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

CHRISTINE COSME and ROY COSME,	)	Appeal from the Lake Superior Court
Appellants (Plaintiffs below)	)	Cause No. 45D01-1803-CT-00039
v.	)	Hon. John M. Sedia, Judge
DEBORAH A. WARFIELD CLARK, DAN CHURILLA, d/b/a CHURILLA INSURANCE, and ERIE INSURANCE	)	
Appellees (Defendants below).	)	

BRIEF OF APPELLEE ERIE INSURANCE EXCHANGE

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STATEMENT OF ISSUE

Whether the trial court correctly granted the motion by Erie Insurance Exchange (hereinafter "Erie") for judgment on the evidence when the evidence presented by Roy and Christine Cosme in their case-in-chief failed to provide substantial evidence that Erie breached the contract of insurance issued to them by Erie or breached its duty of good faith and fair dealing.

STATEMENT OF CASE

On March 20, 2018, Plaintiffs, Roy and Christine Cosme, filed a complaint against Defendants, Erie, Dan Churilla, d/b/a Churilla Insurance, and Deborah A. Warfield Clark, in a case relating to a cancelled insurance policy and subsequent automobile accident. (Appellants' App. Vol. II p. 39-44) On March 11, 2020, Plaintiffs filed what they titled the Second Amended Complaint against Defendants. (Appellants' App. Vol. II p. 48) Against Erie, the Second Amended Complaint alleged claims for breach of contract and for the torts of negligence and breach of the duty of good faith and fair dealing, and it requested declaratory relief, compensatory damages and punitive damages. (Appellants' App. Vol. II p. 55-59)

A jury trial began on June 13, 2022. (Tr. Vol. II, p. 2) On June 15, after Plaintiffs had concluded their case-in-chief, Erie and its co-defendant Churilla filed motions for judgment on the evidence. (Tr. Vol. II, p. 163) The trial court issued an order granting both motions and entered final and appealable judgment in favor of Erie and Churilla and against Plaintiffs. (Appellants' App. Vol. II p. 133) On July 13, Plaintiffs filed with the trial court a motion to correct error and demand for a new trial. (Appellants' App. Vol. II p. 134) On August 1, the court, finding that all theories of recovery were foreclosed, issued an order denying Plaintiffs' motion to correct error and denying their demand for a new trial. (Appellants' App. Vol. II p. 184) On August 11, Plaintiffs filed their notice of appeal from the June 15 order granting Erie judgment on the

evidence. (Appellants' App. Vol. II p. 37) On September 26, the clerk filed a notice of completion of transcript. (Appellants' App. Vol. II p. 37) On November 18, Plaintiffs submitted their brief and appendix. (Appellants' App. Vol. II p. 1)

STATEMENT OF FACTS

In August 2016, Erie sold Erie Automobile Insurance Policy No. Q08-2715138 (hereinafter "the Policy") to Plaintiffs. (Tr. Vol. II, p. 228, ll.1-12; Trial Ex. 8) In August 2017, the Policy, with Plaintiffs as the named insured, automatically renewed. (Tr. Vol. II, p. 228, ll.13-16; Appellants' App. Vol. II p. 187) The Policy was to run for a one-year period ending Aug. 27, 2018. (Trial Ex. 7, p. 2)

Plaintiffs' son, Broyce, 19 years old in 2017, was an additional listed driver on the Policy. (Tr. Vol. II, p. 30, ll.1-15; Appellants' App. Vol. II p. 187) In February 2017, Broyce was arrested after Hobart police pulled over a vehicle and found marijuana inside. (Tr. Vol. II, p. 32, ll.9-16) Although he was a backseat passenger and it was not his vehicle, the incident resulted in a suspension of Broyce's driver's license. (Tr. Vol. II, p. 32, ll.17-20; p. 34, ll.5-7) Broyce received a spring 2017 letter from the Indiana Bureau of Motor Vehicles informing him that his driver's license was suspended. (Tr. Vol. II, p. 34, ll.8-10) Broyce contacted the BMV and learned the reason for the suspension was he "failed to show proof of insurance." (Tr. Vol. II, p. 34, ll.11-14) Furthermore, in March 2017, Broyce, while driving his parents' vehicle, received a speeding ticket for driving 86 miles per hour in a 70-mph zone. (Tr. Vol. II, p. 47, ll.5-11)

In July 2017, Plaintiffs submitted a request to change certain vehicles on the Policy, which prompted Erie's computer system to obtain a motor-vehicle report ("MVR") issued by the BMV. (Tr. Vol. II, p. 229, ll.16-18) This MVR check alerted Erie underwriter Megan Malena that Broyce's driver's license was suspended. (Tr. Vol. II, p. 229, ll.16-18) Malena, whose job title

with Erie was Underwriting Consultant, reviewed applications and claims and engaged in underwriting, among other duties. (Tr. Vol. II, p. 214, ll.12-22). Ms. Malena found that Broyce Cosme's MVR, in addition to showing the license suspension, provided a record of his aforementioned vehicular troubles with drug possession and speeding:

> "Broyce's license is suspended. MVR revealed suspension 4/26/17 failure to file insurance, bureau, suspension 2/9/17 failure to provide proof of insurance to bureau (currently suspended), 2/9/17 drug possession, vehicle operator/MISD, 3/22/17 SPD 86/70 sent driver exclusion emailed to agent for Broyce Cosme."

