Brief of Appellee Dan Churilla

IN THE INDIANA COURT OF APPEALS
CAUSE NO. 22A-CT-01897

CHRISTINE COSME and ROY COSME	)	**Appeal from Lake Superior Court No. 1**
Appellants,	)	**Trial Court Cause Number: 45D01-1803-CT-000039**
vs.	)	
DEBORA A. WARFIELD-CLARK, DAN CHURILLA dba CHURILLA INSURANCE, and ERIE INSURANCE,	)	**Hon. John M. Sedia, Judge**
Appellees.	)	

BRIEF OF APPELLEE DAN CHURILLA d/b/a CHURILLA INSURANCE

Respectfully submitted,

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STATEMENT OF ISSUE(S)

Appellee Dan Churilla ("Appellee Churilla") asks this Court to affirm the Lake Superior Court's June 15, 2022 *Order Granting Motions for Judgment on the Evidence* and August 1, 2022 *Order Denying Motion to Correct Error and Demand for New Trial*.

STATEMENT OF CASE

The Appellants originally filed this lawsuit on March 20, 2018.[1] Following subsequent amendments to the Appellants' pleading,[2] and other refinements to the parties' positions,[3] the cause was tried before a Hammond, Indiana jury in mid-June 2022.[4] After the close of the Appellants' case-in-chief on the third day of trial, Appellees Erie Insurance Exchange and Churilla orally moved the Court to enter judgments on the evidence in their favor pursuant to Trial Rule 50(A).[5] The Court granted those oral motions[6] and subsequently entered a written order that identified the controlling precedent and standards governing Rule 50(A)

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[1] *See* Appellants' App. Vol. II, pp. 39-47. Mindful of Ind. Appellate Rule 50(B)(3) admonition that "the appellee's Appendix shall not contain any materials already contained in appellant's Appendix, unless necessary for completeness or context[,]" Appellee Churilla has not duplicated any pleadings, filings, or orders from the case record in his own Appendix and has cited to such materials, pursuant to App. R. 46 & 22(C), using the page numbers in the Appellants' Appendix.

[2] *See, e.g.,* Appellee Churilla's App. Vol. II, pp. 2-13 (*Plaintiffs' Amended Complaint for Damages*).

[3] *See, e.g.*, Appellee Churilla's App. Vol. II, pp. 14-28 (*Defendant Churilla's Answer, Affirmative Defenses, and Jury Demand to Plaintiffs' Second Amended Complaint*); *id.* at pp. 55-75 (*Plaintiff's Final, Amended Final, and Second Amended Final Witness, Exhibit, & Contention Lists*); Appellants' App. Vol. II at pp. 188-91 (the parties' contentions as set forth in the Court's *Pretrial Order*).

[4] *See* Appellee Churilla's App. Vol. II, p. 48 (*Final Case Management Order (Jury Trial)*).

[5] Tr. Vol. II at pp. 156-63.

[6] Tr. Vol. II at pp. 162-64. Because the other defendant below, Appellee Debora A. Warfield Clark, never appeared in the cause and did not participate in the trial, after granting Appellees Erie Insurance Exchange's and Churilla's motions for judgment on the evidence, the Lake Superior Court indicated that unless the Court received a motion for default judgment or judgment on the evidence – or other instructions from the Appellants' and their counsel – the Appellants' claim(s) as to Appellee Warfield Clark could proceed when the jury returned the following morning. *See id.* at pp. 163-64. Because the record does not reflect any further proceedings or any motion practice or other election by the Appellants with respect to Appellee Warfield Clark, the Appellants' claims against Appellee Warfield Clark do not appear to have been adjudicated below.

determinations and then detailed the substantive grounds for its ruling:

> The evidence presented by the Cosmes[] in their case fails both quantitatively and qualitatively. Erie did not breach its contract of insurance with the Cosmes and neither Erie nor Churilla breached their duties of good faith and fair dealing. Erie sent a notice to the Cosmes that their insurance policy would be cancelled thirty days after the date of the notice if Broyce Cosme were not removed from the policy as an insured driver. Roy Cosme did not wish to do so. He wanted to expunge Broyce Cosme's false suspended license, the reason given for the notice, to prevent him from losing coverage. Churilla advised him that the only sure way to insure no cancellation of the policy was to remove Broyce from the policy and work on reinstating him or obtaining other insurance for him later. The Cosmes had ample time to do so. They chose not to do so. The policy was cancelled and no coverage was afforded for the wreck with the uninsured motorist Warfield Clark. Although Churilla continued to work with them to prevent the cancellation and, even after cancellation, lobbied for coverage with Erie to cover the Warfield Clark wreck, their efforts to prevent the cancellation and cover the wreck were unsuccessful. Erie, on their part, never wavered from their position that the Cosmes had to remove Broyce as an insured driver in order to avoid cancellation. The policy game them the right to do so based upon the information in their possession.
> . . . .
> In a nutshell, according to the testimony of Roy Cosme, the Cosmes received the thirty-day notice, they contacted Erie, Erie referred them to their agent, Churilla, whose employee, Janine Aguilar, advised him that to avoid cancellation of the policy, he needed to execute the form removing Broyce as a driver under the policy. This fulfilled Churilla's duty . . . . The Cosmes chose not to do so. This decision, notwithstanding what Churilla or Erie did or did not do or what the Cosmes' expert opined as to what they should have done or should not have done, brought about all the troubles that flowed from the unanticipated wreck with the uninsured Warfield Clark.[7]

[7] Appellants' App. Vol. II at 131-33. To avoid any possible confusion, the above-referenced apparent non-resolution of the Appellants' claims against Appellee Warfield Clark does not affect the Court's exercise of appellate jurisdiction pursuant to App. R 5(A) because the Lake Superior Court's written order contained Ind. Trial Rule 54(B) finality language. *See id.* at 133.

The Appellants then brought a timely *Motion to Correct Error and Demand for New Trial*,[8] to which Appellee Churilla responded in writing.[9] On August 1, 2022, the Lake Superior Court denied the Appellees' Rule 59 motion, stating:

> The Court remains unpersuaded that any of the evidence presented at trial would allow reasonable people to differ that the choice by the Plaintiff, Roy Cosme, not to remove Broyce Cosme as a driver under the policy to avoid cancellation of the policy after being timely advised to do so obviated all claims for damages under any theory of recovery against Churilla and Erie.[10]

The cause is now before this Court on the Appellants' *Notice of Appeal*.[11]

[8] Appellants' App. Vol. II at 134-83 (including attachments)

