VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 59-11-19 Gicv

Frey et al vs. American National Insurance Co. et

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiffs Thomas and Diane Frey insured their home in Grand Isle through American National Insurance Company and Farm Family Casualty Insurance Company (collectively "Farm Family"). When the home burned down, they discovered that it had been underinsured. In their subsequent Complaint in this case, they alleged that Defendants Richard Miller and William Burke were responsible for the undervaluation. Messrs. Miller and Burke have moved for summary judgment on these claims. The court denies the motion.

Background

The standards on a motion for summary judgment are so familiar as to be almost trite. In this case, however, the result is driven substantially by the careful application of those standards. Hence, at the risk of belaboring the obvious, the court begins by reciting the standards.

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(2), (4); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). Critically for purposes of this case, the court must view all evidence in the light

most favorable to the non-moving party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

With these standards in mind, the Freys' evidence, if believed by the jury, would support the following narrative. Mr. and Ms. Frey bought the Grand Isle property in 2002 and insured it through Farm Family. In October 2017, Mr. Frey asked the agent on the policy to transfer responsibility for the policy to Mr. Miller. Mr. Miller worked out of Farm Family's Glenmont, N.Y. office, of which office Mr. Burke was the agency manager. The policy renewed for the policy term beginning in March 2018, with Mr. Miller and Mr. Burke listed as agents.

Prior to Mr. Miller's assumption of agency responsibility for the policy on the Grand Isle home, he had worked with Mr. Frey as the agent of record on Farm Family policies issued beginning in 2014 on properties Mr. Frey owned in New York. In early 2015, Mr. Frey asked Mr. Miller about taking over responsibility for the Grand Isle policy. Concerned that the current coverage might not reflect the actual cost of replacement of the Grand Isle home, he asked Mr. Miller to reevaluate the house for proper valuation for the dwelling, garage, and inflation guard coverages. Mr. Miller promised that he would perform a new valuation and that when he took over the writing of the policy, the new policy would reflect the new valuation. Mr. Miller never followed through on this promise.

On November 21, 2018, during the term of the policy written by Mr. Miller, there was a fire at the Grand Isle residence. The Freys obtained contractor proposals to rebuild the home: $668,124.50 for the dwelling itself, $75,000.00 for demolition and debris removal, and $30,800.00 for code upgrades. Farm Family calculated the replacement value of the contents loss at $361,135.52. The Farm Family policy limits, however, were only $533,367.00 for the dwelling, $48,331.65 for debris removal, $26,668.35 for code upgrades, and $266,797.00 for contents. Thus, the Freys were substantially underinsured. Farm Family paid its policy limits, leaving the Freys with a deficit well in excess of $250,000.00.

Mr. Frey himself had been an insurance agent, with experience in performing structure valuations for property coverage purposes. Using Farm Family's own Cost Estimator tool, he calculated that had Mr. Miller obtained the correct square footage for the Grand Isle home and plugged it into the tool to obtain updated values for the property, the limits would have been $847,195 for dwelling coverage, $43,709.75 for debris removal $43,709.75 for code upgrades, and $423,597.00 for personal contents. Messrs. Miller and Burke do not dispute these calculations; instead, they argue that expert testimony is required on this point. As far as appears, however, Mr. Frey's calculations are based only on his use of a tool on which agents such as Messrs.

Miller and Burke rely in calculating policy values. They have not provided any evidence to suggest that either calculating square footage or plugging those numbers into the Farm Family calculator requires any particular expertise.

Analysis

On these facts, a jury could properly find that Mr. Miller undertook to revalue the Freys' home but failed to do so, leaving them substantially underinsured. The question, then, is whether the law imposes on him and Mr. Burke any liability for that failure. They argue that they owed no duty to revalue the Freys' home and that even if they did, that duty arose under contract law. They then assert that the Freys waived any contract claim. Finally, they argue that the Freys cannot prove proximate cause, because they have no expert to establish what their coverage limits would have been had Mr. Miller performed the promised revaluation. None of these arguments withstands scrutiny.

First, it is the law of the case that "[t]he duty of an insurance agent is to use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured." *Frey v. American Nat'l Ins. Co.,* no. 59-11-19 Gicv, slip op. at 6 (quoting *Rocque v. Co-operative Ins. Ass'n*, 140 Vt. 321, 326 (1986)). Messrs. Miller and Burke suggest no reason for revisiting this question; indeed, they acknowledge the duty recognized in *Rocque*. Instead, they rest their argument on a misapplication of two other cases, *Hill v. Grandey*, 132 Vt. 460 (1974), and *Booska v. Hubbard Ins. Agency*, 160 Vt. 305 (1993). The salient point from the first of these cases, they argue, is that "[i]t is [the insured's] responsibility to adequately convey, albeit in laymen's terms, the nature of his wishes, in order to obtain the protection requested," Mot. for Summ. J. at 10 (quoting *Hill*, 132 Vt. at 468); from the second, that "[n]either the agency nor its employee had a duty to inquire about special circumstances within the insurance purchaser's control that might affect the quality or degree of protection available under a policy," *id.* at 11 (quoting *Booska*, 160 Vt. at 309). They argue that because the Freys did not clearly express their "needs and wishes," they cannot now complain that Messrs. Miller and Burke did not procure insurance that met those needs and wishes.

