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IN THE
INDIANA COURT OF APPEALS

CAUSE NO. 22A-CT-1897

CHRISTINE COSME and ROY COSME, Appellants. v. DEBORA A. WARFIELD CLARK, DAN CHURILLA dba CHURILLA INSURANCE, and ERIE INSURANCE, Appellees.	Appeal from the Lake Superior Court No. 1 Case No. 45D01-1803-CT-39 The Honorable John M. Sedia, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS..2

TABLE OF AUTHORITIES 3

SUMMARY OF ARGUMENT...4

ARGUMENT...4

I. The trial court erred when it granted Erie's Motion for Judgment on the Evidence...4

A. Erie has failed to rebut the Cosmes' demonstration that the trial court erred by granting judgment on the evidence on the basis that a contract did not exist between Plaintiffs and Erie...4

B. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether Erie breached its contract with the Cosmes...9

C. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether Erie breached its duty of good faith and fair dealing...12

D. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether the Cosmes were entitled to punitive damages...16

E. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether the Cosmes were entitled to any additional damages...16

II. The trial court erred when it granted Churilla's Motion for Judgment on the Evidence...17

A. Churilla has failed to rebut the Cosmes' demonstration that the trial court erred by granting judgment on the evidence on the basis that the Cosmes decision not to sign an exclusion form for their son "brought about all the troubles that flowed from the unanticipated wreck with the uninsured Warfield Clark"..17

B. Churilla has failed to demonstrate that a reasonable jury could not, without undue speculation and based on evidence, find a breach of duty by Churilla which led to the Cosmes' damages..19

CONCLUSION..24
WORD COUNT CERTIFICATE...25
CERTIFICATE OF SERVICE...25

TABLE OF AUTHORITIES

CASES: **Page**
American Family Ins. Group v. Ford, 293 N.E.2d 524, 526 (Ind. Ct. App. 1973).............10

Black's Law Dictionary 972, 1087, 23 (5th Ed. 1979)...21, 22

Blanchard, R.D., An Insurance Agent's Legal Duties to Customers, 21 Hamline
L. Rev. 9, 18 (1997)...24

Bojrab v. John Carr Agency, 597 N.E.2d 376 (Ind. Ct. App. 1992).................................22

Brennan v. Hall, 904 N.E.2d 383, 386 (Ind. Ct. App. 2009)..19

Bulla v. Donahue, 366 N.E.2d 233, 235 (Ind. Ct. App. 1977)..................................20, 22

Burwell v. State, 524 N.E.2d 817 (Ind. Ct. App. 1988)...20, 21

City of Lawrence v. Western World Ins. Co., 626 N.E.2d 477, 480 (Ind. Ct. App.
1993) trans. Denied...14, 15

Drendall Law Office, P.C. v. Mundia, 136 N.E.3d 293, 304 (Ind. Ct. App. 2019).......18, 19

Erie Ins. Co. v. Hickman, 622 N.E.2d 515, 519 (Ind. 1993)..13

Gooch v. State Farm Mut. Auto. Ins. Co.¸712 N.E.2d 38, 40 (Ind. Ct. App. 1999)...........13

Indiana Ins. Co. v. Knoll, 236 N.E.2d 63, 71 (Ind. 1968)..10

Indiana Lumbermans Mut. Ins. Co. v. Vincel, 452 N.E.2d 418, 422 (Ind.
Ct. App. 1983)...10

Jones v. Jones, 866 N.E.2d 812, 814 (Ind. Ct. App. 2007)..17

Malone v. Basey, 770 N.E.2d 846, 851 (Ind. Ct. App. 2002)....................................14, 15

Meridian Title Co. v. Gainer Group, LLC, 946 N.E.2d 634, 638 (Ind. Ct. App. 2011)
....23

Monroe Guar. Ins. Co. v. Magwerks Corp.¸829 N.E.2d 968, 976 (Ind. 2005)..........13, 15

Niezer v. Todd Realty, Inc., 913 N.E.2d 211, 215 (Ind. Ct. App. 2009)..............................5

Priddy v. Atl. Specialty Ins. Co., 468 F. Supp. 3d 1030, 1047-48 (N.D. Ind. 2020).........15

Prosser and Keaton on Torts, sec. 53...21

Town & Country Mutual Insurance Co. v. Savage, 421 N.E.2d 704 (Ind. Ct. App. 1981)...22

Webb v. Jarvis, 575 N.E.2d 992 (Ind. 1991)...20, 21, 22

Westfield Companies v. Rovan, Inc., 722 N.E.2d 851, 858 (Ind. Ct. App. 2000)..............7

Yost v. Wabash College, 3 N.E.3d 509, 517 (Ind. 2014)...24

STATUTES:

I.C. 27-7-6-1 *et seq*...10

I.C. 27-7-6-5...6, 7

SUMMARY OF ARGUMENT

For the reasons articulated herein as well as the Cosmes' initial brief, the trial court erred when it granted defendants' motions for judgment on the evidence. Specifically the trial court's ruling was contrary to the facts and the Cosmes provided ample probative evidence allowing reasonable minds to differ as to their claims. The court's ruling deprived the Cosmes of the determination of the facts by a jury.