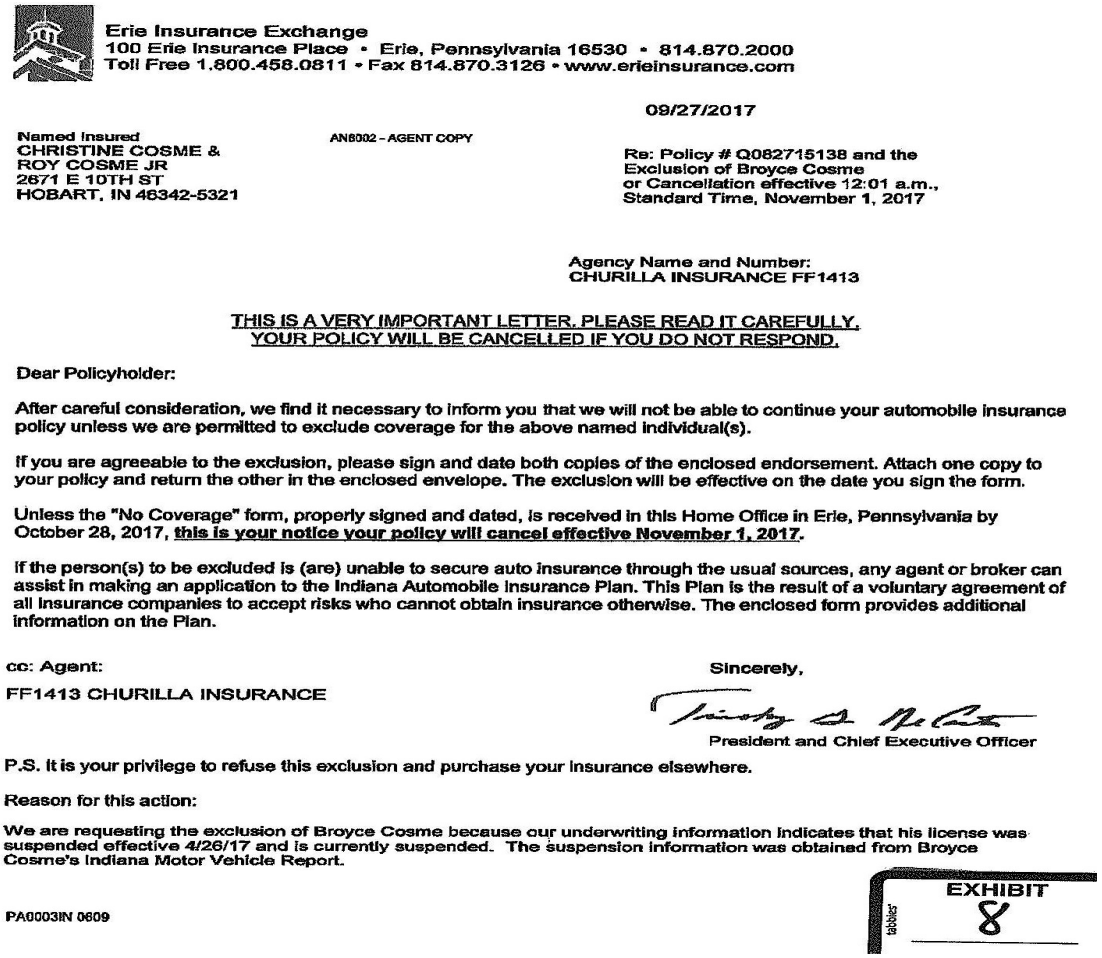
[9] Appellee Churilla's App. Vol. II at 85-93.

[10] Appellants' App. Vol. II, pp. 184-85.

[11] Appellee Churilla's App., Vol., II, pp. 94-96. Appellee Churilla observes, however, that the *Notice of Appeal*'s certificate of service does not reflect any service upon Appellee Warfield Clark. *See* App. R. 9(F)(10) & 24.

STATEMENT OF FACTS

In approximately the first week of October, 2017,[12] the Appellants received correspondence dated September 27, 2017 from Erie Insurance Exchange informing them that their automobile insurance policy would be cancelled effective November 1, 2017 unless they agreed to exclude coverage for their son Broyce Cosme whose license had been suspended months earlier:



Erie Insurance Exchange
100 Erie Insurance Place • Erie, Pennsylvania 16530 • 814.870.2000
Toll Free 1.800.458.0811 • Fax 814.870.3126 • www.erieinsurance.com

09/27/2017

Named Insured
CHRISTINE COSME &
ROY COSME JR
2671 E 10TH ST
HOBART, IN 46342-5321

AN6002 - AGENT COPY

Re: Policy # Q082715138 and the
Exclusion of Broyce Cosme
or Cancellation effective 12:01 a.m.,
Standard Time, November 1, 2017

Agency Name and Number:
CHURILLA INSURANCE FF1413

THIS IS A VERY IMPORTANT LETTER. PLEASE READ IT CAREFULLY.
YOUR POLICY WILL BE CANCELLED IF YOU DO NOT RESPOND.

Dear Policyholder:

After careful consideration, we find it necessary to inform you that we will not be able to continue your automobile insurance policy unless we are permitted to exclude coverage for the above named individual(s).

If you are agreeable to the exclusion, please sign and date both copies of the enclosed endorsement. Attach one copy to your policy and return the other in the enclosed envelope. The exclusion will be effective on the date you sign the form.

Unless the "No Coverage" form, properly signed and dated, is received in this Home Office in Erie, Pennsylvania by October 28, 2017, this is your notice your policy will cancel effective November 1, 2017.

If the person(s) to be excluded is (are) unable to secure auto insurance through the usual sources, any agent or broker can assist in making an application to the Indiana Automobile Insurance Plan. This Plan is the result of a voluntary agreement of all insurance companies to accept risks who cannot obtain insurance otherwise. The enclosed form provides additional information on the Plan.

cc: Agent:
FF1413 CHURILLA INSURANCE

Sincerely,

President and Chief Executive Officer

P.S. It is your privilege to refuse this exclusion and purchase your insurance elsewhere.

Reason for this action:

We are requesting the exclusion of Broyce Cosme because our underwriting information indicates that his license was suspended effective 4/26/17 and is currently suspended. The suspension information was obtained from Broyce Cosme's Indiana Motor Vehicle Report.

PA0003IN 0609

EXHIBIT
8

[12] *See* Tr. Vol I, p. 73/2-4; *id.* at p. 105/7-10; *id.* at pp. 35/21-23; *id.* at p. 49/9-12.

After reading the letter – the face of which references the imminent cancellation of the Appellants' automobile policy no fewer than three times – Appellant Roy Cosme was well-aware that this was a "major issue."[13] The Appellants, however, did not return the signed exclusion form until almost a week after Appellee Erie Insurance Exchange cancelled the policy effective 12:01 a.m. on November 1, 2017.[14]

The Appellants' lawsuit contends that fault for the cancellation – and an uninsured loss that occurred during a lapse in coverage – lies with Defendant Churilla. A little over a year earlier, in August 2016, the Appellants had transferred their personal-line property and casualty insurance policies from Allstate Insurance to Appellee Erie Insurance Exchange, in order to give business to their son, Nick Cosme, who was at that time working with Defendant Churilla.[15] Between the date of issuance of their initial policy with Appellee Erie Insurance Exchange and their receipt of the September 27, 2017 correspondence, the Appellants had had little-to-no contact or communications with Defendant Churilla; the only such contact might have been a call in the summer of 2016 about removing from the policy a vehicle that the Appellants had sold a month or so earlier.[16] And, although Appellant Christine Cosme primarily handled the family's insurance matters – and had been the one who had worked with

[13] Tr. Vol. I, p. 105/15 – 106/9; *id.* at 108/8-11.

[14] Tr. Vol. I, p. 243/16-17.

[15] Tr. Vol. I., p. 68/1-18; *see also id.* at p. 70/6-12.

[16] Tr. Vol. I, p. 75/24-25; *see also id.* at p. 100/12-15; *id.* at p. 108/12-20; *id.* at p. 102/9-15; Tr. Vol. I, p. 229/16/17-20. *But cf.* Tr. Vol. II, pp. 154/23 – 155/2 (Appellant Christine Cosme not recalling the removal-of-vehicle-from-policy contact).

their son and had signed the original application for the policy with Appellee Erie Insurance Exchange[17] – she expected Appellant Roy Cosme to handle the issue presented by Broyce's license suspension and the September 27, 2017 correspondence.[18]

On October 26, 2017 – approximately three weeks after receiving the correspondence from Appellee Erie Insurance Exchange and less than 48 hours before the deadline to avoid cancellation identified in that letter – Appellant Roy Cosme contacted Appellant Churilla for the first time ever – about this issue or any other.[19] In fact, however, he did not actually pick up the phone and call Appellant Churilla; instead, he called the customer service number for Appellee Erie Insurance Exchange and was subsequently transferred to Appellant Churilla, where he spoke with Janine Aguilar.[20]

Appellee Churilla fully acknowledges that there are discrepancies between Appellant Roy Cosme and Janine Aguilar's trial testimonies (or at least the selected portions of Ms. Aguilar's videotaped discovery-deposition testimony that the Appellants played for the jury during their case-in-chief) about some aspects of what the two discussed during that October 26, 2017 telephone call.[21] There is no dispute, however, that, at the very beginning of that call, Ms. Aguilar recommended to Appellant Roy Cosme that the Appellants sign the exclusion form and then subsequently work on resolving Broyce's license status and seeing about getting

[17] Tr. Vol. I p. 99/23 – 100/11.