(Tr. Vol. II, p. 229, ll.7-12)

Ms. Malena recognized that a license suspension of a listed driver on a policy represents grounds under Indiana law for an insurer to cancel an automobile policy midterm. (Tr. Vol. II, p. 199, ll.1-4; p. 223, ll.6-25) On Sept. 6, 2017, Ms. Malena sent to Churilla, Plaintiffs' insurance agent, a notice that Erie would be requesting that Plaintiffs sign a form excluding Broyce from coverage under the Policy. (Tr. Vol. II, p. 230, ll.10-25; p. 231, ll.1-8) Erie does not cover drivers with a suspended license, and individuals with a suspended license are prohibited by law from driving. (Tr. Vol. II, p. 230, ll.10-25; p. 231, ll.1-8) On Sept. 27, 2017, Erie sent a letter to Plaintiffs informing Plaintiffs that they were required to sign a form excluding Broyce from the Policy or else Erie would exercise its right to cancel the Policy. (Tr. Vol. II, p. 225, ll.17-25) The letter stated in relevant part:

> <u>THIS IS A VERY IMPORTANT LETTER. PLEASE READ IT CAREFULLY. YOUR POLICY WILL BE CANCELLED IF YOU DO NOT RESPOND.</u>
>
> * * *
>
> 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).

> 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.

(Trial Ex. 8) The letter also detailed the reason behind Erie's request, which was stated as, "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." (Tr. Vol. II, p. 244, ll.8-9; Trial Ex. 8) The letter reached Plaintiffs on or about Oct. 3, 2017. (Tr. Vol. II, p. 49, ll.9-13; Appellants' App. Vol. II p. 49, ¶ 11)

Because Broyce had not told his parents about the license suspension from months prior, the letter from Erie was the first time Plaintiffs knew of Broyce's suspension. (Tr. Vol. II, p. 49, ll.9-15) After receiving the letter on or around October 3, Roy Cosme read the letter and saw it stated that, unless Broyce were excluded from the Policy, the Policy would be cancelled effective at 12:01 a.m. on Nov. 1, 2017. (Tr. Vol. II, p. 105, ll.7-18) He also saw that the letter stated that the signed no-coverage form excluding Broyce needed to be received at Erie's home office in Pennsylvania by Oct. 28, 2017 in order for cancellation to be avoided. (Tr. Vol. II, p. 106, ll.6-9) The letter arrived in early October; however, Broyce waited until the middle of the month to log onto the BMV website and confirm that his driver's license remained suspended. (Tr. Vol. II, p. 49, ll.16-23)

Despite knowing of the October 28 deadline, Roy and Christine Cosme waited until October 26 – two days before the signed form was due in Pennsylvania – before speaking with their insurance agent for the first time about the Erie exclusion letter. (Tr. Vol. II, p. 188, ll.21-24; p. 189, ll.3-4) Roy told the agent, Churilla employee Janine Aguilar, that Broyce's license suspension was a mistake since Broyce was not driving the automobile at the time he and his friends were arrested. (Tr. Vol. II, p. 189, ll.21-24). Ms. Aguilar recommended that Plaintiffs sign

the exclusion form and work on getting Broyce back on the Policy later. (Tr. Vol. II, p. 76, ll.18-23) Nevertheless, Ms. Aguilar, citing Roy Cosme's statement that the suspension was a mistake, emailed Erie and asked Ms. Malena not to cancel the Policy. (Tr. Vol. II, p. 189, ll.14-24) Roy Cosme had represented to Ms. Aguilar that he possessed paperwork showing Broyce's license should not have been suspended and that Broyce would send the paperwork over. (Tr. Vol. II, p. 190, ll.1-2) Ms. Aguilar subsequently "found out that (Broyce) didn't have the paperwork that would … let me keep him with Erie." (Tr. Vol. II, p. 191, ll.2-3)

On October 27, Ms. Malena spoke to Ms. Aguilar and informed her that Broyce's license remained suspended as per a re-run MVR, to which Ms. Aguilar replied that she would forward to Erie whatever paperwork Broyce eventually produced. (Tr. Vol. II, p. 195, ll.2-8) Broyce received a receipt for the fee he paid to have his license reinstated and emailed this receipt to Ms. Aguilar, but Broyce sent the email to an incorrect address and the email bounced back on October 27. (Tr. Vol. II, p. 52, ll.8-23) Broyce, because he did not regularly check his email, was not aware that his email to Ms. Aguilar with the reinstatement receipt had not been delivered. (Tr. Vol. II, p. 52, ll.16-23) It was not until October 30 – two days after Erie's deadline for Plaintiffs to avoid cancellation – that Broyce sent the reinstatement receipt to Ms. Aguilar's correct email address. (Tr. Vol. II, p. 52, ll.16-23) Of note, Broyce did eventually get the suspension expunged from his driving record, but the expungement did not occur until Nov. 13, 2017. (Tr. Vol. III, p. 110, ll.6-10)