This argument ignores one of the fundamental precepts of summary judgment: the court must view all evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. at 476. Here, Messrs. Miller and Burke make much of what they characterize as Mr. Frey's inability to "describe his needs and wishes coherently." Mot. for Summ. J. at 13. This, however, is a gross mischaracterization of the evidence. While Messrs. Miller and Burke may not be clear as to why Mr. Frey requested a revaluation of the property, there is abundant evidence that he did make such a request. There were no special

circumstances that might affect the quality or extent of coverage available; rather, all that Mr. Frey asked was that Mr. Miller go to the house, verify the square footage, plug the figures into the Cost Estimator to obtain an accurate valuation of the property, and adjust the coverages accordingly. In short, viewed in the light most favorable to the Freys, the evidence before the court reflects that they did make their needs and wishes known: a revaluation of their home, and a policy whose limits reflected that valuation. And, importantly, at least on the Freys' evidence, Mr. Miller agreed to this undertaking.

Second, this court predicts that the Vermont Supreme Court would recognize that the duty here arises under the law of negligence. Traditionally, the economic loss rule prohibits recovery in tort for purely economic losses. *See Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 314 (2001). "[I]njury to the product or property that is the subject of a contract is generally considered disappointed economic expectation for which relief lies in contract rather than tort law." *Walsh v. Cluba*, 2015 VT 2, ¶ 28, 198 Vt. 453. The rule is intended to separate contract and tort claims. It rests on the recognition that "negligence actions are best suited for 'resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damages that the parties have, or could have, addressed in their agreement.' " *Springfield Hydroelectric*, 172 Vt. at 314 (quoting *Spring Motors Distribs. v. Ford Motor Co.*, 489 A.2d 660, 672 (1985)).

Our Court has recognized a narrow exception to the economic loss rule for cases in which the parties have a special relationship independent of their underlying contractual relationship. *See EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 31, 181 Vt. 513. As the *Springfield Hydroelectric* Court clearly stated:

> Even where courts have permitted recovery for economic loss, they have required a special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor.

172 Vt. at 316. Whether a "special relationship" exists depends on the "type of relationship created between the parties." *EBWS*, 2007 VT 37, ¶ 31. In the past, the Court has found it significant whether defendants held "themselves out as providers of any licensed professional services" or "maintained complex and highly specialized responsibilities." *Id.* ¶ 30 (quoting *Springfield Hydroelectric*, 172 Vt. at 316–17). The Court has also indicated that such relationships usually take the form of "a professional relationship such as doctor-patient or attorney-client . . . such that it 'automatically

triggers an independent duty of care that supports a tort action even when the parties have entered into a contractual relationship.' " *Walsh v. Cluba*, 2015 VT 2, ¶ 30 (quoting *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1263 (Colo. 2000)). This exception is narrow, and it does not appear that the Court has ever actually found an application. *See Hunt Constr. Grp. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10, 14 (2d Cir. 2010) ("Although *EWBS* held that a professional services exception exists . . . , we know of no case in which the Vermont Supreme Court has actually found the exception to apply.").

Our Court has not yet had the opportunity to consider whether this exception would apply to insurance agents. The American Law Institute, however, has. The Restatement (Third) of Torts states, "[a] professional is subject to liability in tort for economic loss caused by the negligent performance of an undertaking to serve a client." Restatement (Third) of Torts: Liab. for Econ. Harm § 4. Comment b explicitly recognizes insurance agents within the definition of "professionals." *Id*. Other jurisdictions, while not necessarily embracing the full breadth of this rule, have acknowledged that a "special relationship" can arise in the insurance context. In 1999, for example, the Michigan Supreme Court held that "the general rule of no duty changes when . . . the agent assumes an additional duty by either express agreement with or promise to the insured." *Harts v. Farmers Ins. Exch.*, 461 Mich. 1, 10-11 (1999). *See also Trupiano v. Cincinnati Ins. Co.*, 654 N.E.2d 886, 889 (Ind. Ct. App. 1995) (affirming that a non-standard interaction between insured and insurer, with the insured relying on the insurance agent to their detriment, is required to find a special relationship permitting a negligence action); *Bicknell, Inc. v. Havlin*, 9 Mass. App. Ct. 497 (1980) (agent's failure to make necessary changes to insurance policy and to inform clients, leaving them uninsured, subjected him to negligence liability).