[18] Tr. Vol. II, p. 151/21-25

[19] Tr. Vol. I., pp. 108/21 – 109/2; *id.* at p. 77/18-20; *id.* at p. 136/22-24.

[20] Tr. Vol. I, p. 75/1-9; *id.* at p. 110/11-16.

[21] *Compare*, *e.g.*, Tr. Vol. 1, pp. 76/1 – 78/6 *with id.* at pp. 188/21 – 189/4.

him reinstated on the policy.[22] And there is also no dispute that the same afternoon, Ms. Aguilar sent an email to Appellee Erie Insurance Exchange's underwriter assigned to Appellee Churilla's office:

From: Janine Aguilar [mailto:janine.churillainsurance@outlook.com]
Sent: Thursday, October 26, 2017 4:59 PM
To: Malena, Megan
Cc: FF1413
Subject: Fw: Q32 2751098 CHRISTINE COSME 2nd REQ D 10/30

Hi Megan,

Roy Cosme called in today to say the Broyce's suspension was an error. He was in the back seat of a car where the driver had an incident and the police report was wrong. The suspension has been reversed and they are reimbursing him his money. His license should now show valid.

Please let me know that the policy will not be cancelled on November 1st.

Thanks,

After the underwriter responded the following day that the Indiana BMV records still showed Broyce Cosme's license to be suspended, Ms. Aguilar contacted Appellant Roy Cosme seeking documentation – exactly what she requested is another topic of dispute – but did not receive anything that day because Broyce Cosme made a mistake when typing her email address and, because he did not regularly check his email, and had thousands of unread emails

[22] *See* Tr. Vol. I, p. 76/18-23; *id.* at pp. 131/17-20.

sitting in his inbox, did not discover that his email to Ms. Aguilar had bounced back until she circled back to Appellant Roy Cosme looking for it the following Monday.[23]

Nor is there any dispute that, on the afternoon of October 31, 2017, after Ms. Aguilar received the underwriter's final response, which indicated that only the receipt of a signed exclusion that day would prevent the policy's cancellation, she called and left voice mail messages for both Appellant Roy Cosme and Broyce Cosme – the two people with whom she had communicated on this issue – and sent an email to Broyce Cosme – the only person affiliated with the Appellants with whom she had exchanged email correspondence.[24] Unfortunately, however, neither Appellant Roy Cosme nor Broyce Cosme received and/or reviewed any of those communications that afternoon or evening; Broyce, again, apparently did not check email – or review voicemails unless they came from a known contact[25] -- and Roy testified that he did not receive Ms. Aguilar's message the day of her call and that it was not until he rebooted his phone several days later, after receiving correspondence confirming the cancellation of their insurance, that the voicemail first appeared on his older-model iPhone.[26, 27]

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[23] *See* Tr. Vol. I, pp. 38/23 – 39/3; *id.* at p. 39/22 – 40/3; *id.* at p. 52/6-15; *id.* at p. 52/16-23; *id.* at p. 56/13-21.

[24] *See* Tr. Vol. I, p. 199/21-23.

[25] Tr. Vol. I, p. 53/5-19; *id.* at p. 59/3-10.

[26] Tr. Vol. I, pp. 85/18 – 87/7; *id.* at pp. 119/25 – 120/25.

[27] Because the undisputed facts regarding the limited-at-best relationship between the Appellants and Appellee Churilla lie at the core of the issues this Court will need to evaluate in reviewing the Lake Superior Court's judgment on the evidence in Appellee Churilla's favor, this Brief will not be unnecessarily lengthened with point-by-point refutation of every asserted fact or "spin" in the

SUMMARY OF ARGUMENT

The Lake Superior Court correctly entered judgment on the evidence in favor of Appellee Churilla because the Appellants' evidence was insufficient as a matter of law to sustain all the required elements of any of the claims they had asserted. The trial court acted well within its discretion when it concluded that the Appellants' evidence would not permit reasonable inferences necessary for a jury to find that any fault on the Appellees' part was a proximate cause of the Appellants' claimed injuries. Moreover, the judgment on the evidence was independently justified because Appellee Churilla neither owed the Appellants a duty of care under the controlling Indiana precedent, which recognizes such duties only in the context of agreements to procure insurance for a client or when there is a "special relationship" beyond that typically found between an insurance agent and client, neither of which were suggested by the evidence introduced at trial. That evidence was also insufficient to support any assertion that Appellee Churilla had otherwise assumed a duty of care vis-à-vis the Appellants. The Lake Superior Court thus correctly concluded that the inferences required for the Appellants to recover could not logically be drawn from evidence introduced and therefore appropriately entered judgment on the evidence pursuant to Trial Rule 50(A). This Court should affirm that judgment.

Appellants' Statement of Facts about this melodrama of a case. With respect to "evidence" outlined in the Appellants' Brief to which the trial court actually sustained an objection – *see, e.g., Brief of Appellants* at 22; Tr. Vol. I, p. 162/2 – 163/3 – however, Appellee Churilla will simply note that "this Court understandably presumes that a trial court's ruling is based only on cognizable and admissible evidence." *Purcell v. Old Nat'l Bank*, 972 N.E.2d 835, 841, n.4 (Ind. 2012).

ARGUMENT

A. This Court Applies Abuse-of-Discretion Review to the Challenged Rulings.

Because "[a] trial court is vested with broad discretion to determine whether it will grant or deny a motion to correct error,"[28] trial-court rulings on Rule 59 motions are "cloaked in a presumption of correctness[,]"[29] and this Court reviews such determinations only for abuse of that discretion, *i.e.*, whether the "decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences therefrom."[30] The Indiana appellate courts similarly apply abuse-of-discretion review to trial court's Trial Rule 50(A) determinations.[31]

B. The Lake Superior Court Did Not Abuse Its Discretion in Entering Judgment on the Evidence for Appellee Churilla.

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[28] *Jones v. Jones*, 866 N.E.2d 812, 814 (Ind. Ct. App. 2007).

[29] *Id.* (emphasis added).

[30] *Id.* In evaluating whether the trial court's decision constituted an abuse of discretion, this Court generally employs as a lens the standard of review applicable to the underlying ruling challenged in the motion to correct error. *See Luxury Townhomes, LLC v. McKinley Props.*, 992 N.E.2d 810, 815 (Ind. Ct. App. 2013) (applying two-tiered standard of review applicable when a trial court enters findings of fact and conclusions pursuant to a party's request under Ind. Trial Rule 52); *Shane v. Home Depot USA, Inc.*, 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007) (applying deferential standard applicable to determination whether to set aside default judgment); *Life v. F.C. Tucker Co., Inc.*, 948 N.E.2d 346, 349-50 (Ind. Ct. App. 2011) (applying summary-judgment standard).

[31] *See Drendall Law Office, P.C. v. Mundia*, 136 N.E.3d 293, 304 (Ind. Ct. App. 2019) ("[T]he grant or denial of a Trial Rule 50 motion is within the broad discretion of the trial court and will be reversed only for an abuse of discretion." (*citing Hill v. Reinhart*, 45 N.E.3d 427, 435 (Ind. Ct. App. 2015)); *see also Purcell*, 972 N.E.2d at 837 ("The issue presented in this case is whether the trial court abused its discretion under Rule 50(A) in its determination that the evidence presented . . . was insufficient to merit presentation of the evidence to the jury." (emphasis added)); *see also id.* at 842 ("[T]he Court cannot say that the trial court abused its discretion in determining that Purcell's inference of fraud could not be found by a reasonable jury without engaging in undue speculation." (emphasis added)).

