2017 IL App (2d) 160557-U
No. 2-16-0557
Order filed April 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LOOMCRAFT TEXTILE & SUPPLY COMPANY, Plaintiff, v. SCHWARTZ BROTHERS INSURANCE AGENCY, INC., Defendant (Schwartz Brothers Insurance Agency, Inc., Third-Party Plaintiff-Appellant v. Fireman's Fund Insurance Company, Third-Party Defendant-Appellee).	)	Appeal from the Circuit Court of Lake County. No. 14-L-482 Honorable Margaret J. Mullen, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment for Fireman's Fund, because: (1) Schwartz failed to state a claim of negligent misrepresentation against Fireman's Fund, as Fireman's Fund was not in the business of supplying information for the guidance of others in their business transactions; and (2) Schwartz's claim of professional negligence required expert witness testimony to establish the applicable standard of care. Therefore, we affirmed.

¶ 2 Third-party plaintiff, Schwartz Brothers Insurance Agency, Inc. (Schwartz), appeals from the trial court's grant of summary judgment in favor of third-party defendant, Fireman's Fund Insurance Company (Fireman's Fund), on Schwartz's amended third-party complaint. The trial court ruled that Schwartz needed expert testimony to be able to prevail on its allegations. On appeal, Schwartz argues that: (1) negligent misrepresentation is resolved under a standard of ordinary care, for which no expert testimony is necessary; and (2) even if its complaint raised issues of professional negligence, the breach's obvious nature eliminated the need for expert testimony. We affirm the trial court's grant of summary judgment for Fireman's Fund, concluding that: (1) Schwartz failed to state a claim for negligent representation, and (2) Schwartz's claim of professional negligence required expert testimony to establish the applicable standard of care.

¶ 3 I. BACKGROUND

¶ 4 Schwartz filed a third-party complaint against Fireman's Fund after Schwartz was sued by Loomcraft Textile & Supply Company (Loomcraft). Loomcraft brought its suit against Schwartz on July 8, 2014. It filed an amended complaint on August 13, 2014, containing a single count of broker negligence. Loomcraft alleged as follows. It was in the business of supplying commercial fabric and finished goods. At the end of 2012, Loomcraft hired Scwartz, an insurance broker, to procure a new commercial liability insurance policy to replace Loomcraft's existing liability insurance policy with Liberty Mutual Insurance. The Liberty Mutual Insurance policy included a "selling price endorsement" that covered any loss or damage to Loomcraft's finished goods, or merchandise it held for resale, for the regular cash selling price, minus certain discounts and charges. Schwartz obtained a replacement policy from Fireman's Fund and assured Loomcraft that it matched the coverage in the Liberty Mutual

Insurance policy, including the selling price endorsement. On December 16, 2013, Loomcraft suffered a loss to its fabric inventory and goods with a retail value of $608,611.85. It submitted proof of the loss to Fireman's Fund. However, Fireman's Fund asserted that according to the policy, the loss for finished goods was valued at replacement cost rather than selling price. In its complaint, Loomcraft claimed that Schwartz breached its duty to Loomcraft by failing to obtain the agreed-upon coverage under the Fireman's Fund policy, and that as a direct and proximate result of Schwartz's breach, Loomcraft sustained damages of $529,980.58.

¶ 5 In its answer to the amended complaint, Schwartz admitted that it agreed to procure an insurance policy for Loomcraft that included "Selling Price Replacement Cost" (selling price coverage) and that it had informed Loomcraft that the Fireman's Fund policy included such coverage.

¶ 6 Schwartz brought a third-party complaint against Fireman's Fund on October 12, 2014, alleging contribution and reformation. The trial court dismissed the third-party complaint pursuant to Fireman's Fund's motion on March 12, 2015.

¶ 7 Schwartz filed an amended third-party complaint against Fireman's Fund on March 26, 2015, alleging as follows. Pursuant to an agreement, it was an appointed agent of Fireman's Fund. The agency agreement contained the following language:

> "We [Fireman's Fund] will indemnify you and hold you harmless, including paying your reasonable defense costs, against liability for damages, fines and penalties, arising out of acts we took or failed to take, and for our errors and omissions, and for your acts taken at our direction."