ARGUMENT

I. The trial court erred when it granted Erie's Motion for Judgment on the Evidence.

A. Erie has failed to rebut the Cosmes' demonstration that the trial court erred by granting judgment on the evidence on the basis that a contract did not exist between the Cosmes and Erie.

Erie argues that a contract did not exist between the parties; therefore, the Cosmes could not bring their breach of contract claim. (Tr. Vol. III, p.159, ll.11-19). However, Erie admits to entering into an insurance contract with the Cosmes in August

of 2016 and admits the contract was renewed in August of 2017. (Erie's Response p. 5). Erie admits that that policy was in place until *at least* November 1, 2017, when Erie purportedly canceled the policy. (Erie's Response, p. 9). As such, Erie admits that a contract existed between Erie and the Cosmes when Malena made the decision that she felt Broyce was a bad risk. Erie admits that a contract existed when Malena sent an exclusion request form to the Cosmes to exclude Broyce from their policy citing Broyce's license suspension only. Erie admits that a contract existed between Erie and the Cosmes at all times during the conversations and communications which occurred between the Cosmes and Churilla and between Churilla and Erie from October 26, 2017 until Malena allegedly took the action to cancel the Cosmes' policy at midnight on October 31, 2017. A contract existed when Malena factored into her decision to cancel the policy other portions of Broyce's MVR which were not statutory reasons Erie could cancel a policy mid term. All of those actions that led up to the alleged cancellation at midnight on October 31, 2017 were actions taken while a contract existed between the Cosmes and Erie. The action by Malena to cancel the Cosmes' insurance policy happened while the parties were under a contract of insurance.

Analyzing this from the perspective of basic contract law, in order to prove breach of contract, Plaintiffs need only show that a contract existed, that there was a breach of that contract, and that Plaintiffs suffered damages due to that breach. *Niezer v. Todd Realty, Inc.*, 913 N.E.2d 211, 215 (Ind. Ct. App. 2009), *trans. denied*. Element one is satisfied as outlined above: a contract existed between Erie and the Cosmes and Erie admits it. It was an error for the trial court to find otherwise.

Additionally, the Cosmes presented probative evidence allowing reasonable minds to differ as to whether the contract did not cancel and was in place at the time of

the collision. That evidence was in the form of a certified copy of the policy showing the policy was in place at the time of the accident as well as expert testimony (Elliott Flood) confirming the importance of certification and that certification meant that when the Erie employee was directed to pull the policy up in the system, it showed the policy still in place and that is why it was certified as such. (Tr. Vol. III, p. 97, ll. 12-15; 19-25, p. 98, ll. 9-14).

Erie's sole argument to the contrary is simply that the certification indicating that the policy was still in place was mere "scrivener's error" even though the date of the enforcement of a policy (especially in this case) is virtually the most important term of the contract. Specifically, Erie states as follows: "As Flood conceded, the woman who signed the certified copy of the Policy testified that the particular copy of the Policy contained a scrivener's error that did not properly show cancellation". (Erie's Response p. 12). However, Erie misrepresents Flood's testimony and misrepresents what evidence was presented to the jury on this issue. Flood never agreed that there was an error in the certification. In fact, he consistently testified as to the importance of the certification, how the records custodian would have come to conclude the policy was still in place, and that "scrivener's error" was not even an insurance term and was, in fact, ". . . more of a lawyer's term." (Tr. Vol. III, p. 110-111, ll. 13-25, 1-20). No evidence was ever presented to the jury to support that this certification of the policy was truly "scrivener's error" especially considering the importance of policy certification as articulated by Flood.

The Cosmes also presented probative evidence allowing reasonable minds to differ as to whether the contract did not cancel because Erie failed to provide proper notice of cancellation which is required under I.C. §27-7-6-5. In response, Erie simply argues that the document they sent to the Cosmes, an exclusion request form, ticks all

the boxes articulated in I.C. §27-7-6-5. Erie goes on to cite to *Westfield Companies v. Rovan, Inc.*, 722 N.E.2d 851, 858 (Ind. Ct. App. 2000). However, Erie fails to provide the *entire* quote from the Court of Appeals which is as follows:

> A notice of cancellation of insurance must be ***clear, definite and certain***. While it is not necessary that the notice be in any particular form, it must contain such a clear expression of intent to cancel the policy that the intent to cancel would be apparent to the ordinary person. ***All ambiguities in the notice will be resolved in favor of the insured***.