On October 31, Ms. Malena emailed Ms. Aguilar and explained that, while Broyce paid a fee to reinstate his license, reinstatement does not mean a suspension did not occur. (Tr. Vol. II, p. 198, ll.19-25) Ms. Malena further explained to Ms. Aguilar that Erie is permitted to execute a midterm cancellation for any license suspension during the policy term, regardless of whether the

suspension remains in effect at the time of cancellation. (Tr. Vol. II, p. 199, ll.1-4)

Nonetheless, Ms. Malena provided one last chance to avoid cancellation, telling Ms. Aguilar that if Plaintiffs signed and returned the exclusion form prior to midnight, the November 1 cancellation would be void. (Tr. Vol. II, p. 199, ll.10-14) Because Plaintiffs did not send in a signed exclusion form by the October 28 deadline provided for in Erie's letter, the cancellation was already set to process as scheduled November 1 unless stopped. (Tr. Vol. II, p. 239, ll.1-2)

Ms. Aguilar, after speaking to Ms. Malena on October 31, called Broyce and left an October 31 voicemail that stated as follows:

> Hi Broyce, please give me a call. This is Janine calling from Churilla. You're still suspended. So, Erie says if you don't sign the exclusion today, then you won't have insurance as of midnight tonight. So right now they're showing him with a speed of 86 in a 70 and March 22nd of this year; then the February 9th drug possession vehicle operator, which I think is the mistake; and then the suspension February 9th, failure to provide proof of insurance; and then a suspension on April 26th for failure to file insurance. So, until we can get these things cleared up, you guys cannot have insurance with Erie unless you exclude him, and that has to be done today. So, please just give me a call back, (219) 922-4447. Thank you.

(Tr. Vol. II, p. 18, ll.4-12) Ms. Aguilar also sent an email that read, "Hi Broyce. I left messages for both you and your dad on your cell phones. I wanted to email as well. The family's auto insurance will cancel at midnight tonight if we do not receive the signed exclusion form for you." (Tr. Vol. II, p. 18, ll.16-19) Broyce did not read that email on October 31; he did not discover it until some time in November. (Tr. Vol. II, p. 53, ll.7-17) Likewise, Broyce did not look for Ms. Aguilar's voicemail until after October 31. (Tr. Vol. II, p. 53, ll.5-15) Roy Cosme did not listen to Ms. Aguilar's October 31 voicemail until November 6. (Tr. Vol. II, p. 87, ll.3-7)

Plaintiffs never did sign the exclusion form on October 31. (Tr. Vol. II, p. 85, ll.12-13) As the original September 27 Erie letter warned, the consequence of the family's failure to sign the exclusion form was that the Policy did indeed cancel. (Tr. Vol. II, p. 85, ll.12-13)

On Nov. 4, 2017, Plaintiffs' van, driven by Roy Cosme that day, was rear-ended by a vehicle Ms. Warfield Clark drove. (Tr. Vol. II, p. 82, ll.15-25) On Nov. 6, 2017, the Policy cancellation notice from Erie arrived in the mail and was opened by Christine Cosme. (Tr. Vol. II, p. 82, ll.15-25) Roy Cosme placed a call to Ms. Aguilar, who confirmed the cancellation. (Tr. Vol. II, p. 85, ll.10-14)

Despite the November 1 cancellation of Policy No. Q08-2715138, Plaintiffs nonetheless submitted a claim under Policy No. Q08-2715138 for their damages stemming from the November 4 accident involving Warfield Clark. (Trial Ex. 47) In a letter to Plaintiffs' representative dated Nov. 30, 2017, Erie stated that its records show the Policy cancelled as of Nov. 1, 2017. (Trial Ex. 47) Erie accordingly denied coverage for the accident because the Policy was not in place at the time of the accident. (Trial Ex. 47)

After the initiation of Plaintiffs' lawsuit in 2018, Erie produced to Plaintiffs' attorney a certified copy of the Policy. (Tr. Vol. III, p. 111, ll.16-19) This certified copy showed the policy period as running from Aug. 27, 2017 to Aug. 27, 2018. (Tr. Vol. III, p. 110, ll.10-14) Records coordinator Julia Swanson signed the certification. (Tr. Vol. III, p. 97, l.19) At trial, Plaintiffs called as a witness an insurance consultant named Elliott Flood. (Tr. Vol. III, p. 64, l.5-10) Flood testified that, looking at the certified copy of the Policy, one would get the impression that the Policy was still active at the time of the Nov. 4, 2017 accident. (Tr. Vol. III, p. 98, ll.7-14) However, Flood also acknowledged Ms. Swanson testified in an affidavit that the date range on the Policy period was a "scrivener's error" and that the true Policy period on the certified copy should be listed as Aug. 27, 2017 to Nov. 1, 2017. (Tr. Vol. III, p. 110, ll.22-25; p. 111, ll.1-4) Flood testified that, in handling an insurance claim, the first investigatory job on the checklist is to find out whether there is policy coverage, because, if there is no policy to enforce, the claim will

not be covered. (Tr. Vol. III, p. 104, ll.1-10)