John Jacobs, a Schwartz insurance producer, submitted an application for insurance to Fireman's Fund in January 2013 to insure Loomcraft. Thomas Brennan, a Fireman's Fund insurance

underwriter, then contacted Jacobs to further discuss the coverage sought, and they had several conversations about the topic. At an in-person meeting on January 22, 2013, Jacobs specifically informed Brennan that Loomcraft required selling price coverage for all of its goods. Jacobs also shared with Brennan a competing quote for Loomcraft's insurance renewal that included such coverage. Brennan told Jacobs that such coverage would be included with Fireman's Fund's property coverage and that a separate endorsement was not necessary. Fireman's Fund inspected all of Loomcraft's business locations prior to issuing a quote, and it should have known that Loomcraft did not manufacture any goods. Following Loomcraft's insurance claim, Fireman's Fund stated that the selling price coverage in the policy applied only to product manufactured by Loomcraft and not to product which Loomcraft finished and held for sale to others. Thus, contrary to Schwartz's specific request and instruction, Fireman's Fund underwrote and issued an insurance policy to Loomcraft that did not contain the selling price coverage requested, thereby exposing Schwartz to liability to Loomcraft. Schwartz alleged that pursuant to the agency agreement, it was entitled to indemnification from Fireman's Fund for the compensatory damages that could be awarded against it in Loomcraft's favor, and for Schwartz's reasonable attorney fees and costs expended in defending itself against Loomcraft's suit.

¶ 8 On June 2, 2015, Loomcraft moved for summary judgment against Schwartz. In response to Loomcraft's statement of uncontested facts in support of its summary judgment motion, Schwartz admitted that it confirmed that the Fireman's Fund policy included the same selling price endorsement as the Liberty Mutual Insurance policy. The trial court granted Loomcraft's motion on July 28, 2015, and entered judgment against Schwartz for $529,980.58, subject to reduction upon evidence of discounts and charges. On October 8, 2015, the trial court entered an agreed final judgment order requiring Schwartz to pay Loomcraft $519,910.58.

However, Loomcraft and Schwartz thereafter entered into a settlement agreement. On November 6, 2015, they requested that the trial court vacate its October 8, 2015, order and dismiss Loomcraft's suit with prejudice. The trial court granted the motion on December 3, 2015.

¶ 9 Meanwhile, on August 12, 2015, Fireman's Fund moved for summary judgment against Schwartz on Schwartz's amended third-party complaint. Fireman's Fund argued that the agency agreement's provisions were inapplicable because the trial court had found that Schwartz's negligence as an insurance broker caused Loomcraft's damages; Fireman's Fund argued that Schwartz was not acting as Fireman's Fund's agent when it engaged in the negligent conduct. The trial court denied the motion on March 15, 2016, finding that there was a question of fact as to the agency agreement's scope.

¶ 10 On May 25, 2016, Fireman's Fund again moved for summary judgment against Schwartz on Schwartz's amended third-party complaint. This time, it argued that the indemnity provision limited its obligation to its own acts and conduct, as opposed to negligence attributable to Schwartz. Fireman's Fund further argued that any attempt at succeeding in the indemnification claim required Schwartz to prove that Brennan failed to possess and exercise the minimum standard of knowledge and ability of an insurance underwriter, which required expert testimony.

¶ 11 In its response, Schwartz disputed that expert witness testimony was required, stating that a jury did not need to understand the technical points of underwriting, but rather just that the insurer knew that its customer's desired coverage was not included in the policy but failed to alert the producer or the insured.

¶ 12 The trial court granted Fireman's Fund's motion for summary judgment on June 16, 2016, stating that an expert witness was required.

¶ 13 Schwartz timely appealed.

¶ 14 II. ANALYSIS

¶ 15 This appeal comes before us on the trial court's grant of summary judgment for Fireman's Fund. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. A party moving for summary judgment can meet its initial burden of production by establishing that the nonmovant lacks sufficient evidence to prove an essential element of the cause of action. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. The trial court may grant such a motion only after the plaintiff has had the opportunity to establish its case. *Id.* We review *de novo* an order granting summary judgment. *Gurba*, 2015 IL 118332, ¶ 10.

¶ 16 Schwartz argues that the issue here is whether Fireman's Fund, through Brennan, could knowingly misrepresent the coverage that it was selling to Loomcraft. Schwartz points to evidence in the record that could be interpreted as Brennan telling Jacobs that Loomcraft's products would be subject to selling price coverage under the policy even when Brennan knew that they would not be. Schwartz argues that this conduct amounts to negligent misrepresentation. Schwartz points out that to sustain an action for negligent misrepresentation, the plaintiff must show: (1) a false statement of material fact; (2) carelessness or negligence by the speaker in determining the statement's truth; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the statement's truth; (5) damage to the other party

from the reliance; and (6) a duty on the party making the statement to communicate accurate information. *Auto-Owners Insurance Co. v. Konow*, 2016 IL App (2d) 150823, ¶ 7.