Id. (emphasis added). The sections of the quote omitted from Erie's Response are the most important. The notice must be clear, definite and certain. First, the document sent to the Cosmes was not even a notice of cancellation, it was a driver exclusion request form which, Erie confirmed, is not the same thing. (Tr. Vol. II, p. 225, ll.17-25). The driver exclusion request form was not clear, definite or certain: it was contingent. It sought the Cosmes to do something once it was received (it also solicited communication from the Cosmes and provided Erie's phone number for questions) and the Cosmes did. They reached out to Erie via the phone number listed on the form. From there began a slew of miscommunications, misinformation, concealment, and a fool's errand to procure a license reinstatement that would not have mattered anyway. The Cosmes' expert also testified that proper notice was not given:

> A. . . . And what leaps out at me right away is that, well, this doesn't say that it's a notice of cancellation what I'm used to seeing thousands of times over the last 40 years. Notice of cancellation is called that at the top so you see that tile at the top of this thing. They need to be clear. There needs to be no way that it can be misread or no contingencies, if, ands, or buts, you know, and this letter has some contingencies in it. It's not clear. It's not a clear notice of cancellation, okay. It looks like maybe you're gonna get a cancellation, because has a deadline in it. You got to do something by October 28th or else we'll cancel.

> Q. But they did something, didn't they?
>
> A. Well, they did. They provided what Churilla allowed them to believe that you could get Broyce on the policy because this was all a big mistake. . .
> . . .
> A. . . . Don't combine a notice of cancellation with request to exclude and change the policy that allows for reinstatement of the policy if you comply with the condition. Sign this piece of paper and nevermind. We won't be cancelling. So, it's not certain from this letter that they're going to cancel. You need to separate these things. And the corrected action plan, auditors always do this when they find a defect in internal control, what they do is they say, you got to fix this; my report goes to the CEO; and you need to separate the functions. It's lazy and it creates risk of misfires like this. And so you separate the acknowledgement from denial. There needs to be a gap in between there, and you separate the request, one purpose per document. It's hard enough to understand insurance from the policy of a point of view.
>
> Q. . . .Is this a proper notice of cancellation?
>
> A. No.
> . . .
> A. . . . Number one is, is this will be, that contingent, is that ambiguous, and we know what the rule is. Ambiguity is the insurance business term for company creates a problem, it's complicated business, insurance, and policyholders aren't experts in insurance. We created a problem at the company because of our poor communication. We don't penalize the insured for our mistake.

(Tr. Vol.III, p.93, ll. 3-14; 20-25; p. 94, ll. 1-6, 11-13, 19-24).

Furthermore, the Cosmes provided ample evidence of the miscommunications that occurred after the Cosmes received the request to exclude which made the request even more unclear, uncertain, ambiguous, and certainly not definite. Specifically, Malena's concealment of the other issues with the MVR, Malena and Churilla implying that reinstatement could keep Broyce on the policy, among other miscommunications.

Erie cannot just stand on the exclusion request form itself when its actions thereafter implied something else and complicated further its actual intention. What if Malena had said to the Cosmes "nevermind that correspondence". Could Erie still stand on proper notice if their communication thereafter said something wholly different? Not likely.

The Cosmes demonstrated that probative evidence was introduced at trial which would allow reasonable minds to differ as to whether that policy did, in fact, properly cancel on November 1, 2017. Erie's argument of "scrivener's error" on the insurance policy fails to demonstrate otherwise, especially given what evidence was presented to the jury and what evidence was not. Erie's argument of proper cancellation also fails to rebut the Cosmes showing of probative evidence to the contrary.

In sum, there can be no doubt that a contract existed between Erie and the Cosmes up until November 1, 2017 and the Cosmes presented probative evidence which would allow reasonable minds to differ as to whether that policy was in force on November 4, 2017 as well. As such, the trial court erred when it granted Erie's motion for judgment on the evidence finding no contract existed. A decision that no contract existed at any time was contrary to the facts (Erie admits a contract was in place at least up until November 1, 2017). A decision that no contract existed at the time of the collision deprived the Cosmes of the determination of facts by the jury as to whether the policy ever did cancel and whether proper notice was provided. Given that reasonable people may differ as to whether the policy was in place at the time of the collision, the Cosmes should have been given the benefit of the doubt and motion for judgment on the evidence should have been denied.

B. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow

reasonable minds to differ as to whether Erie breached its contract with the Cosmes.

Although Erie did not argue lack of breach of contract when it presented its motion for judgment on the evidence, the trial court found lack of breach and Erie now argues it. First, with respect to the existence of a contract prior to November 1, 2017, Erie argues that its actions leading up to cancellation and the act of canceling the contract cannot constitute breach because Erie had a "legal basis to cancel" the Cosmes policy: Broyce's license suspension. (Erie's Response, p. 17). Erie also argues that it can consider other facts known to it in deciding to exercise its discretion to cancel the policy once there is a legal basis to do so. (Erie's Response p. 12, p. 18). This latter statement is not supported by statute, case law, or any contractual provisions and there was certainly no evidence presented to a jury to support it.[1] As confirmed by the Indiana Court of Appeals in *Indiana Lumbermans Mut. Ins. Co. v. Vincel*, 452 N.E.2d 418, 422 (Ind. Ct. App. 1983), the purpose of I.C. §27-7-6-1 *et seq.* is to protect policyholders against termination except in the manner specifically authorized by the chapter. I.C. §27-7-6-1 *et seq.* provides no authority for Erie considering other factors on Broyce's MVR other than those articulated in the statute.