In relevant part, Rule 50(A) reads:

> **Judgment on the Evidence – How Raised – Effect**. Where all or some of the issues in a case tried before a jury or an advisory panel are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence: (1) after another party carrying the burden of proof or of going forward with the evidence upon one or more issues has completed presentation of his evidence thereon . . . . or (6) The trial court upon its own motion may enter such a judgment on the evidence at any time before final judgment[.][32]

Indiana trial courts' Rule-50(A)-stage sufficiency-of-the-evidence determinations are both different[33] and analytically distinct from their Rule-56/summary-judgment-stage determinations.[34] This Court has characterized the claimant's burden at the Rule-50(A) stage as "higher . . . than at the summary judgment stage."[35]

> The purpose of a party's motion for judgment on the evidence under Rule 50(A) is to test the sufficiency of the evidence presented by the non-movant.

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[32] Ind. Trial Rule 50(A).

[33] *See Think Tank Software Dev. Corp. v. Cheste, Inc.*, 30 N.E.3d 738, 745 (Ind. Ct. App. 2015) ("[T]he procedural standards for summary judgment and judgment on the evidence are fundamentally different.").

[34] *See Purcell*, 972 N.E.2d at 841 ("Unlike a motion for summary judgment under Rule 56, the sufficiency test of Rule 50(A) is not merely whether a conflict of evidence may exist, but rather whether there exists probative evidence, substantial enough to create a reasonable inference that the non-movant has met his burden." (emphasis added)).

[35] *Denman v. St. Vincent Med. Group, Inc.*, 176 N.E.3d 480, 492 n.5 (Ind. Ct. App. 2021). *Cf. Think Tank*, 30 N.E.3d at 746 ("Therefore, the same evidence that allowed Think Tank to defeat a summary judgment motion could be insufficient to overcome a motion for directed verdict. Thus, Think Tank cannot argue that – in defeating the defendant's summary judgment motion – it has also automatically defeated a motion for directed verdict.").

> In *American Optical* [*v. Wiedenhamer*[36]], this Court articulated the means by which a trial court may determine whether evidence is "sufficient" to survive a motion for judgment on the evidence. In that case, this Court stated that determining whether evidence was sufficient "requires both a quantitative and a qualitative analysis." Evidence fails quantitatively only if it is wholly absent; that is, only if there is no evidence to support the conclusion. If some evidence exists, a court must then proceed to the qualitative analysis to determine whether the evidence is substantial enough to support a reasonable inference in favor of the non-moving party.
>
> "Qualitatively, . . . [evidence] fails when it cannot be said, with reason, that the intended inference may logically be drawn therefrom; and this may occur either because of an absence of credibility of a witness or because the intended inference cannot be drawn therefrom without undue speculation." The use of such words as "substantial" and "probative" are useful in determining whether evidence is sufficient under the qualitative analysis.[37] Ultimately, the sufficiency analysis comes down to one word: "reasonable."
>
> By its express language, Rule 50 acknowledges that a party must do more than simply present *some* evidence; in addition that evidence must also be *sufficient* evidence. . . .The crux of the qualitative failure analysis under Rule 50(A) is "whether the inference the burdened party's allegation are true may be drawn without undue speculation."[38]

As such, when "the plaintiff fails to present sufficient, probative evidence as to a necessary

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[36] 457 N.E.2d 181 (Ind. 1983).

[37] *See American Optical*, 457 N.E.2d at 184 (opining that those value-laden words "are useful in articulating the methodology, because they focus our attention upon the qualitative aspects of the issue and succor objectivity where subjectivity is wont to go."). *See also id.* (characterizing the purpose of the qualitative analysis as "determining whether or not it can be said, with reason, that [the purpose for which the evidence was proffered] was thereby fulfilled. If opposite conclusions could, with reason, be drawn, then it cannot be said that the evidence was insufficient." (emphasis added)).

[38] *Purcell,* 972 N.E.2d at 839-41 (citations omitted, italicized emphasis in original, underlined emphasis added).

element of a claim, the trial judge is within his or her discretion to issue judgment on the evidence pursuant to Rule 50(A)," and, in so doing, "helps to ensure the proper administration of our laws with the added benefit of preserving judicial economy."[39]

By focusing their Brief essentially exclusively on the sufficiency of their evidence as to their pared-down list of theories of recovery against the Appellees, the Appellants substantially overlook and fail to engage with the trial court's identified basis for its entry of judgment for the Appellees. The Lake Superior Court entered judgment because it perceived the evidence as both quantitatively and qualitatively insufficient to support a conclusion that any wrongdoing by the Appellees was the proximate cause of the Appellants' woes – which is an "essential element" of all of the Appellants' claims and thus an entirely independent and sufficient basis for a Rule 50(A) adjudication.[40] "Proximate cause requires that there be a reasonable connection between the defendant's allegedly negligence conduct and the plaintiff's damages [and] requires, at a minimum, that the harm would not have occurred but for the defendant's conduct."[41] And, although ordinarily an issue for the factfinder to determine, proximate cause can be resolved as a question of law when the relevant facts are undisputed and lead to only a single inference or conclusion."[42]

The trial court's June 15, 2022 *Order* assumed, presumably *ad arguendo*, that the

[39] *Id.* at 842.

[40] *See Drendall Law Office*, 136 N.E.3d at 305-08.

[41] *Gates v. Riley ex rel Riley*, 723 N.E.2d 946, 950 (Ind. Ct. App. 2000) (citations omitted).

[42] *Wilson v. Lawless*, 64 N.E.3d 838, 848-49 (Ind. Ct. App. 2016).

Appellants' evidence might have permitted a finding of fault as to one or both Appellees; the trial court nevertheless entered judgment for the Appellees because it determined that, "notwithstanding what Churilla or Erie did or did not do or what the Cosmes' expert opined as to what they should have done or should not have done[,]"[43] the Appellants' choice to ignore Ms. Aguilar's recommendation to execute the exclusion "brought about all the troubles that flowed from" subsequent events. The trial court's rationale has not changed since the afternoon of the third day of trial.[44] It found the Appellants' evidence insufficient to demonstrate that it was more probable than not that the Appellants' claimed injuries stemmed from their interactions with Appellee Churilla rather than their decision to ignore both the directions in Appellee Erie Insurance Exchange's September 27, 2017 correspondence and the recommendation from Ms. Aguilar. Stated otherwise, the trial court's June 15, 2022 *Order* reflects its conclusion that there was insufficient evidence of probative value to demonstrate the proximate-cause element of the Appellants' claims because the evidence "fail[ed] to create a reasonable inference of [that] ultimate fact, [and] merely le[ft] the possibility of its existence open for surmise, conjecture or speculation."[45] The arguments articulated in the Appellants' brief, however address – exclusively or nearly exclusively – entirely distinct questions about

[43] Appellants' App. Vol. II, p. 133 (emphasis added).

[44] *See id.* at 184 (explaining, again, in denying the Appellants' *Motion to Correct Error* that it had entered judgment because it had concluded that reasonable people could not disagree that Appellant Roy Cosme's "choice . . . not to remove Broyce Cosme as a driver under the policy to avoid cancellation of the policy after being timely advised to do so obviated all claims for damages under any theory of recovery against Churilla and Erie.").

[45] *Court View Centre, L.L.C. v. Witt*, 753 N.E.2d 75, 81 (Ind. Ct. App. 2001).

whether the Appellants' asserted causes of action against the Appellees hold water. The Lake Superior Court' own rationale for entering judgment fell well within its discretion because, for the reasons the court itself outlined – and which nothing in the nearly 50-page Appellants' Brief rebuts directly – on the evidence introduced during the Appellants' case-in-chief, a proximate-cause finding favorable to the Appellants could not be reasonably reached without undue speculation.