After receiving notice of cancellation in the mail on November 6 and receiving confirmation that same day from Ms. Aguilar that the Policy was indeed cancelled, Roy Cosme finally signed the exclusion form and had Broyce send it to her. (Tr. Vol. II, p. 88, ll.7-10) Plaintiffs then applied for, and Erie issued a new automobile insurance policy to Plaintiffs, with Broyce excluded from coverage, policy No. Q11-5707792. (Tr. Vol. II, p. 88, ll.11-25; App. Of Appellee Erie Insurance Exchange Vol. II p. 5) Plaintiffs never simultaneously paid premiums on two policies. (Tr. Vol. III, p. 112, ll.4-6) For the old, cancelled Policy, Erie wrote Plaintiffs a refund check for the portion of their premium unused prior to cancellation. (Trial Ex. 46)

SUMMARY OF ARGUMENT

The trial court properly granted Erie's motion for judgment on the evidence because Plaintiffs presented insufficient evidence on essential elements necessary to sustain each of their claims against Erie. Because Plaintiffs chose not to sign the required exclusion form and allowed the Policy to cancel, no contract existed between Plaintiffs and Erie at the time of the Nov. 4, 2017 automobile accident, and Plaintiffs' breach-of-contract claim fails. The lack of a contract in place at that time creates a domino effect on Plaintiffs' other claims against Erie. Since there was no contract in place at the relevant time, Erie owed Plaintiffs no further duty of good faith and fair dealing, which means Plaintiffs cannot carry a claim against Erie for breach of that duty. Without any viable tort claim, Plaintiffs lack an underlying cause of action upon which to recover punitive damages. Finally, Plaintiffs cannot be held derivatively liable for any alleged breach of the duty of good faith and fair dealing on Churilla's part, because case law makes clear Churilla owed no duty of good faith and fair dealing to Plaintiffs. This Court should affirm the trial court in all respects.

Regarding Plaintiffs' breach-of-contract claim, the trial court correctly concluded that Plaintiffs presented insufficient evidence to show that a contract was in place between Plaintiffs and Erie at the time of the accident. On Sept. 27, 2017, Erie sent Plaintiffs a letter, which Plaintiffs read and understood, stating that the Policy would be cancelled unless Plaintiffs signed and returned, by Oct. 28, 2017, a form agreeing to exclude Broyce Cosme from the Policy. Plaintiffs chose not to sign the form. Erie, exercising its rights under the relevant statute which allows for midterm cancellation of auto insurance if any driver named on the policy has a suspended driver's license during the term, cancelled the Policy on Nov. 1, 2017 due to Broyce Cosme's license suspension. Days later, Plaintiffs received a notice of cancellation in the mail. Their insurance agent, Ms. Aguilar, confirmed the cancellation. Plaintiffs then purchased a replacement policy at higher cost which excluded Broyce, and Erie refunded the unearned premium on the cancelled Policy to the Plaintiffs. The only logical inference to be drawn from the evidence presented at trial was that the Policy did indeed cancel and was no longer in place on Nov. 4, 2017 when Plaintiffs were in an automobile accident. Plaintiffs' only evidence that the Policy remained active on that date – a certified copy of the Policy produced years later in litigation and the testimony of their expert, Flood – does not support a reasonable inference that the Policy was not cancelled. 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. Moreover, the existence of a contractual relationship between Plaintiffs and Erie *prior* to the accident does not save their claim, for that contractual relationship was properly and lawfully terminated. Erie, as mentioned, had a legal basis to cancel: Broyce's license suspension. No authority forbade Erie's consideration of other facts known to it in deciding to exercise its discretion to cancel the policy once it had a legal basis to do so. Erie's cancellation notice complied in all respects with the

cancellation statute: it was timely, it was complete, it gave the statutorily required notice, and it made the intent to cancel apparent to an ordinary person. Because their contract with Erie was lawfully terminated before the accident, Plaintiffs lack any viable contract on which to launch a breach-of-contract claim.

Without a contractual relationship in place at the time of the accident, Plaintiffs' claim that Erie breached the duty of good faith and fair dealing fails, too. Erie owed Plaintiffs no duty of good faith and fair dealing because Erie was no longer in a contract with Plaintiffs. Such a duty of good faith, the Indiana Supreme Court has made clear, flows only from a contract between an insurer and its insured. Plaintiffs cannot sustain a claim for breach of a duty that was not owed in the first place. None of Erie's actions would qualify as a breach, anyway. Plaintiffs complain about a lack of investigation on their claim stemming from the accident, but a lack of investigation in and of itself is insufficient evidence of a breach of the duty of good faith and fair dealing. More importantly, as Plaintiffs' own expert acknowledged, the first step in any claim investigation is to determine if a policy is in place to cover the claim. Here, no coverage was in place. Once Erie determined that no active policy existed, Erie was under no obligation to further investigate a claim from a party who was not among its insured. Plaintiffs presented no evidence to maintain their claim of breach of the duty of good faith.