¶ 17 Schwartz notes that in *Rozny v. Marnul*, 43 Ill. 2d 54, 63-66 (1969), the supreme court allowed an action for negligent misrepresentation where the speaker was in the business of supplying information to guide others in their business transactions. Schwartz argues that such a standard employs an ordinary care test, which is provable without the need of an expert. Schwartz further cites *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 295 (2000), where the supreme court stated, "No expert testimony is required in a case of ordinary negligence." Schwartz argues that in a negligent misrepresentation case, the professional's skills are not at issue, but rather the truthfulness of the professional's statement. Schwartz asserts that the question is a simple one for the jury to resolve, especially here where Brennan admitted that he knew that the selling price coverage would not "come into play" even before the policy was issued, but repeatedly told Jacobs that it would.

¶ 18 Although the trial court granted summary judgment for Fireman's Fund on the basis that Loomcraft was required to provide expert testimony, we may affirm a grant of summary judgment on any basis in the record, regardless of whether the trial court relied on that basis. *Mitchell v. Village of Barrington*, 2016 IL App (1st) 153094, ¶ 25. Here, we conclude that Schwartz failed to state a claim for negligent misrepresentation. A negligent misrepresentation claim must include facts showing that the defendant owed the plaintiff a duty to communicate accurate information. *Kupper v. Powers*, 2017 IL App (3d) 160141, ¶ 40. " '[N]egligent misrepresentation actions are almost universally limited to situations involving a defendant who, in the course of his business or profession, supplies information for the guidance of others in their business relations with third parties.' " *Id.* (quoting *Hoover v. Country Mutual Insurance*

Co., 2012 IL App (1st) 110939, ¶ 40). Schwartz alludes to this requirement through its citation of *Rozny* but does not explicitly analyze the issue.

¶ 19 Fireman's Fund argues that Schwartz has forfeited the question of whether Fireman's Fund is in the business of supplying information, because Schwartz did not appeal the trial court's order which dismissed the original third-party complaint and answered this question in the negative. Fireman's Fund's argument is without merit, as the referenced order does not state the basis for the ruling, and, more significantly, the question before us is the grant of summary judgment on the amended third-party complaint, which we review *de novo*.

¶ 20 For a claim of negligent misrepresentation, the defendant has to be in the business of supplying information to guide others, in contrast to information that is supplied as ancillary to or in connection with the sale of merchandise or other matter. *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 168 (1997). *Hoover* provides insight into this analysis. There, the homeowners alleged that they told their insurance agent that they wanted sufficient insurance coverage to replace their home and its contents in the event of a loss, and that the agent assured them that the policy provided such coverage. *Hoover*, 2012 IL App (1st) 110939, ¶ 20. However, after an explosion, the insurance company stated that their policy had a liability limit of less than 80% of their home's actual replacement cost. *Id.* ¶ 17. The appellate court held that the homeowners had failed to allege facts to state a claim for negligent misrepresentation against the agent and the insurance company, because the defendants were not in the business of providing information to the homeowners for guidance in their business transactions, and any information provided was merely ancillary to the sale of homeowners' insurance. *Id.* ¶ 47; see also *University of Chicago Hospitals v. United Parcel Service*, 231 Ill. App. 3d 602, 606 (1992) (the insurer could not be held liable for negligent misrepresentation because an insurance

company is not in the business of supplying information for the guidance of others, but rather accepts risks in return for money).

¶ 21 Just as in *Hoover*, Fireman's Fund is in the business of selling insurance rather than in the business of supplying information, and any information that it does supply is in connection with the sale of insurance. Therefore, as in *Hoover*, Schwartz has failed to state a claim of negligent misrepresentation.

¶ 22 Schwartz argues that even if its allegations raise a claim of professional negligence rather than negligent misrepresentation, Illinois law still does not require it to retain an expert to prove its case. Schwartz recognizes that, in general, a plaintiff in a professional negligence case has the burden to establish the standard of care through expert witness testimony. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 20. This is because jurors, who are not skilled in the profession, are not otherwise equipped to judge the professional's conduct. *Id.* There are two exceptions to the rule, specifically where the professional's conduct is so grossly negligent, or the procedure is so common, that the jury can readily appraise it without expert testimony. *Id.*

¶ 23 Schwartz notes that the former exception of gross negligence has been applied to an attorney's failure to file an action before the statute of limitations had run (*House v. Maddox*, 46 Ill. App. 3d 68, 73 (1977)) and the failure to obtain service of process within a limitations period (*Gray v. Hallett*, 170 Ill. App. 3d 660, 664 (1988)). Schwartz argues that the jury here would face a set of facts that would even more clearly show misrepresentation, namely that Brennan repeatedly assured Jacobs that Fireman's Fund's insurance policy for Loomcraft included selling price coverage that would apply to Loomcraft's goods, even though Brennan knew that this was not true. Schwartz questions what an expert would add to this evidence, because the fact that an underwriter should correctly describe the coverage would already be apparent to the jury.