Relatedly, under the principles of agency law, an agent is bound to use due care in the implementation of the agency and in carrying out instructions of the principal-client. *See Knudsen v. Torrington Co.*, 254 F.2d 283, 286 (2d Cir. 1958) (an agency relationship "implies a promise to use care and skill and imposes fiduciary obligations of loyalty and obedience not normally present in other bilateral agreements"); Restatement (Third) Of Agency § 8.08 (Am. Law Inst. 2006) ("Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances."). Moreover, "[a]n agent's individual tort liability extends to negligent acts and omissions as well as to intentional conduct." *Id*. § 7.01 cmt. b.

As noted above, our Court has not yet had the opportunity to consider the application of these principles to the insurance agent-insured relationship. Nevertheless, its teachings concerning the duties

of an insurance agent suggest that it would recognize a duty, enforceable under the law of negligence, at least when an insurance agent makes a specific undertaking with respect to the procurement of coverage. For example, at least as early as its decision in *Hill v. Grandey*, the Court tacitly acknowledged a duty, arising in negligence, to procure insurance that "[meets] the needs of the insured as stated by him." 132 Vt. at 467. Twelve years later, the Court reiterated that "[t]he duty of an insurance agent is to use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured." *Rocque*, 140 Vt. at 326. Finally, in *Booska*, the Court rejected a "duty to inquire about special circumstances within the insurance purchaser's control that might affect the quality or degree of protection available under a policy." 160 Vt. at 309–10. Nevertheless, it couched its analysis in terms of negligence law. *See id.* (quoting *Rocque* "reasonable care and diligence" standard); *id.* at 310 ("As long as the agent does the job without negligence, as between the agent and the purchaser, the task of reading and understanding the policy text is that of the purchasers.").

The court need not predict whether our Supreme Court would recognize an across-the-board duty, enforceable under negligence law. Here, as noted above, there is competent evidence that Mr. Frey requested, and Mr. Miller undertook, a specific duty: to reevaluate the Freys' residence to ensure that their policy limits accurately reflected the residence's value. If Mr. Miller failed "to use reasonable care and diligence" in this endeavor—and a complete failure to undertake a reevaluation would certainly meet this standard—he can be liable in negligence for all harm that followed.[1]

Next, the argument that the Freys cannot prove proximate cause rests principally on the assertion that such proof requires expert testimony. This assertion fails for two simple reasons. First, the claim here is that Mr. Miller failed to obtain accurate square footages for the Freys' residence and plug them into Farm Family's Cost Estimator. Messrs. Miller and Burke have made no showing, however, that either obtaining correct measurements or plugging them into the Cost Estimator requires any particular expertise. Their bald assertion that "[t]his evidence would have to come from an expert with sufficient evidence," Mot. for Summ. J. at 17, finds no support in either fact or law. Rather, at least as far as appears from their motion papers, each of these tasks can be performed by a layperson of average intelligence and computer skills. Second, the Freys have made a sufficient showing that Mr.

[1]In their Reply, Messrs. Miller and Burke argue for the first time that Mr. Burke cannot be liable here. Having declined to raise this argument in their motion, however, they failed to meet their initial burden of demonstrating the absence of a genuine dispute of material fact on this question. Moreover, while there appears to be no dispute that Mr. Burke was not directly involved in Mr. Miller's alleged negligence, the parties' dueling factual submissions do suggest sufficient disputes as to Mr. Burke's relationship with both Mr. Miller and the Farm Family policy to allow the question of any derivative liability to go to the jury.

Frey is fully capable of performing each of these tasks. Thus, to the extent that "scientific, technical, or other specialized knowledge" is required here, *see* V.R.E. 702, Messrs. Miller and Burke have failed to show an absence of genuine dispute as to Mr. Frey's competence to offer an opinion based on such knowledge.

Finally, Messrs. Miller and Burke assert that the Freys cannot prove proximate cause because the amount they recovered from Farm Family exceeds the amount of their fire loss. Again, however, Messrs. Miller and Burke have failed to carry their initial burden of demonstrating an absence of dispute of material fact on this issue. Their Statement of Undisputed Material Facts establishes only that the Freys "settled with Farm Family in February 2020 for $1,041,182.66." Defs.' SUMF, ¶ 4. They make no showing whatsoever as to what this payment covered. Thus, they have failed to demonstrate that any recovery in this case would duplicate payments that the Freys have already received.

ORDER

The court denies the motion for summary judgment. The negligence claims against Messrs. Miller and Burke remain for trial. The clerk will schedule a pretrial conference.

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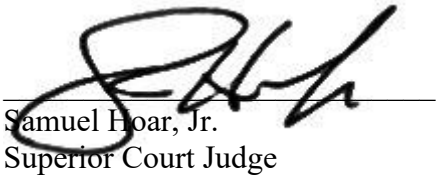

Samuel Hoar, Jr.
Superior Court Judge