Without a viable tort claim, the trial court properly entered judgment for Erie against Plaintiffs' claim for punitive damages, which Plaintiffs pleaded as if it is an independent cause of action when it is not. Punitive damages may only be awarded when there has been a successful recovery on an underlying claim. Punitive damages are unavailable as a matter of law for breach of contract. To recover punitive damages, then, Plaintiffs required a viable tort claim. Once the trial court had properly entered judgment against Plaintiffs and in favor of Erie on the claims of

breach of the duty of good faith and fair dealing and negligence, the trial court correctly recognized that Plaintiffs lacked any basis to receive punitive damages.

Finally, the trial court properly considered all other possible damages and correctly determined that there was no breach of the duty of good faith and fair dealing on Churilla's part for which Erie could be held derivatively liable. Insurance agents such as Churilla, as a matter of law, cannot be held liable for breach of the duty of good faith and fair dealing, which means Churilla did not owe the very duty Plaintiffs allege it violated. Erie cannot be held liable for an alleged breach by Churilla of a duty Churilla never owed.

For those reasons, the trial court correctly entered judgment for Erie and against Plaintiffs on all theories of recovery. This Court should affirm the trial court's order and judgment.

STANDARD OF REVIEW

"The standard of review for a challenge to a ruling on a motion for judgment on the evidence is the same as the standard governing the trial court in making its decision." *Scheffer v. Centier Bank*, 101 N.E.3d 815, 822 (Ind. Ct. App. 2018). Rule 50 of the Indiana Rules of Trial Procedure provides that standard, stating, "Where all or some of the issues in a case tried before a jury … are not supported by sufficient evidence … the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict."

"Judgment on the evidence is appropriate where all or some of the issues are not supported by sufficient evidence." *Scheffer*, 101 N.E.3d at 822. "The purpose of a motion for judgment on the evidence is to test the sufficiency of the evidence." *Hartford Steam Boiler Inspection & Ins. Co. v. White*, 775 N.E.2d 1128, 1133 (Ind. Ct. App. 2002). "The grant or denial of a motion for judgment on the evidence is within the broad discretion of the trial court and will be reversed only for an abuse of that discretion." *Id*. "When reviewing a trial court's ruling on a motion for

judgment on the evidence," the Court examines the "evidence and the reasonable inferences most favorable to the plaintiff from a quantitative as well as qualitative perspective." *Id*.

"Quantitatively, evidence may fail only where there is none at all; however, qualitatively, it fails when it cannot reasonably be said that the intended inference may logically be drawn therefrom." *Id*. "The failure of inference may occur as a matter of law when the intended inference can rest on no more than speculation or conjecture." *Id*.

ARGUMENT

I. The Trial Court Correctly Granted Erie's Motion for Judgment on the Evidence.

The trial court correctly granted Erie's motion for judgment on the evidence because, in Plaintiffs' case-in-chief, Plaintiffs presented insufficient evidence to support essential elements of their claims against Erie.[1] The trial court correctly determined that no contract between Erie and Plaintiffs existed in the relevant time period, thus precluding Plainfiffs' breach-of-contract claim. As no contractual relationship existed, Erie owed Plaintiffs no duty of good faith and fair dealing in the relevant time period, and the trial court correctly found that Plaintiffs' breach-of-good-faith claim failed. Without a viable tort claim, the trial court correctly ruled Plaintiffs were not entitled to punitive damages. Finally, the trial court correctly found no damages were available to Plaintiffs based on a derivative theory of liability against Erie based on Churilla's negligence. For those reasons, the Court should affirm the trial court's judgment for Erie.

A. The Trial Court Correctly Found that Plaintiffs Presented Insufficient Evidence for Their Breach-of-Contract Claim.

[1] On appeal, Plaintiffs challenge the trial court's finding that they presented insufficient evidence to carry a negligence claim against *Churilla*. (Brief of Appellants, p. 30-31) However, Plaintiffs do *not* challenge the trial court's entry of judgment for Erie on the negligence claim against *Erie*. (Brief of Appellants, p. 31-39) Because their brief does not explicitly address or argue the negligence claim against Erie, Plaintiffs have waived any challenge on that ground to the trial court's granting of Erie's motion for judgment on the evidence. Even if Plaintiffs had preserved this argument, it fails as a matter of law as insurance companies cannot be sued for negligence. *See Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993); *Travelers Indemnity Co. v. Johnson*, 440 F. Supp. 3d 980, 987-88 (N.D. Ind. 2020).

Plaintiffs presented insufficient evidence for their breach-of-contract claim because they did not establish that a contract was in place with Erie at the time of the accident. "To prevail on a claim for breach of contract, the plaintiff must prove the existence of a contract, the defendant's breach of that contract, and damages resulting from the breach." *Haegert v. Univ. of Evansville*, 977 N.E.2d 924, 937 (Ind. 2012). A terminated contract – in other words, one that does not exist at the relevant time – cannot be breached. That is why there is no liability for an insurance company stemming from an accident in which the injured would-be claimant was no longer insured by the company on the date of the collision. *See Am. Standard Ins. Co. of Wisconsin v. Rogers*, 788 N.E.2d 873, 880 (Ind. Ct. App. 2003).