C. *The Lake Superior Court's Judgment on the Evidence for Appellee Churilla Was Independently Correct Because Appellee Churilla Owed the Appellants No Applicable Duty of Care*.[46]

> In any negligence action, there are three elements a plaintiff must prove in order to recover: (1) the defendant owed the plaintiff a duty to conform his or her conduct to a standard of care arising from a relationship with the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach of that duty proximately caused an injury to the plaintiff.[47]

When the undisputed material facts negate at least one element of the plaintiff's claim, the

[46] Although the Appellants argued below that they also had viable causes of action against Appellee Churilla for both breach of contract and breach of the duty of good faith and fair dealing (the latter of which they had not even asserted against Defendant Churilla in their *Second Amended Complaint*), their Brief to this Court appears to exclusively argue that the trial court should have allowed them to proceed on a negligence claim against Appellee Churilla, thereby waiving any other claim. In an abundance of caution prompted by the lack of any express acknowledgement by the Appellants that they have abandoned the other claims, however, Appellee Churilla reiterates that the Appellants never had a cognizable claim against him for breach of their insurance contract with Appellee Erie Insurance Exchange, which the Appellants understood to be a contract with the insurer and not Appellee Churilla, *see, e.g.,* Tr. Vol. I, pp. 103/22 – 104/20; *see also Carlson Wagonlit Travel, Inc. v. Moss*, 788 N.E.2d 501, 503-04 (Ind. Ct. App. 2003) (known agent not bound by contract entered into on behalf of principal), and otherwise incorporates the arguments he articulated below as to why the Appellants' other asserted causes of action were unsustainable. *See, e.g.*, Tr. Vol. II, pp. 156/10 – 158/19; *id.* at pp. 161/11-24; 162/10-21; Appellee Churilla's App., Vol. II, pp. 89-90.

[47] *Brennan v. Hall*, 904 N.E.2d 383, 386 (Ind. Ct. App. 2009).

defendant is entitled to judgment as a matter of law.[48]

As is the case with any duty, the existence of which often turns upon what are fundamentally policy determinations,[49] the existence and nature of duties that may arise in the context of dealings between an insured (or prospective insured) and insurance agent are generally questions for the trial court itself to decide as a matter of law.[50] And, in this particular context of the legal duties applicable to insurance agents, the Indiana appellate courts have repeatedly highlighted a desire to avoid "transform[ing] insurance companies from a competitive industry 'into personal financial counselors or guardians of the insured, a result we believe goes well beyond anything required by law or dictated by common sense."[51] The Appellants' Brief's effort to address the relevant questions in five individual sub-arguments also substantially overcomplicates[52] the analysis insurance agents' duties under Indiana law,

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[48] *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 430 (Ind. Ct. App. 2006).

[49] *See, e.g. Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991) ("Duty is not sancrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." (*quoting* PROSSER & KEETON ON TORTS § 53 (5th ed. 1984)).

[50] *See United Farm Bureau Mut. Ins. Co. v. Cook*, 463 N.E.2d 522, 527 (Ind. Ct. App. 1984) ("The question of whether a particular defendant owes the plaintiff a duty is a question of law. Therefore, it was not an encroachment on the jury's function for the trial court to resolve the issue."); *American Family Mut. Ins. Co. v. Dye*, 634 N.E.2d 844, 848 (Ind. Ct. App. 1994) ("Whether an insurance agent owes the insured a duty to advise is likewise a question of law for the court."). But when the nature of the relationship between the insurance agent and client "turn[s] on factual issues that must be resolved by the trier of fact[,]" the duty question can become "a mixed question of law and fact." *Ind. Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 27 N.E.3d 260, 264-65 (Ind. 2015).

[51] *Parker v. State Farm Mut. Ins. Co.*, 630 N.E.2d 567, 570 n.4 (Ind. Ct. App. 1994) (internal quotations omitted). *See also Myers v. Yoder*, 921 N.E.2d 880, 889 (Ind. Ct. App. 2010).

[52] In particular, the Appellants are off-base with their suggestion, *see Brief of Appellants* at 42-43, that Appellee Churilla's alleged advice and advocacy on the exclusion issue gave rise to a duty

which boil down to (a) a general duty of care in the procurement context alone in the ordinary insurance-agent/client relationship and (b) a heightened duty, including a duty to advise, only when there are special circumstances to the relationship between client and agent – and "which duty governs in a particular case is a matter of law."[53]

Although an insurance agent "who undertakes to procure insurance for another owes that person or entity a general duty to exercise reasonable care, skill and good faith diligence in obtaining the insurance[,]"[54] "[a]n insurance agent's duty does not extend beyond merely

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and citation of *Borjab v. John Carr Agency*, 597 N.E.2d 376 (Ind. Ct. App. 1992), in support of that claim. *Borjab* is a failure-to-procure-insurance case; in fact, the footnote to which the Appellants cite is preceded by the words "Borjab initiated this lawsuit against Carr for damages allegedly suffered by Carr's negligent failure to procure insurance for Borjab's 1988 Pontiac." *Id.* at 378 (emphasis added). The language the Appellants cite from *Borjab* – which references "effecting insurance" (emphasis added) and the corresponding duty of notification "if insurance cannot be obtained" (emphasis added) – cites *Town & Country Mutual Insurance Co. v. Savage*, 421 N.E.2d 704 (Ind. Ct. App. 1981), which is itself another failure-to-procure case that relies primarily upon the holding in *Bulla v. Donahue*, 366 N.E.2d 233, 236 (Ind. Ct. App. 1977), which, in turn, is one of the seminal failure-to-procure-insurance cases. *See Savage*, 421 N.E.2d at 707. Appellee Churilla thus addresses the substance of Appellants' Argument II(B) as part of his discussion below of the Appellants' assumed-duty argument, which seems where that analysis more logically fits.

[53] *Filip v. Block*, 879 N.E.2d 1076, 1085 (Ind. 2008).

[54] *Meridian Title Corp. v. Gainer Group, LLC*, 946 N.E.2d 634, 637 (Ind. Ct. App. 2011) (emphasis added). In other words, the parties' agreement gives rise to a "duty to obtain insurance" and a closely related "duty to inform the principal if [the insurance agent] is unable to procure the requested insurance." *Brennan*, 904 N.E.2d at 386 ("If the agent undertakes to procure the insurance and through fault and neglect fails to do so, the agent or broker may be liable for breach of contract or for negligent default in the performance of the duty to obtain insurance." (emphasis added)). *See also Anderson Mattress Co. v. First State Ins. Co.*, 617 N.E.2d 932, 938-38 (Ind. Ct. App. 1993) ("Indiana law requires an agent retained to procure insurance for another to use reasonable kills, care, and diligence to obtain the desired insurance. An agent may thus be held to answer in damages if his principal suffers a loss after the agent has failed to obtain insurance." (emphasis added). The decisional precedent observes that because the duty to procure arises in a contractual context, "[t]he action against the agent may be for breach of contract or for negligent default in the performance of a duty imposed by contract." *Bulla*, 366 N.E.2d at 236.

procuring insurance for the insured unless the insured can establish the existence of an intimate-long-term relationship with the agent, or some other special circumstance."[55] Even the duty of good faith and fair dealing that Indiana law implies on the part of an insurer party to an insurance contract[56] lies outside the scope of an insurance agent's limited duty.[57]

The client who claims that his, her, or its insurance agent owed additional duties beyond obtaining insurance shoulders the burden of proving with probative evidence that he, she, or it had something beyond "a typical agent-insured relationship"[58] with the insurance agent or broker.[59] Stated otherwise, such heightened duties require evidence of "something more than the standard insured-insurer relationship."[60] And, "[i]n this state . . . the agent's duty extends to the provision of advice only upon a showing of an intimate long term relationship between

[55] *Meridian Title*, 946 N.E.2d at 637 (emphasis added); *see also id.* at 639 ("[A]n insurance agent's duty does not extend beyond the general duty to exercise reasonable care, skill and good faith diligence in obtaining a policy of insurance unless the evidence, through certain factors as set forth above, establishes a special relationship." (emphasis added)).

