two contracts, not the first. Western National claims that it "was not in breach in respect to either the second or third insurance contracts

[1] Western National also argues that the jury intended to award it $101,407.64 in damages for its breach-of-contract claim against Prospect, and the district court erred by interpreting that award as hypothetical. However, the jury clearly found that Prospect did not breach its contracts with Western National. The third question on the special verdict form then asked how much money would compensate Western National for its damages "regardless of your answers to the previous questions." Even though the jury responded with $101,407.64, based on the language of the question, we conclude that the jury intended to respond with what Western National *would* have won if it had prevailed on its breach-of-contract claim.

and sought only to enforce Prospect's premium payment obligations under those policies," and that "any claimed breach of the first [contract] is no justification for Prospect's failure to pay the full amounts owed for the second and third policies." Prospect counters that evidence introduced at trial demonstrated that Western National breached all three contracts. For instance, Prospect claims that it introduced evidence at trial that Western National did not pay Prospect promised credits for the 2012-2013 and 2013-2014 policies, that Western National did not pay the correct dividend for the 2012-2013 policy, and that Western National impermissibly changed the amount of premiums Prospect allegedly owed for the 2013-2014 policy—including demanding a new number the day before trial—in violation of the agreement.

We conclude that the record contains evidence demonstrating that Western National breached all three contracts. This court should set aside the jury's special-verdict answers only if its decision cannot be reconciled on any theory. *Dunn*, 745 N.W.2d at 555. Because the jury's verdict may be reconciled with Prospect's evidence showing that Western National breached all three contracts, we will not set aside the jury's special-verdict finding that Prospect was not in breach.[2]

[2] Western National also argues that the verdict should be set aside because the jury was never instructed that an initial breach by Western National could excuse subsequent breaches by Prospect. Again, we will not disturb a jury's special verdict if it can be reconciled on *any* theory. *Dunn*, 745 N.W.2d at 555. Only when it is clear that findings cannot be reconciled should the verdict be set aside. *Nihart v. Kruger*, 291 Minn. 273, 276, 190 N.W.2d 776, 778 (1971). Because the jury's verdict may be reconciled with the theory that Western National breached each contract prior to any subsequent breach by Prospect, we will not disturb the verdict.

Implied Covenant of Good Faith and Fair Dealing

The jury also determined that Western National breached the implied covenant of good faith and awarded Prospect $53,300 in damages. Minnesota law recognizes the implied covenant of good faith and fair dealing in most contracts, including insurance contracts. *Columbia Cas. Co. v. 3M Co.*, 814 N.W.2d 33, 36 (Minn. App. 2012), *review denied* (Minn. June 19, 2012). The implied covenant requires that "one party not unjustifiably hinder the other party's performance of the contract." *In re Hennepin Cty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 504 (Minn. 1995) (quotation omitted). "To establish a violation of this covenant, a party must establish bad faith by demonstrating that the adverse party has an ulterior motive for its refusal to perform a contractual duty." *Minnwest Bank Cent. v. Flagship Props. LLC*, 689 N.W.2d 295, 303 (Minn. App. 2004). "Actions are done in good faith when done honestly, whether it be negligently or not." *Prairie Island Indian Cmty. v. Minn. Dep't of Pub. Safety*, 658 N.W.2d 876, 889 (Minn. App. 2003) (quotation omitted).

The district court upheld the jury's special verdict based on four main pieces of evidence. First, Prospect's president testified that an agent for Western National told him that the two open claims would be resolved and closed, resulting in Prospect receiving a dividend. Second, Prospect's president testified that the same agent told him that the two claims were not closed in time because the adjuster in charge of them was on vacation. Third, Prospect's expert witness testified that one of the claims should have been closed before the policy period ended, something a claims supervisor at Western National also conceded at trial, and that the reserves on the other open claim were significantly

overstated. And fourth, Prospect's president testified that he had trouble understanding how Western National arrived at its numbers, and even Western National's vice president testified that his numbers were fluctuating and the calculations he approved yielded different numerical outcomes. While Western National's witnesses disputed some of this evidence, the district court concluded that the jury found Prospect's witnesses more credible.

We believe the district court did not err in upholding the jury's special verdict. Again, we must determine if the jury's special verdict can be reconciled in *any* reasonable manner with the evidence and fair inferences, and under *any* theory. *Dunn*, 745 N.W.2d at 555. This court's review is also "particularly limited" in this instance, because the jury's finding "turns largely upon an assessment of the relative credibility of witnesses . . . ." *Kelly*, 598 N.W.2d at 662. Here, the jury reconciled conflicting testimony in favor of Prospect's witnesses, and given the evidence of Western National's fluctuating numbers and questionable statements from its representatives, it was reasonable for the jury to conclude that Western National unjustifiably hindered the contracts and acted in bad faith. Given the evidence, we conclude that the district court did not err in refusing to set aside the jury's special verdict.

Jury Instructions

Western National argues the district court's jury instruction regarding the implied covenant of good faith and fair dealing was incomplete and unduly prejudicial. "The district court has broad discretion in determining jury instructions and we will not reverse in the absence of abuse of discretion." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147

(Minn. 2002). If the instruction destroys the substantial correctness of the charge as a whole, causes a miscarriage of justice, or results in substantial prejudice, the error requires a new trial. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974). A new trial is also required if the instruction was erroneous and its effect cannot be determined. *Lieberman v. Korsh*, 264 Minn. 234, 242, 119 N.W.2d 180, 186 (1962).