Although Plaintiffs did present reed-thin quantitative evidence that a contract was in place at the time of the accident, the trial court correctly discounted this evidence from a qualitative perspective because it cannot reasonably be said that Plaintiffs' intended inference (that the Policy remained active on Nov. 4, 2017) could logically be drawn from the evidence they cite. Plaintiffs' sole evidence that the Policy remained in effect was the certified copy produced years later in conjunction with this lawsuit and Flood's expert trial testimony about the meaning of this certified copy. However, Flood – who had no firsthand, contemporaneous knowledge of any of the events of this case – acknowledged at trial that the date range on the certified copy was averred by the certifier to contain a scrivener's error. All other evidence – the mailed Nov. 6, 2017 cancellation confirmation from Erie, Ms. Aguilar's phone confirmation to Roy Cosme that the Policy was cancelled, Ms. Malena's testimony that she cancelled the Policy, Roy Cosme's testimony that he purchased a second, separate policy with Broyce excluded, and Erie's returning of the unearned premium on the cancelled Policy to the Plaintiffs – confirmed that all parties to these events understood a cancellation to have taken place. Plaintiffs' attempt to infer that one piece of

evidence, the certified copy of the Policy issued after litigation commenced, amounted to something more than a paperwork error, is at best conjecture, which is not enough to survive a motion for judgment on the evidence.

Plaintiffs' alternative argument – that the undisputed existence of a contract *prior* to Nov. 1, 2017 should have been enough to survive Erie's motion for judgment on the evidence on the breach-of-contract claim – misses the mark. For that fact to matter in this case, Erie's cancellation of the contract would have had to have been improper or ineffective. It was not. The cancellation conformed to statute and was lawful and proper in every way.

First, a license suspension is a statutorily authorized basis for an insurer to execute a midterm cancellation of an insurance policy. There is an entire statutory scheme in the Indiana Code that governs auto policies and sets out grounds for an insurer to cancel. Those grounds include: 1) nonpayment of premium; 2) driver's license or vehicle registration of the named insured or of any other operator who either resides in the same household or customarily operates an automobile insured under the policy has been denied or has been under suspension or revocation during the policy period or the existence of one or more grounds for such denial, suspension or revocation has become known; 3) the named insured or any other operator who resides in the same household or customarily operates an automobile operator in the same household uses drugs or alcohol to excess, or is under treatment for epilepsy or heart disease and does not produce a doctor's note attesting to the operator's ability to operate a motor vehicle; 4) fraud, misrepresentation, or concealment of any fact relating to the issuance of insurance; 5) violation of the terms or conditions of the policy; and 6) the place of residence of the insured or the state of registration or license of the insured is changed to state or country in which the insurer is not licensed. Ind. Code § 27-7-6-4. Despite the undisputed evidence at trial showing Broyce Cosme

was on the Policy and had his license suspended during the same term in which the Policy was cancelled, Plaintiffs still bizarrely claim "no legal reason existed to cancel the policy." (Brief of Appellants, p. 39) Their reasoning appears to be that it was improper for Ms. Malena to consider "portions of Broyce Cosmes [sic] driving record which were not legal reasons for a cancellation," (Brief of Appellants, p. 33), but Plaintiffs cite no authority that would preclude an insurance company from considering a full universe of facts known to it before making a decision to execute a lawful cancellation. Erie possessed a legal reason to cancel. Broyce, a driver listed on the Policy, had a suspended license. Under Ind. Code § 27-7-6-4, a license suspension is a legal reason to cancel the policy. The existence of a statutory ground for cancellation "makes the contract voidable at the insurer's option." *Indiana Ins. Co. v. Knoll*, 236 N.E.2d 63, 71 (1968). An option necessarily implies a level of discretion, and Erie's use of that discretion was not improper.

Second, Plaintiffs' attempt to allege an improper cancellation notice also falls flat. The primary statute governing automobile insurance cancellation and non-renewal sets out what must be included in a notice of cancellation and the amount of notice which must be given to an insured. The relevant statute states as follows:

> No notice of cancellation of a policy to which section 4 of this chapter applies shall be effective unless mailed or delivered by the insurer to the named insured at least twenty (20) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium at least ten (10) days notice of cancellation accompanied by the reason therefor shall be given. In the event such policy was procured by an insurance producer duly licensed by the state of Indiana, notice of intent to cancel shall be mailed or delivered to the insurance producer at least ten (10) days prior to such mailing or delivery to the named insured unless such notice of intent is or has been waived in writing by the insurance producer. Unless the reason accompanies or is included in the notice of cancellation, the notice of cancellation shall state or be accompanied by a statement that upon written request of the named insured, mailed or delivered to the insurer not less than fifteen (15) days prior to the effective date of cancellation, the insurer will specify the reason for such cancellation. This section shall not apply to nonrenewal.

Ind. Code § 27-7-6-5. The cancellation notice in this matter was mailed on Sept. 27, 2017 with a Nov. 1, 2017 cancellation date and thus complied with the statute. The notice of cancellation also conformed with the statute in that it provided the reason for cancellation and it copied Churilla on the notice.