[56] *See, e.g.*, *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993).

[57] *Meridian Title*, 946 N.E.2d at 639. *See also Schwartz v. State Farm Mut. Ins. Co.*, 174 F.3d 875, 878-79 (7th Cir. 1999) ("The Schwartzes have not cited a single case from any jurisdiction, let alone Indiana, which has recognized individual liability for bad faith denial of an insurance claim."); *Priddy v. Atl. Specialty Ins. Co.*, 468 F.Supp.3d 1030, 1047 (N.D. Ind. 2020) (referencing black-letter legal principle "that tortious bad faith claims may not be asserted against an agent, independent adjuster, or independent adjusting company").

[58] *Ind. Restorative Dentistry*, 27 N.E.3d at 266. *See also Myers*, 921 N.E.2d at 885 ("In other words, something more than the standard insurer-insured relationship is required to create a special relationship obligating the agent to advise the insured about coverage." (emphasis added).

[59] *See, e.g., Meridian Title*, 946 N.E.2d at 637 ("The burden of establishing an intimate long-term relationship or other special circumstance is on the insured.").

[60] *Craven v. State Farm Mut. Ins. Co.*, 588 N.E.2d 1294, 1297 (Ind. Ct. App. 1992) (*quoting Nelson v. Davidson*, 456 N.W.2d 343, 347 (Wisc. 1990)).

the parties or some other special circumstance."[61] To "establish an agent 'plus' relationship . . . [a]t a minimum, the insured and insurer must be engaged in a long-term relationship for the purpose of securing insurance coverage."[62] But, while "[a]ll special relationships are long-term, . . . not all long-term relationships are special"[63] because "it is the *nature* of the relationship and not merely the number of years associated therewith, that triggers the duty to advise."[64] Over almost the past half-century:

> [This Court] has consistently relied on four factors beyond mere duration to identify a special relationship: whether the agent
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> (1) Exercise[es] broad discretion to service the insured's needs, (2) counsel[s] the insured concerning specialized insurance coverage; (3) hold[s] oneself out as a highly-skilled insurance agent, coupled with the insured's reliance upon the expertise; and (4) receiv[es] compensation above the customary premium paid, for the expert advice provided.[65]

The general duty of care applicable in the agreement-to-procure-insurance context is simply not germane to this case, where the Appellants had already obtained[66] a policy with Appellee Erie Insurance Exchange, which policy had, in fact, automatically renewed a few

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[61] *Craven*, 588 N.E.2d at 1297; *see also id.* at 1297, n. 5 (observing that, although courts nationwide may not have "reached agreement" on this "infrequently litigated issue," "the law in Indiana is settled: an insured must demonstrate some type of special relationship for a duty to advise to exist.").

[62] *Parker*, 630 N.E.2d at 569.

[63] *Ind. Restorative Dentistry*, 27 N.E.3d at 265.

[64] *Parker*, 630 N.E.2d at 569.

[65] *Ind. Restorative Dentistry*, 27 N.E.3d at 265.

[66] *See Burwell v. State*, 524 N.E.2d 817, 818 n.2 (Ind. Ct. App. 1988) (observing that the *Black's Law Dictionary* definitions of "obtain," "procure," and "acquire" are essentially synonymous that the terms are used as such in the context of procuring insurance).

months earlier. The Appellants' attempt to stretch this "general duty" to cover the facts and circumstances in this litigation lacks any sufficient purchase in Indiana precedent, which has never found a duty of care arising under comparable circumstances. In fact, where decisional precedent has, via obiter dictum, imprecisely articulate the failure-to-procure-insurance duty in a manner that might be read to imply that a reasonable-care duty applies more broadly to insurance agents, that rhetoric has been later reined in and the applicable duty correctly re-centered exclusively in the insurance-procurement context.[67] Moreover, the foundational precedents recognize that the contours of the tort duty are shaped by the contractual agreement to procure insurance that sits at its heart[68] -- and that renders it illogical to expand an insurance agent's reasonable-care duty beyond that limited context to all interactions with his or her clients. Although the dispute in this case is a unique one, and likely even a first impression in this state, other jurisdictions have expressly rejected closely situated efforts to frame insurance agents' actions and/or omissions with regard to policy cancellations as within the scope of the

[67] *See, e.g., Cook*, 463 N.E.2d at 527 (observing that an instruction that described an insurance agent as "to possess and exercise that degree of reasonable or ordinary care and skill in the handling of his client's insurance affairs that is ordinarily possessed and exercised by an insurance agent" (emphasis added) was "poorly worded," but, when read with the instructions as a whole "explained that this duty would be applicable if [the agent] had undertaken to procure insurance for Cook" and which instructions "also explained the elements of a contract to procure insurance" (emphasis added)). *See also id.* at 528 ("[A]n insurance agent's duty does not arise in regard to any particular client, until he undertakes to procure insurance." (emphasis added).

[68] *See Bulla*, 366 N.E.2d at 236 ("A proposed insured who enters into an agreement to procure insurance with an agent does so with the ultimate objective of effecting a contract of insurance. However, the performance for which the proposed insured is bargaining is the services of the insurance agent in obtaining the most favorable terms commensurate with his insurance needs.").

"general duty" applied in the failure-to-procure context.[69]

As such, the Appellants understandably focus the primary weight of their argument on the heightened duties applicable in "special circumstances." On that issue, however, the Appellants' proof at trial fell substantially short of Rule 50(A)'s sufficiency threshold. Notwithstanding the Appellants' conclusory assertion that "[a] majority of [the special-relationship factors] are present in the case at bar,"[70] the evidence introduced at this trial actually checked none of the boxes and instead unequivocally demonstrated that the Appellants and Defendant Churilla had nothing more than a run-of-the-mill client/insurance-agent relationship. Stated otherwise, if this insurance-agent/client relationship is "special," then they

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[69] *See Honeycutt v. Kendall*, 549 F.Supp. 802, 805 (D. Del. 1982) ("The law does not impose a duty upon brokers to inform insureds of a notice of cancellation if the insured knew or should have known about the cancellation."); *Kotlar v. Hartford Fire Ins. Co.*, 83 Cal. App. 4th 1116, 1123 (Cal. Ct. App. 2000) (declining to recognize a duty on the part of an insurance broker to provide the named insured with notice of the insurer's intent to cancel the policy for nonpayment of premiums both because statutory law imposed that obligation on the insurer and "the relationship between an insurance broker and its client is not the kind which would logically give rise to such a duty. The duty of a broker, by and large is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client." (emphasis added)); *Colagoivanni v. Premium Fin. Specialists*, 1996 Conn. Super. LEXIS 1882, *15, 1996 WL 457006 (Conn. Super. July 22, 1996) (holding that a defendant insurance agent/broker "has no general duty created by any ongoing agency relationship with the plaintiff that would impose a particular standard of care in the defendant in its dealings with the plaintiff as to cancellation, reinstatement, or any other matter." (emphasis added)); *Kutz v. State Farm Fire & Cas. Co.*, 189 P.3d 740, 744-45 (Okla. Civ. App. 2008) ("'An agent has the duty to . . . use reasonable care, skill and diligence in the procurement of insurance and an agent is liable to the insured if, by the agent's fault, insurance is not *procured* as promised and the insured suffers a loss.' The Kutzes acknowledge they have found no cases affirmatively finding an agent has a duty to maintain insurance by notifying his client that the policy is being cancelled for non-payment. The Kutzes have cited cases finding a duty to *procure* insurance coverage. None of these cases finds a duty on the part of an agent to notify the insured in advance of cancellation for non-payment." (emphasis in original and citations omitted)).