Furthermore, Erie had the burden of proof to show that the policy was canceled and failed to meet that burden. *American Family Ins. Group v. Ford*, 293 N.E.2d 524, 526 (Ind. Ct. App. 1973). Erie presented no evidence in this case prior to the trial court making the determination that cancelation was proper. On the other hand, the Cosmes

[1] Erie's reliance on *Indiana Ins. Co. v. Knoll*, 236 N.E.2d 63, 71 (Ind. 1968) is fallacious. *Indiana Ins. Co.* does not address I.C. §27-7-6-1 whatsoever and, instead, deals with whether a policyholder's concealment during the application process made the policy voidable. *Indiana Ins. Co.* is not factually similar and does not stand for the proposition that Erie could reach outside of the statute governing mid-term cancellations to consider whatever they wanted in order to cancel the policy.

presented substantial probative evidence to the contrary even though it was not their burden.

The Cosmes presented facts to demonstrate that Malena made a decision that she did not like Broyce as a risk because of what she uncovered on his MVR but, because the policy was in mid term, she could only cancel for reasons articulated in the statute. The facts presented support that Malena hung her hat on an erroneous suspension which she had more than enough reason to know was erroneous in order to kick Broyce off the policy. The facts presented to the jury support that Malena never communicated to anyone that she was considering these "other issues" with Broyce's MVR until the date of cancellation. As shown above, Erie cannot consider other factors outside of those articulated in the statute so Malena's consideration of the entirety of Broyce's MVR at any time was illegal and improper. The fact that Malena withheld that she was considering those other factors from the Cosmes and from Churilla cannot be ignored. (Tr. Vol.II, p.243, ll.3-7; Exhibit 17). It is more than reasonable for a jury to infer that she kept these "other issues" to herself because she knew her use of them to cancel the Cosmes policy was illegal. The jury could also infer that her doing so had a domino effect and caused Churilla to send the Cosmes on a fool's errand to get Broyce's license reinstated when it would have made no difference to Erie. Erie was never going to allow him to be on the Cosmes insurance policy yet no one communicated that until it was too late.

Given the above, there can be no doubt that whether the cancellation of the policy was improper and constituted a breach is a question of fact for the jury to consider after weighing all of the facts presented to it. Again considering this in the context of pure contract law, Erie unilaterally and allegedly terminated the contract and left the Cosmes

exposed. It is hard to imagine a world where a plaintiff could not bring a breach of contract claim against a party for canceling a contract in its entirety. If we take "bad faith" and even insurance out of this equation and simply look at this as a basic contract case, if two parties enter into a contract and one party cancels that contract, and that cancellation causes damages to the other party, the plaintiff would be able to bring a breach of contract claim. When it comes to contract law, what greater breach is there than canceling an entire contract? It is unfathomable to suggest that parties to a contract can go around canceling contracts and causing damages without risk of recourse.

With regard to the Cosmes theory that the policy was still in place on the date of the accident, if a jury were to find a contract existed, the breach is obvious: failure to investigate and pay proceeds owed to the Cosmes under their uninsured motorist coverage. However, this has not been argued as Erie stands on the proposition that no contract existed at the time of the loss.

In sum, ample probative evidence was presented at trial allowing reasonable minds to support the Cosmes theory of breach of contract against Erie. Erie has failed to rebut that demonstration and the trial court's finding that no breach occurred was an error. The matter should be decided by a jury.

C. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether Erie breached its duty of good faith and fair dealing.

Erie argues that because no contract existed there can be no breach of the duty of good faith and fair dealing. For all of the reasons articulated in Section IA above, Erie's reliance on the lack of a contract is erroneous. First, Erie admits that a contract existed

at least until November 1, 2017. Following Erie's logic, then, Erie owed a duty of good faith and fair dealing to the Cosmes at least up until November 1, 2017. As such, duty is established at least until November 1, 2017.