Plaintiffs erroneously imply a cancellation notice must conform to a particular form and that Erie's was invalid for not doing so. "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." *Westfield Companies v. Rovan, Inc.*, 722 N.E.2d 851, 858 (Ind. Ct. App. 2000) (internal citation and quotation marks omitted). Erie's notice to Plaintiffs included, in all-capital letters, at the very top of the page, an announcement that Erie intended to cancel the Policy unless Plaintiffs took action. Erie's expression of intent was clear enough to be apparent to the ordinary person, and accordingly its notice was proper.

For the reasons stated above, the trial court correctly found that Plaintiffs did not put forth the evidence of a contractual relationship necessary to sustain their breach-of-contract claim.

B. The Trial Court Correctly Determined Plaintiffs Presented Insufficient Evidence for Their Claim of Breach of the Duty of Good Faith and Fair Dealing.

Because there was no contractual relationship in place between Erie and Plaintiffs at the time of Plaintiffs' accident, Plaintiffs failed to present sufficient evidence on their claim for breach of the duty of good faith and fair dealing. The existence of a duty on the part of an insurer to act in good faith and deal fairly arises only where the insurer is in "privity of contract" with an insured party. *Hickman*, 622 at 518. As explained in Section A of this Argument, Plaintiffs, by ignoring Erie's letter requiring exclusion of Broyce, allowed the Policy to cancel. If there is no contractual relationship between the insurer and an insured, then the insurer does not owe that party a duty of

good faith and fair dealing. Erie does not owe a duty of good faith and fair dealing to the public at large – just its insureds. *See Hickman*, 622 N.E.2d at 518. As such, Plaintiffs' claim that Erie breached the duty of good faith and fair dealing failed, for the reason that there was no contractual relationship in place between Plaintiffs and Erie at the time of the accident.

Alternatively, even if Erie did owe a duty of good faith and fair dealing in the relevant period, which it did not, no breach occurred. The Indiana Supreme Court has articulated four acts that constitute a breach of an insurer's duty of good faith and fair dealing: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim. *Hickman,* 622 N.E.2d at 519. Since that holding, courts have been careful to not expand the duty beyond the four acts the Supreme Court initially articulated. *See Monroe Guaranty Insurance Co. v. Magwerks Co.,* 829 N.E.2d 968, 976 (Ind. 2005); *Klepper v. Ace American Insurance Co.,* 999 N.E.2d 86, 98 n.11 (Ind. Ct. App. 2013*); Telamon Corp. v. Charter Oak Insurance Co.,* 179 F. Supp. 3d 851, 856 (S.D. Ind. 2016). Thus, only conduct that fits in one of the four articulated spheres can be considered a breach of the duty of good faith and fair dealing.

This case involves no act by Erie that fits within one of the four examples. As no contract existed between Erie and Plaintiffs, the denial of their claim was well-founded. This case does not involve an unfounded delay in making a payment. At no point did Erie – or Churilla, for that matter – deceive Plaintiffs.[2] The Sept. 27, 2017 letter was read and understood by Plaintiffs, and its command that Broyce be excluded or else the Policy would cancel was never contradicted by Erie or Churilla. Finally, the fourth ground for breach does not apply since there was no claim

[2] Plaintiffs claim Erie knew Broyce's license suspension was an error "because the reason for the suspension was lack of insurance and Erie had a policy of insurance insuring Broyce at the time the suspension was issued." (Brief of Appellants, p. 35) However, Plaintiffs mischaracterize the evidence at trial, which showed that the reason for the suspension was, not *lack* of insurance, but rather failure to show *proof* of insurance.

settlement, meaning Plaintiffs did not present sufficient evidence of even one of the four Supreme Court-articulated varieties of breach of the duty of good faith and fair dealing.

"Similarly, the lack of diligent investigation alone is not sufficient to support an award" for breach of the duty of good faith. *Hickman*, 622 N.E.2d at 520. Plaintiffs cite an alleged lack of investigation on their accident claim as evidence of breach. (Brief of Appellants, p. 36) This argument misses the mark, not only due to *Hickman*'s statement that breach is not established through a lack of diligent investigation, but also due to Plaintiffs' mischaracterization of the evidence. Contrary to Plaintiffs' claim that their presented evidence "established that no investigation was done," Erie's claim denial clearly stated that the claim was denied due to the Policy being cancelled. The only reasonable inference from the presence of that statement in the denial notice is that some investigation was done on the claim to determine that the claim was made on a cancelled policy. As the Plaintiffs' own expert, Flood, testified, the first thing to do in a claim investigation is to determine if an active policy exists. Erie at the outset determined there was no coverage and thus conducted a diligent investigation that was required to go no further.

In conclusion, for all of the above reasons, the trial court appropriately entered judgment on the evidence for Erie as to Plaintiffs' claim of breach of the duty of good faith and fair dealing.

C. The Trial Court Correctly Ruled Plaintiffs Were Not Entitled to Punitive Damages.

Because no viable tort claim existed against Erie, the trial court was correct to rule that Plaintiffs were not entitled to recovery of any punitive damages. Punitive damages may not be awarded in a vacuum, and breach-of-contract claims do not support them. "It is well settled that a breach of contract claim may not lead to an award of punitive damages." *Sheaff Brock Inv. Advisors, LLC v. Morton*, 7 N.E.3d 278, 288 (Ind. Ct. App. 2014). Therefore, contrary to Plaintiffs' pleading of punitive damages as if punitive damages are somehow an independent cause

of action, Plaintiffs needed – but failed to establish – a viable tort claim upon which to recover punitive damages.