[70] *Brief of Appellants* at 44.

all are. In contrast to the small handful of cases in which the Indiana appellate courts have either found such a special relationship or found the evidence sufficient to warrant additional factfinding on that question,[71] the Appellants had been doing business with Appellee Churilla for just over a year (which fails to check the necessary-but-not-sufficient longstanding-relationship box), had transferred their insurance portfolio to Appellees not because of any particular faith or trust in Appellee Churilla's expertise, but instead just to throw some business to their own offspring,[72] and had communicated with Appellee Churilla's office at most once,

[71] *See Ind. Restorative Dentistry*, 27 N.E.3d at 266-67 (finding genuine issue of material fact as to "special relationship" between agent and dentistry-practice client who had worked together for at least a dozen years – and more than three decades with the agent's predecessor via merger – spoke via telephone "three or four times a year[,]" communicated annually regarding a coverage summary and questionnaire that permitted the practice to "indicate changes to its practice that would affect coverage and express any changes [the practice] wanted to make[,]" and which included marketing materials in which the agent held itself out as "an 'authorized administrator for Indiana Dental Association Insurance plans including professional liability and office property/casualty coverage" and the agent mailed quarterly risk-review newsletters prepared by a third party trumpeting the agent's expertise in the dental-practice context); *Billboards 'N' Motion, Inc. v. Saunders-Saunders & Assocs.*, 879 N.E.2d 1135, 1136 & 1142-43 (Ind. Ct. App. 2008) (concluding that "whether the parties' relationship gives rise to a duty to obtain additional information [needed to procure a policy] involves factual questions[,]" and reversing summary judgment, where the agent had worked with the client company for fifteen years and the client relied on the agent for advice – to the degree where it delegated to the agent substantially all decision-making regarding the selection of appropriate policies and coverage); *Cook*, 463 N.E.2d at 524-28 (affirming judgment on jury verdict for client against insurance agent where "a long-established relationship of entrustment had developed between the insured and agent" and [the agent] exercised broad discretion to service Cook's insurance needs" and where the client he had done business with the insurance agent for more than a decade and "would consult [the agent] about potential risks related to his firm and the necessary insurance to cover those risks[,]" "would ask [the agent] for all coverage pertinent to his farm and leave the details to [the agent's] discretion[,]" and the agent "was aware that Cook relied on his advice to cover risks related to the farm and both men considered [the agent] to be Cook's 'insurance agent' for the farming operation.").

[72] *Cf. Myers*, 921 N.E.2d at 887 (affirming summary judgment and finding that "no intimate long-term relationship or other special relationship existed between [agent] and the Myerses" in part

about a garden-variety remove-a-vehicle-from-the-policy matter[73] involving their unexceptional property-and-casualty coverage.[74] There was zero evidence introduced to suggest that the Appellants separately compensated Appellee Churilla over and above a share of their policy premiums. And by criticizing the level of customer service that they had received from Appellee Churilla prior to this incident,[75] and going to great lengths in their briefing to argue that, after Appellee Erie Insurance Exchange issued the policy, Appellee Churilla became its agent rather than the Appellants' agent,[76] the Appellants operate at cross purposes to their own position and affirmatively and repeatedly undermine the suggestion that they had any special relationship with Appellee Churilla. It also seems worthy of mention that the trial evidence also conclusively established that, when Appellant Roy Cosme finally

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upon observation that the plaintiffs had started doing business with the agent for only because their previous agent "they knew through their church – decided to leave the insurance business).

[73] *Cf. id.* at 888 (observing that the plaintiff spoke to the agent "on only one occasion regarding the coverage limits under the Cincinnati Insurance policy, which occurred when [she] inquired about adding coverage for the shed to the homeowner's policy.").

[74] *See, e.g., DeHays Group v. Pretzels, Inc.*, 786 N.E.2d 779, 783 (Ind. Ct. App. 2003) (reversing denial of summary judgment and remanding case for entry of summary judgment for insurance agent because evidence "failed to show the special relationship that is required for a heightened duty to be placed on an insurance broker" and observing that discussions of "standard casualty and property insurance" did not implicate the "counseling of the insured regarding specialized insurance coverage" factor). *See also Cox v. Mayerstein-Burnell Co.*, 19 N.E.3d 799, 807 (Ind. Ct. App. 2014) ("Here, like in *DeHayes*, the insurance policy is a standard casualty and property insurance policy, and the designated evidence demonstrates that [the agent] provided no specific analysis regarding specialized coverage like that present in *Cook*.").

[75] *See, e.g.* Tr. Vol. I, p. 67/11-25 (Appellant Roy Cosme discussing how his previous Allstate agent was more hands-on than Appellee Churilla was); *id.* at p. 71/3-7 (observing that no one from Appellee Churilla ever called to advise the Appellants that they would be servicing the policy after Nick Cosme left the insurance business).

[76] *See* Brief of Appellants at 37.

decided to make a call about the imminent cancellation of his family's automobile insurance policy, he did not pick up the phone to intending to call Appellee Churilla – and certainly not because of any longstanding and close relationship between them. This Court has rejected duty-to-advise claims, as a matter of law, on similar facts – and even in cases where the evidence showed a much closer relationship between client and agent than was present here.[77] In sum, because the Appellants' evidence, as a matter of law "fail[ed] to establish . . . that the nature of [their] business relationship with [Appellee Churilla] was special and intimate as required"[78] under Indiana law, the Lake Superior Court acted well within its discretion under Rule 50(A) to enter judgment on the evidence for Appellee Churilla.[79]

Under certain circumstances, of course, a party might assume a duty that he, she, or it would not otherwise have via "affirmative, deliberate conduct such that it is 'apparent that the actor . . . specifically [undertook] to perform the task that he is charged with having performed negligently, "for without the actual assumption of the undertaking there can be no correlative

[77] *See, e.g.*, *Schweitzer v. Am. Family Mut. Ins. Co.*, 16 N.E.3d 982, 988-89 (Ind. Ct. App. 2014); *Meridian Title*, 946 N.E.2d at 638; *Myers*, 921 N.E.2d at 887-88; *Wyrick v. Hartfield*, 654 N.E.2d 913, 915 (Ind. Ct. App. 1995); *Dye*, 634 N.E.2d at 848 ("While Dye averred that Rockenbach acted as his sole insurance agent over an eight-year period, Dye merely established that a long-term relationship existed with Rockenbach. His designated evidence does not show any special relationship over and above the typical insured-insurer relationship."); *Parker*, 630 N.E.2d at 569-70 (thirteen-year client-agent relationship did not give rise to duty to advise where none of enumerated factors were present).

[78] *Dye*, 634 N.E.2d at 848.

[79] *See Stockberger v. Meridian Mut. Ins. Co.*, 395 N.E.2d 1272, 1278-80 (Ind. Ct. App. 1979) (affirming trial court's entry of judgment on the evidence on claim of defendant broker's alleged negligence).

legal duty to perform that undertaking carefully."""[80] On a small handful of occasions, Indiana appellate courts have either found that insurance agents assumed certain duties or that conflicting evidence required a factfinder's resolution of whether a duty had been assumed. In *Anderson Mattress Co.*, for example, the agent "undertook to assist . . . in procuring insurance for [client] on the basis of applications which requested blanket coverage,"[81] this Court found a genuine dispute of material fact as to "whether [an agent] assumed and then breached a duty to inform [the client] that the policy [the agent] procured on its behalf differed from the policy that [the agent] was retained to procure."[82]

Although the Appellants attempt to plug the missing "duty" hole in their prima facie case for negligence against Appellee Churilla with an allegation that Appellee Churilla assumed such a duty, that argument fails to demonstrate that the Lake Superior Court erred

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[80] *Yost v. Wabash College*, 3 N.E.3d 509, 517 (Ind. 2014) (*quoting Lather v. Berg*, 519 N.E.2d 755, 766 (Ind. Ct. App. 1988)).