Erie next argues that even if there were a contract (and thus, a duty), no breach occurred, and erroneously claims that there are only four "articulated spheres" that can be considered a breach of duty of good faith and fair dealing. (Erie's Response p. 20). As argued in initial brief, Indiana courts have repeatedly found that there are no hard and fast rules as to what constitutes a breach of the duty of good faith and fair dealing. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 519 (Ind. 1993); *see also Monroe Guar. Ins. Co. v. Magwerks Corp.*¸829 N.E.2d 968, 976 (Ind. 2005)(in *Hickman* ". . . we specifically declined to determine the precise extent of an insurer's duty to deal in good faith"); *Gooch v. State Farm Mut. Auto. Ins. Co.*¸712 N.E.2d 38, 40 (Ind. Ct. App. 1999)(stating that the Supreme Court did not create an exhaustive list of an insurer's duties under the obligation of good faith and fair dealing and that failure to conduct an adequate investigation may constitute bad faith and is a question for the jury). In fact, the four "articulated spheres" presented by Erie in its Response Brief are nothing more than mere "general observations". *Monroe Guar. Ins. Co. v. Magwerks Corp.*¸829 N.E.2d 968, 976 (Ind. 2005). The fact is, there are no strict parameters.

With respect to actions leading up to the alleged cancellation on November 1, 2017 and the cancellation itself, the Cosmes have demonstrated enough probative evidence which would allow reasonable minds to differ as to whether Erie breached its duty of good faith and fair dealing. Specifically, the Cosmes showed the jury that Malena illegally took into consideration portions of Broyce's MVR which were not legal reasons to cancel the contract, that Malena purposely withheld those other considerations from

Churilla, the Cosmes, and in the request for exclusion, that Malena sent an exclusion request form which was ambiguous, confusing, and deceitful, that Malena and Churilla sent the Cosmes on a fool's errand to reinstatement Broyce's license knowing it did not matter, and that, ultimately, Erie unilaterally and allegedly canceled the contract notwithstanding all the miscommunications that had occurred leading up to the alleged cancellation. Erie's arguments that a contract did not exist and that there are only four elements which constitute a breach of the duty of good faith and fair dealing fail.

With regard to the duty of good faith and fair dealing at the time the collision occurred, Erie again argues that no contract existed at the time and, as such, they did not owe that duty. As articulated in Section IA above, the Cosmes have provided ample probative evidence to the jury that a contract was in place at that time; therefore, that duty was owed. As to breach, it is obvious: if a contract were in place, a duty would be owed and, by Erie denying the claim, wholly failing to investigate the claim, and failing to pay out the claim (along with those articulated in the preceding paragraph), Erie breached its duty of good faith and fair dealing. An added bonus is that with respect to the contract being in place at the time of the collision, all of the actions taken by Erie fall within the sacred "articulated spheres".

The Cosmes also provided ample probative evidence that Erie can be held liable for the actions of its agent, Churilla, under *City of Lawrence v. Western World Ins. Co.*, 626 N.E.2d 477, 480 (Ind. Ct. App. 1993) *trans. denied* and *Malone v. Basey*, 770 N.E.2d 846, 851 (Ind. Ct. App. 2002). Specifically, the Cosmes provided sufficient probative evidence of the agency relationship between Churilla and Erie as well as evidence of Churillas actions: that Churilla misinformed the Cosmes that they could reinstate Broyce's license, failed to properly advise the Cosmes that their policy could be

canceled, and failed to properly communicate with the Cosmes after the policy was allegedly canceled, among other things. Pursuant to *City of Lawrence* and *Monroe*, Erie would be responsible for those actions as Churilla was acting as their agent.[2]

In response, Erie shockingly claims that it cannot be held liable for the acts of its agent and cites to *Priddy v. Atl. Specialty Ins. Co.*, 468 F. Supp. 3d 1030, 1047-48 (N.D. Ind. 2020) in support. However, *Priddy* simply does not say what Erie claims it says. *Priddy* refers to *independent* causes of action for bad faith against an agent. The Cosmes are claiming that Erie, through the acts of its agent, can be held liable for bad faith due to those acts of the agent and both *City of Lawrence* and *Malone* support that theory.

In sum, the Cosmes provided ample probative evidence and Erie admits that a contract was in place at least up until November 1, 2017; therefore, a duty of good faith and fair dealing was owed by Erie to the Cosmes at least until that date. The Cosmes provided ample probative evidence allowing reasonable minds to differ as to whether Erie's actions leading up to the alleged cancellation constitute a breach of the duty of good faith and fair dealing. Erie's argument that the breach must fall within only four "articulated spheres" is contrary to law and fails. Furthermore, with regard to the breach of duty of good faith and fair dealing at the time the accident occurred, as noted above, the Cosmes argue that a contract was still in place and, were the jury to agree, the Cosmes provided ample probative evidence that Erie's actions of failing to investigate, dyeing the claim, and not paying the claim (along with the actions leading up to the alleged cancellation) constitute a breach of the duty of good faith and fair dealing.

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[2]Erie's footnote claims the Cosmes have waived their theory of agency even though the argument and facts supporting it were clearly articulated on pages 37-38 and 12-18 of their brief. Clearly the Cosmes have not waived their right to argue.