"There is no 'cause of action' for punitive damages. Punitive damages are a remedy, not a separate cause of action." *Crabtree ex rel. Kemp v. Est. of Crabtree*, 837 N.E.2d 135, 137 (Ind. 2005). "Successful pursuit of a cause of action for compensatory damages is a prerequisite to an award of punitive damages." *Id*. at 137-38. "There is no freestanding claim for punitive damages apart from the underlying cause of action." *Id*. at 138. For the reasons stated in Section B of this Argument, Plaintiffs failed to present sufficient evidence to sustain an underlying cause of action against Erie for breach of the duty of good faith and fair dealing. Without a claim that Erie breached the duty of good faith, Plaintiffs' claim for punitive damages also failed because, again, punitive damages were never legally permissible on Plaintiffs' breach-of-contract claim.

Alternatively, even if Plaintiffs had presented sufficient evidence of breach of the duty of good faith, which they did not, the trial court was still correct to find that Plaintiffs may not recover punitive damages from Erie. This is so in part because proof that an insurer breached its duty of good faith and fair dealing "is not sufficient to establish the right to punitive damages." *Hickman*, 622 N.E.2d at 520. Stated differently, breach of the duty of good faith in and of itself does not open the door to punitive damages. "Punitive damages may be awarded only if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing … ." *Id*. Plaintiffs presented no evidence, let alone clear and convincing evidence, that Erie acted with any malice, fraud, gross negligence or oppressiveness that was not the result of a mistake of fact, honest error or judgment, or mere negligence. Accordingly, in all respects, the trial court correctly granted judgment for

Erie against Plaintiffs' claim for punitive damages.

D. The Trial Court Correctly Determined There Were No Damages Available to Plaintiffs Based on a Derivative Theory of Liability Against Erie Based on Churilla's Breach of the Duty of Good Faith and Fair Dealing.

To the extent Plaintiffs are attempting to hold Erie derivatively liable for alleged breach of the duty of good faith and fair dealing on Churilla's part, the evidence presented at trial and as outlined in the trial court's June 15 order failed both quantitatively and qualitatively. Plaintiffs' brief devotes only a very short, opaque, one-paragraph argument to the idea that "the trial court erred when it did not consider all other damages allowable to Appellants beyond punitive damages." (Brief of Appellants, p. 31-39)

Plaintiffs' argument to that effect fails for three reasons. First, there is no evidence the trial court failed to consider all allowable damages. *See* Appellants' App. Vol. II p. 131-33. Second, quantitatively, Indiana law holds that a claim of breach of duty of good faith and fair dealing may not be asserted against an insurance agent such as Churilla. *Priddy v. Atl. Specialty Ins. Co.*, 468 F. Supp. 3d 1030, 1047-48 (N.D. Ind. 2020). Plaintiffs claim Erie should be held responsible, on a theory of derivative liability for alleged breach of the duty of good faith and fair dealing, based on evidence 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."[3] (Brief of Appellants, p. 37-38) Erie, on the contrary, cannot be held responsible for violations by

[3] This Court has frequently stated it will not become an advocate for a party and sift through the record to find support for undeveloped arguments. *See Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016). Plaintiffs have not argued for any derivative theory of liability against Erie other than Churilla's alleged breach of the duty of good faith and fair dealing. Therefore, Plaintiffs have waived any other theory of agency liability for which Erie might be liable for acts and omissions on the part of Churilla.

Churilla of a duty Churilla never owed in the first place. The duty does not apply to agents such as Churilla.

Third, even if such a duty existed, which it did not, Churilla did not commit any breach of such duty for which Erie could be derivatively liable. Churilla never told Plaintiffs that reinstating Broyce's license would render moot Erie's Sept. 27, 2017 letter requiring Broyce to be excluded or else the Policy would cancel. Churilla did advise Plaintiffs on multiple occasions that the Policy could be cancelled. After the Policy did cancel, any interactions between Churilla and Plaintiffs could not be imputed to Erie, for Churilla would no longer have been acting as an agent of Erie toward Plaintiffs. As such, the trial court correctly determined there were no damages available to Plaintiffs based on a derivative theory of liability stemming from Churilla's alleged breach of the duty of good faith and fair dealing.

CONCLUSION

For the foregoing reasons, the trial court correctly granted Erie's motion for judgment on the evidence. Erie requests the Court affirm the trial court's order entering judgment for Erie.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Ind. App. R. 44(E), I certify that this Brief of Appellee contains fewer than 14,000 words, excluding the items listed in Rule 44(C).

/s/ Christopher Goff
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CERTIFICATE OF SERVICE

Pursuant to Ind. App. Rule 24, I certify that on December 20, 2022, the foregoing document was filed electronically via the Indiana E-filing System (IEFS), and contemporaneously served upon registered-user counsel (listed below) via the Indiana E-Filing System (IEFS) and/or by First-Class U.S. Mail, postage prepaid where indicated:

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