¶ 24 Schwartz analogizes this case to *Wheaton National Bank v. Dudek*, 59 Ill. App. 3d 970 (1978). There, the plaintiffs claimed that their insurance agent had negligently failed to obtain insurance for plaintiff's snowmobiles and trailer. *Id.* at 971. The court held that "an agent or broker who represents to an applicant that the applicant is insured has a duty to procure such insurance and is liable for any damages caused by the failure to do so. *** [E]xpert testimony is unnecessary to establish a standard of care." *Id.* at 973; see also *Lee v. Calfa*, 174 Ill. App. 3d 101, 110 (1988) ("[I]n an action against an insurance agent for damages sustained as a result of the agent's alleged failure to obtain proper insurance coverage, expert testimony [is] unnecessary to establish a standard of care."). Schwartz argues that while its cited cases were not against an insurance carrier, the premise is the same as the issue presented here. Schwartz argues that there is no qualitative difference between whether a producer is confirming coverage to an insured or an underwriter like Brennan is confirming coverage to a contracted agency.

¶ 25 We conclude that Schwartz's argument is not persuasive. The elements of a professional negligence action are: (1) the existence of a professional relationship; (2) a breach of duty arising from that relationship; (3) causation; and (4) damages. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 129 (2011). Assuming that a professional relationship exists here, the second element requires a breach of duty. A defendant breaches its duty by deviating from the applicable standard of care. *Rice v. White*, 374 Ill.App.3d 870, 886 (2007); see also *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 31 (professional negligence is a deviation from the standard of care). In professional negligence cases, the standard of care requires that the defendant act using the same degree of knowledge, skill, and ability as an ordinarily careful professional under similar circumstances. *Colburn*, 2012 IL App (2d) 110624, ¶ 37. As previously discussed, expert testimony is generally necessary to prove the standard of care in a

professional negligence case, except where the conduct is so grossly negligence or the procedure is so common that the jury can readily appraise it without expert testimony. *Studt*, 2011 IL 108182, ¶ 20.

¶ 26 In *House*, cited by Schwartz, the court stated that expert testimony was not required "where the record discloses obvious and explicit carelessness in defendant's failure to meet the duty of care owed by him to plaintiff." *House*, 46 Ill. App. 3d at 73. Although Schwartz cites caselaw that provides that expert testimony is not required to establish that an agent or broker is liable to the insured if he or she misrepresents that the insured is covered (see *Dudek*, 59 Ill. App. 3d at 973; see also 735 ILCS 5/2-2201 (West 2014) (an insurance producer shall exercise ordinary care and skill in procuring insurance coverage)), there is no corresponding caselaw or statute where the information is communicated from the insurer to the broker/producer.[1] In this manner, the "duty of care" owed from an insurer to the broker/producer is not established as a matter of law. Indeed, in contrast to the duty imposed on insurance brokers and producers acting as agents of the insured, there is generally no corresponding duty between the insurer and the insured. *Bovan v. American Family Life Insurance Co.*, 386 Ill. App. 3d 933, 939-40 (2008). This distinction highlights that there is no defined "duty of care" or "standard of care" regarding an insurer's representations about coverage to the broker/producer, and whether the insurer can expect that a broker/producer would rely solely on such representations without examining the policy itself. This is especially true considering that it is the broker who has the duty to the

[1] The term "insurance producer" can at times be understood to be referring to an insurance agent, an insurance broker, or both. *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 23. We include the term "producer" here because that is how Schwartz refers to itself.

insured to obtain the agreed-upon insurance coverage, and that the policy here did contain a type of selling price coverage, albeit one not ultimately applicable to Loomcraft's products. Expert testimony is generally necessary to prove the standard of care in a professional negligence case (*Studt*, 2011 IL 108182, ¶ 20), and this is not the type of straight-forward situation where an exception to this rule would apply. Accordingly, an expert would be necessary to testify regarding the standard of care applicable between an insurer and a broker/producer, and the trial court correctly granted summary judgment in Fireman's Fund's favor based on Schwartz's lack of an expert witness.

¶ 27 Based on our resolution of this case, we do not address Fireman's Fund's alternative arguments that summary judgment should also be affirmed because (1) Schwartz's own negligence was the superseding cause of Loomcraft's damages, and (2) the trial court's finding of broker negligence against Schwartz demonstrates that the indemnity provision is inapplicable, as the provision solely applies to Schwartz's conduct as an agent.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the Lake County circuit court's grant of summary judgment in Fireman's Fund's favor.

¶ 30 Affirmed.