Reviewing the evidence that was presented to the jury, the trial court erred when it granted judgment on the evidence as to breach of duty of good faith and fair dealing. The matter should have been left to a jury to decide after weighing all the facts in conjunction with appropriate jury instructions.

D. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether the Cosmes were entitled to punitive damages

Erie again argues that no contract existed, no breach existed, and, therefore, the Cosmes cannot recover punitive damages against Erie. The Cosmes rest on their arguments articulated in their initial Brief as well as those articulated herein. A contract existed between the parties and probative evidence was presented which would allow reasonable minds to differ as to whether the Cosmes were entitled to punitive damages due to the actions of Erie. Specifically, the Cosmes presented clear and convincing evidence that Erie acted with malice, fraud, gross negligence, and/or oppressiveness when they took actions leading up to the alleged cancellation and when they allegedly canceled the Cosmes contract as well as their post claim actions including failure to investigate, outright denial, and failure to pay policy proceeds. In the interest of the Court's time, the Cosmes see no need to regurgitate the same argument here as was already argued in the initial brief and above. The matter should have been left to a jury to decide after weighing all the facts in conjunction with appropriate jury instructions.

E. Erie has failed to rebut the Cosmes' demonstration that probative evidence was presented at trial which would allow reasonable minds to differ as to whether the Cosmes were entitled to any additional damages

The Cosmes stand on their argument articulated in their initial brief. The Cosmes were entitled to more than just punitive damages and the court finding for Erie on its

motion for judgment on the evidence that no punitive damages were allowable without considering other damages available deprived the Cosmes of those other damages.

II. The trial court erred when it granted Churilla's Motion for Judgment on the Evidence.

A. Churilla has failed to rebut the Cosmes' demonstration that the trial court erred by granting judgment on the evidence on the basis that the Cosmes decision not to sign an exclusion form for their son "brought about all the troubles that flowed from the unanticipated wreck with the uninsured Warfield Clark".

Churilla makes reference to case law discussing the standard for this Court's review of a Trial Rule 50(A) grant of judgment on the evidence. A Trial Rule 50(A) motion must be reversed if the "decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable inferences therefrom." *Jones v. Jones*, 866 N.E.2d 812, 814 (Ind. Ct. App. 2007). The trial court is "not free to engage in weighing evidence or judging the credibility of witnesses to grant judgment on the evidence in a case where reasonable people may come to competing conclusions, as weighing evidence and judging witness credibility have always been within the purview of the jury." *Drendall Law Office, P.C. v. Mundia*, 136 N.E.3d 293, 304 (Ind. Ct. App. 2019). A motion for judgment on the evidence should be granted "only when there is a complete failure of proof because there is no substantial evidence or reasonable inference supporting an essential element of the claim." *Id.* Judgment on the evidence is proper if "the inference intended to be proven by the evidence cannot logically be drawn from the evidence without undue speculation." *Id.* "But if there is evidence that would allow reasonable people to differ as to the result, then judgment on the evidence is improper." *Id.*

Churilla admitted in its Brief that "[t]he trial court's June 15, 2022 Order assumed, probably *ad arguendo*, that the Appellants' evidence might have permitted a finding of fault as to one or both Appellees ...". Appellee Churilla's Brief at 20-21. The Cosmes presented a summary of the actions of Churilla, including Churilla's failure to timely reach out to the Cosmes to discuss Erie's exclusion request, failure to accurately assess whether the Cosmes' desired insurance coverage (coverage for the entire family including Broyce) was obtainable by submitting paperwork showing reinstatement or otherwise, failure to accurately and clearly inform the Cosmes that Churilla actually had no idea whether submitting reinstatement or other paperwork would allow them to obtain the desired coverage, failure to give the Cosmes other options they could obtain coverage other than through Erie, failure to obtain quotes for other insurance, and failure to act competently in dealing with and communicating with Erie and its underwriter. (Appellants' Brief at pp. 40-41). The Cosmes submitted that "Churilla's miscommunication and misperformance in the procurement of the Cosme's desired insurance was in fact so poor that the Cosmes were led to believe that the insurance contract was intact and did not receive notice to the contrary until two days after their motor vehicle collision." (Appellants' Brief at 41).

The Cosmes established that the evidence showed that Churilla's negligent actions led the Cosmes to believe they had insurance when they did not, leading to the damages the Cosmes suffered. The Cosmes established there was no failure of proof on this point, and that the inference that the Cosmes suffered confusion and a false belief they had coverage could logically be drawn "without undue speculation" by the jury. *Drendall Law Office, Id.* There may have been evidence "from which reasonable people could differ" on the issue, but the Cosmes have demonstrated to this Court that there

was evidence from which reasonable people could conclude, without undue speculation, that they were damaged by the actions of Churilla. *Drendall Law Office*, *Id*. Churilla has failed to demonstrate otherwise, and the Cosme's demonstration of error in the Court's finding that all the Cosmes' troubles flowed from only the Cosmes' actions stands.