The district court's instruction read as follows:

> Under Minnesota law, every contract includes an implied duty of good faith and fair dealing. Acting in good faith means a person acts honestly in performing this part of the contract, whether it be negligently or not.
>
> Western National Mutual Insurance Company has a duty to act in good faith in the calculation of Prospect Foundry's entitlement [to] dividend payments.

By contrast, Western National's proposed instruction read:

> Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance of the contract. Actions are done in good faith when done honestly, whether it be negligently or not. Actions are done in bad faith when a party's refusal to fulfill some duty or contractual obligation is based on an ulterior motive, not an honest mistake regarding one's rights or duties.

Western National argues that the district court's instruction was misleading because it did not mention that the implied covenant requires that the violating party, with an ulterior motive in mind, unjustifiably hindered or obstructed the other party's performance. But the district court determined that Western National's instruction was too restrictive and cited to the Restatement (Second) of Contracts for the idea that "evasions of the spirit of

the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in another party's performance" also qualify as violations of the covenant. *See* Restatement (Second) of Contracts § 205 cmt. d (1981).[3]

The instruction preserved the substantial correctness of the charge and did not result in a miscarriage of justice such that it affected "the fairness, integrity or public reputation of judicial proceedings." *State v. Kelley*, 855 N.W.2d 269, 279 (Minn. 2014) (quotation omitted). And while Prospect prevailed on its claim, that is insufficient to conclude that Western National was substantially prejudiced by the instruction. Because the district court's instruction was not erroneous or prejudicial to Western National, we conclude that the district court did not abuse its discretion.

Evidentiary Rulings

Western National argues that it is entitled to a new trial because the district court improperly admitted the hearsay statements of its insurance agent, John Mares. The district court has broad discretion on evidentiary matters and this court will not disturb its ruling "unless it is based on an erroneous view of the law or constitutes an abuse of discretion."

[3] Minnesota's appellate courts have not settled whether the state's common law limits an implied-covenant claim only to the unjustifiable hindrance of performance or if this claim could include the behaviors in Section 205, comment d, of the Restatement (Second) of Contracts. *See Columbia Cas. Co.*, 814 N.W.2d at 40 (declining to determine whether a claim under the implied covenant of good faith and fair dealing is limited to unjustifiable hindrance). "Restatements of the law are persuasive authority only and are not binding unless specifically adopted in Minnesota by statute or case law." *Williamson v. Guentzel*, 584 N.W.2d 20, 24 (Minn. App. 1998), *review denied* (Minn. Nov. 24, 1998). Minnesota has not adopted this part of the Restatement (Second) of Contracts in statute or in caselaw, but we find its guidance persuasive.

Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id*. at 46 (quotation omitted).

Western National argues that the district court abused its discretion by permitting Prospect's president to testify about statements made by Western National's insurance agent, John Mares, that the two open claims would be closed, which would have entitled Prospect to a dividend. The district court determined that Mares was a broker for Western National and was therefore Western National's agent. Because Mares was an agent, the court concluded that his hearsay statements were admissible as statements of a party opponent. *See* Minn. R. Evid. 801(d)(2). Western National argues that because Mares had no authority to determine when and how claim reserves were established, he was not an agent for the purposes of the hearsay analysis.

In the past, Minnesota distinguished between insurance agents and insurance brokers for principal-agent analysis. *See Eddy v. Republic Nat'l Life Ins. Co.*, 290 N.W.2d 174, 176 (Minn.1980) (stating that the essence of the difference between agents and brokers is that an insurance agent acts on behalf of a particular insurance company, whereas an insurance broker acts on behalf of the prospective insured). However, a Minnesota statute now states that "[a] person performing acts requiring a producer license . . . is at all times the agent of the insurer and not the insured." Minn. Stat. § 60K.49, subd. 1 (2016); *see also Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 118 n.5 (Minn. 2011) (stating that although Minnesota law previously recognized a distinction between agents and brokers, that distinction "appears to have been superseded by statute."). One such act

is negotiating insurance. Minn. Stat. § 60K.32 (2016). And negotiating insurance is specifically defined as "conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract if the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers." Minn. Stat. § 60K.31, subd. 12 (2016).

Western National and John Mares's brokerage company had an agency agreement giving him some authority to act and speak on Western National's behalf. Specifically, the agreement gave brokers the authority to provide "all usual and customary services of an insurance agent on all insurance contracts placed by the Agent with the [Western National]." A Western National employee testified that all communications between Western National and Prospect flowed through John Mares's company and that one of the services the company provides is communicating about claims between policyholders and Western National. The scope of this relationship was supported by Prospect's expert witness who testified to his understanding that policyholders take what an insurance agent tells them as a communication from the insurance company itself.

Based on this evidence, we conclude that the district court had sufficient grounds to treat John Mares as being "authorized by [Western National] to make a statement concerning" the open claims to Prospect, or—at minimum—was making a statement concerning a matter within the scope of the agency or employment, either of which would qualify as a party-opponent statement. *See* Minn. R. Evid. 801(d)(2)(C)-(D). The district

court did not abuse its discretion by admitting testimony about statements made by Western National's agent.

Affirmed.