[81] 617 N.E.2d at 938.

[82] *Id.* at 939. And, although the *Meridian Title* Court used "special circumstances" rhetoric instead of labeling its holding as grounded in assumption-of-duty precedent, it held that a title insurance agency that had "undert[aken] the mission of attempting to facilitate a settlement between" the two parties to a real-estate transaction in which a dispute had arisen "in order to avoid a claim being made against the policy of title insurance,[,]" and had held a meeting at the title agency's office at which one of its principals "pointed to a provision in the title policy and stated that [the insured party] did not have a claim because it had closed without a survey[,]" 946 N.E.2d at 638, "had a duty to advise [the insured] regarding coverage under its policy" that went "beyond its general duty to exercise reasonable care, skill, and good faith diligence in obtaining the insurance policy." *Id.* And, in *Filip*, in obiter dictum that was unnecessary to the holding, which turned on the statute of limitations, the Indiana Supreme Court opined that there was "a material question of fact as to whether [agent] assumed a special relationship, obligating her to advise the Filips at least as to inadequate coverage of the[ir] non-business personal property," 879 N.E.2d at 1086, by virtue of the agent's previously misinforming the clients "at the time the policy was first issued . . . [that] their properly would 'be covered' and that she would visit the premises." *Id.* at 1079.

and/or abused its discretion when it entered judgment on the evidence for Appellee Churilla. Initially, the Appellants' argument is belied by the fact that the Appellants neither pleaded the operative facts of an assumption-of-duty theory in their *Second Amended Complaint*,[83] nor included any mention of such a theory within their contentions,[84] and most significantly, also, did not tender any proposed jury instruction on that theory,[85] which would have been integral to presenting such a theory at trial because "[t]he existence and extent of such duty are ordinarily questions for the trier of fact[.]"[86]

"However, when the record contains insufficient evidence to establish such a duty, the court will decide the issue as a matter of law."[87] And, here, the evidence was both quantitatively and qualitatively insufficient to warrant an instruction that would have allowed a jury to speculate that Appellee Churilla had assumed some duty as to the Appellants. To begin with, "to impose liability resulting from breach of assumed duty, it is essential to identify and focus on the specific services undertaken. Liability attaches only for the failure to exercise

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[83] *See* Appellants' App. Vol. II, p. 56 (Count II, ¶¶ 49-50, referencing only "contractual and common law duties to the Cosmes consistent with" the contractual rights allegedly vested in the Cosmes by their insurance policy with Appellee Erie Insurance Exchange); *id.* at p. 57 (Count II, ¶ 55, referencing only "contractual duties mentioned above").

[84] *See* Appellee Churilla's App. Vol. II, p. 74 (referencing only a "professional duty" that, for reasons explained above, is not recognized under Indiana common law).

[85] *See* Appellee Churilla's App. Vol. II, pp. 76-84.

[86] *See Hous. Auth. of S. Bend. v. Grady*, 815 N.E.2d 151, 160 (Ind. Ct. App. 2004).

[87] *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 975 (Ind. 1999). *See also Teitge v. Remy Constr. Co.*, 526 N.E.2d 1008, 1014-15 (Ind. Ct. App. 1988) (holding that "where there was insufficient evidence to present a jury question on" the issue of whether a defendant had assumed a duty of care, the trial court did not err in entering judgment on the evidence for the defendant).

reasonable care in conducting the 'undertaking.'"[88] But the Appellants' shotgun approach – which claims that Appellee Churilla assumed a duty "through advice, advocacy, counseling, procurement, communication and in many other respects"[89] – turns that principle on its head and suggests that every undertaking in a business relationship triggers a corresponding assumption of duty. But that, of course, cannot be the law – for if actors assumed duties by doing just about anything, it would render many common law duties entirely superfluous. Moreover, in *Cox,* this Court rejected a contention that an agent had "assumed a duty to advise [a business client] regarding the adequacy of its coverage by providing" the client with a commercial building valuation report prepared by an insurer that allegedly underestimated the replacement-cost value of the client's building.[90] In so doing, the Court expressed reluctance to find assumption of a duty where the agent had "acted only as an intermediary between" the client and insurer.[91] This Court has similarly been unwilling to impute a duty under an assumption theory that would effectively make a party another's guarantor "merely by speaking to them on the phone."[92]

[88] *Yost*, 3 N.E.3d at 517.

[89] *Brief of Appellants* at 47 (emphasis added).

[90] 19 N.E.3d at 809-10.

[91] *Id.* at 809.

[92] *Grady*, 815 N.E.2d at 161.

Assumption-of-duty principles would, however, presumptively apply to an insurance agent who ordinarily just sells insurance, but then steps outside of his or her proverbial lane and "performs a service ordinarily performed by a risk manager or gives advice ordinarily given only by insurance counselors," in which case "the agent must exercise due care."[93] But, even then, liability under RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42[94] -- the Restatement provision regarding assumed duties previously adopted by the Indiana Supreme Court[95] -- also "require[s] that the actor increase the risk of harm . . to the other person beyond that which existed in the absence of the actor's undertaking."[96] When the Indiana appellate courts have found evidence sufficient to justify factfinding as to whether a duty was assumed, the actor in question had undertaken additional responsibilities via "specific actions" relevant to the claimed duty.[97] On the evidence introduced at the trial of this cause, however, where the short-fuse risk of the Appellants' automobile-insurance policy's cancellation was already fully known to and appreciated by the Appellants weeks before Appellant Roy Cosme picked up the phone on October 26, 2017 and was transferred to Appellee Churilla, the Appellants' effort to shoehorn this case into an assumption-of-duty theory against Appellee Churilla falls well short of the mark.

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[93] Blanchard, R.D. *An Insurance Agent's Legal Duties to Customers*, 21 HAMLINE L. REV. 9, 18 (1997).

[94] (A.L.I. 2012) (hereinafter "RESTATEMENT (THIRD) OF TORTS § 42")

[95] *See Yost*, 3 N.E.3d at 517.

[96] RESTATEMENT (THIRD) OF TORTS § 42, cmt. f (emphasis added).

[97] *Compare Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1220 (Ind. Ct. App. 1983) (finding "sufficient evidence upon which to present to a jury the questions of whether Plan-Tec assumed a duty to provide Wiggins with a safe place to work by inspecting the scaffolding each morning and

CONCLUSION

Accordingly, Appellee Churilla respectfully requests that this Court AFFIRM the Lake Superior Court's June 15, 2022 *Order Granting Motions for Judgment on the Evidence* and its August 1, 2022 *Order Denying Motion to Correct Error and Demand for New Trial.*

Respectfully submitted,

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WORD-COUNT CERTIFICATE

I verify that this Brief contains fewer than 14,000 words.

/s/ *Trevor W. Wells*
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whether Plan-Tec assumed a duty for the overall safety aspects of the project by appointing a safety director, holding safety meetings, and issuing directives concerning safety.") *with Hunt Constr. Group, Inc. v. Garrett*, 964 N.E.2d 222, 230-31 (Ind. 2012) (holding that "for a construction manager not otherwise obligated by contract to provide jobsite safety to assume a legal duty of care for jobsite-employee safety, the construction manager must undertake specific supervisory responsibilities beyond those set forth in the original construction documents" and concluding that "because [the manager] did not undertake any jobsite-safety actions beyond those required . . . it did not assume by its actions any legal duty of care for jobsite-employee safety.").

CERTIFICATE OF SERVICE

Pursuant to App. R. 46(A)(11) and 24(D), I certify that on December 19, 2022, I electronically filed this *Brief of Appellee Dan Churilla* with the Clerk via the Indiana E-File System / DoxPop, and thereby served a true and complete copy of it upon the following registered-user counsel and upon the unrepresented party by First-Class U.S. Mail as indicated:

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