B. Churilla has failed to demonstrate that a reasonable jury could not, without undue speculation and based on evidence, find a breach of duty by Churilla which led to the Cosmes' damages.

In its 46th footnote, Churilla commented that "[a]lthough 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 …, 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 …". (Appellee Churilla's Brief at 22, f.n. 46.) Briefly, the Cosmes have argued the brief to this Court and to the trial court that the actions of Churilla are attributable to Erie for contractual and bad faith claims against Erie. As to the liability of Churilla proper, the Cosmes' Brief focused on breach of professional duty in general, which sounds properly in contract or in tort: "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." *Brennan v. Hall*, 904 N.E.2d 383, 386 (Ind. Ct. App. 2009). Accordingly, the erroneous grant of judgment on the evidence had the effect of removing both a contract and a tort claim from the jury's consideration.

Churilla's argument that judgment on the evidence was proper, independently of the issue of proximate cause and specifically on the issue of whether Churilla owed the Cosmes a duty of care, is divided into three parts. Churilla argues in its Brief that (1) the

duty to procure (and therefore to advise and counsel on procurement) does not attach to Churilla in the case at bar, (2) that there is no "special circumstance" which attaches a duty to Churilla running to the Cosmes, and (3) that there is no proper assumption of duty by Churilla running to the Cosmes. All three arguments fall short and fail to rebut the Cosmes showing that the Court erred in failing to submit the case to a jury.

The Cosmes will address each of these arguments individually, but two of the cases cited by Churilla are of particular interest in evaluating the overall duty analysis in the case at bar vis-à-vis Churilla: *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991) and *Burwell v. State*, 524 N.E.2d 817 (Ind. Ct. App. 1988). The two cases have general application to the discussion of duty and the court's error in removing the case from the jury because there was substantial evidence to support a duty running from Churilla to the Cosmes.

Churilla cites *Webb* for the proposition that "Duty is not sacrosanct 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." (Brief of Appellee Churilla, f.n. 49.) The *Webb* Court enunciated three principles that must be balanced in the determination of duty: "(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns." *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991).

As to the first prong of *Webb*, relationship, Indiana courts have long recognized that there is a reliance element to the insurance agent/insurance consumer relationship: "An insurance agent holds himself out as an expert in his field and invites his client to rely upon this expertise in procuring a policy consistent with his needs." *Bulla v.*

Donahue, 366 N.E.2d 233, 235 (Ind. Ct. App. 1977). The *Webb* court explains the second prong, foreseeability, as follows: "In analyzing the foreseeability component of duty, we focus on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable." *Webb*, *Id.* At 995. The third prong, public policy, is explained as follows: "Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say the plaintiff is entitled protection." *Webb*, *Id.* At 997 (citing *Prosser and Keaton on Torts*, sec. 53).

Given that Indiana law recognizes the disparity of knowledge between insurance consumer and agent, the obvious foreseeability of harm if the agent gives wrong advice or gets involved beyond mere selling of insurance (i.e., via advocacy in a conflict situation as in the case at bar), and Indiana's recognition that duty is based on policy considerations, the narrow definition of "procurement" and "special circumstances" urged by Churilla on this Court runs counter to the structure and policy of *Webb*.

Burwell v. State is also instructive in giving perspective to the narrow definition of procurement urged by Churilla. The *Burwell* court observed (in a different context, but with relevance to the case at bar) as follows: "To obtain means to procure or cause a thing to be done, to acquire. *See Black's Law Dictionary* 972, 1087, 23 (5th Ed. 1979)(defining "obtain", "procure", and "acquire"). "The following cases define the relevant terms consistently though in a variety of contexts: [citations omitted]". *Burwell v. State*, 524 N.E.2d 817, 819 (Ind. Ct. App. 1988).

Despite policy considerations and the recognized definition of "obtain"/"procure" as set out in Black's Law Dictionary and *Burwell*, Churilla's argument runs like this: On September 27, 2017, Erie told the Cosmes that they could not have insurance with Erie

as a family with their son Broyce on their policy. Despite that, the Cosmes wanted to procure, obtain, or acquire coverage from Erie on different terms – viz., with Broyce on the policy. However, per Churilla, the Court is urged not to view this case as a procurement case. Such a view runs counter to logic, the facts of the case, common definitions recognized in Black's Law Dictionary, and the public policy rationale of *Webb*. Churilla's narrow and contrafactual view of "procurement" urged on this Court should be rejected for all these reasons.

Churilla attempts to distinguish *Bojrab v. John Carr Agency*, 597 N.E.2d 376 (Ind. Ct. App. 1992). However, *Bojrab* contained language that strongly embraces the facts of the case at bar within the solid framework of the duty to procure: "Conversations between an insurance agent and an insured may impose upon the agent a duty to exercise reasonable care, skill, and diligence in effecting insurance for the insured, or notifying the insured if insurance cannot be obtained. Failure to meet this standard of reasonableness would give rise to a negligence action against the agent." *Id.* At 377.

In this matter, the Cosmes were transferred to Churilla to handle the entire situation, by agreement and policy of both Erie and Churilla, and there was an entire course of conduct undertaken by Churilla to obtain/procure/acquire Erie insurance for the Cosmes on terms other than what were being currently offered. Nothing in *Bulla v. Donahue*, 366 N.E.2d 233 (Ind. Ct. App. 1977), *Town & Country Mutual Insurance Co. v. Savage*, 421 N.E.2d 704 (Ind. Ct. App. 1981) or the other cases urged by Churilla changes the fact that the case at bar fits, as a matter of law and policy, under a procurement theory sufficient to go to a jury. A judgment on the evidence for Churilla

was error both generally and under the theories of negligent procurement, negligent advice and advocacy and negligent counseling.

Churilla argues that, failing the theory of Churilla's negligent failure to procure, advise and counsel, "special circumstances" do not apply in the case at bar because this case fails the "special relationship" factors. (Brief of Appellee Churilla, p. 28.) However, "special circumstances" do not turn only on the number of years of the business relationship, but also on the facts of the case. In *Meridian Title Co. v. Gainer Group, LLC*, 946 N.E.2d 634, 638 (Ind. Ct. App. 2011), "special circumstances" were found absent a long term relationship where the insurer took a series of unusual actions outside the usual selling of insurance, including: the insurance agent's informing the plaintiff regarding the existence of legal issues, the insurance agent's meeting with and attempting to facilitate a settlement of the issues, the insurance agent's work in attempting to mediate and solve conflicts in the situation, and other "unusual" action.

In this matter, Churilla's interactions were not run-of-the-mill or "just selling insurance". It was, rather, a series of complex interactions to help solve a dispute just as in *Meridian Title Co.* Churilla talked to Roy Cosme numerous times, never definitively told Roy he had to exclude his son, repeatedly stated or implied that it was an option to resolve the situation by submitting the right paperwork to Erie, and provided assistance far beyond the pale of normal insurance agent duties by submitting paperwork and advocating for procurement of insurance on terms the Cosmes sought.

It would be an injustice to say this case, like *Meridian*, was just run-of-the-mill insurance agency work. It would likewise be an error to grant a judgment on the evidence because there was no special circumstance, as the circumstance in the case at bar regarding the insurance agency involvement was anything but ordinary.

Finally, Churilla argues that, though assumption of duty under Restatement (Third) of Torts: Liability for Physical and Emotional Harm, Sec. 42 could apply, it does not apply because Churilla did not increase the Cosmes risk of harm by its assumption of duty. In conjunction with its discussion of the Restatement duty, Churilla cites to Blanchard, R.D., *An Insurance Agent's Legal Duties to Customers*, 21 Hamline L. Rev. 9, 18 (1997): assumption of duty principles would apply to an 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". (Brief of Appellee Churilla at 35 (Citing Blanchard)). Then, "the agent must exercise due care". *Id.*

It would be difficult to imagine a course of conduct further away from "staying in one's lane" or "just selling insurance". The Restatement section referenced above has been adopted by our Supreme Court in *Yost v. Wabash College*, 3 N.E.3d 509, 517 (Ind. 2014). Clearly, Churilla and Aguilar "stepped outside of their lane" and assumed a duty. Had they stayed in their lane, and said, "Look, you have one option – exclude your son", Roy would have done that. By stepping out of their lane, assuming the duty, Churilla caused harm in the case. Granting a judgment on the evidence on the basis that there was no assumption of duty would be an error.

CONCLUSION

For the reasons articulated herein, the trial court erred when it found in favor of both Defendants on their motions for judgment on the evidence and ruled that the matter should not proceed to a jury. The trial court's ruling was contrary to the evidence with respect to whether a contract existed at any time. Furthermore, the Cosmes

provided ample probative evidence allowing reasonable minds to differ as to their claims against each party; therefore, the matter should have proceeded to a jury to weigh the evidence that was presented to it and make their own finding. The trial court's finding deprived the Cosmes of a determination of the facts by the jury and; therefore, the trial court's ruling should be reversed.

WORD COUNT CERTIFICATE

I verify that this Brief contains no more than 7,000 words as required by Ind. App. R. 44(E).

/s/ Angela M. Jones
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CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 2023, service of a true and complete copy of the above and foregoing Reply Brief of Appellants was e-filed with the Clerk of the Court through the Indiana E-Filing System.

I further certify that on the 17th day of January, 2023, a copy of the foregoing Reply Brief of Appellants was served upon the following though the Indiana E-Filing System:

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I further certify that on the 17th day of January, 2023, a copy of the foregoing Reply Brief of Appellants was served upon the following via U.S. Mail, in envelopes properly addressed, and with sufficient first-class postage affixed:

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