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Franklin County Legal Journal
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Jason L. Fox and Karen S. Fox, Plaintiff vs. State Farm Mutual Automobile Insurance, And David W. Stauffer Insurance Agency, Inc., Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2017-3925

HEADNOTES

Insurance Agents: Standard for Establishing a Duty of Care

1. Where an insured alleges negligent misrepresentation and unfair or deceptive acts against an insurer, there can be no recovery by the insured if an insurer complied with statutory notice and did not intentionally conceal information. Treski v. Kemper, 674 A.2d 1106, 1109 (Pa. Super. 1996).

2. The relationship between insurers and insureds is not so unique that the law requires an insurer to explain every consequence which may result from the selected choice of coverage. Kilmore v. Erie Insurance Company, 595 A.2d 623, 626-27 (Pa. Super. 1991).

3. Every insured must question his insurer to determine the effects and coverage consequences of his respective policy. Kilmore, 595 A.2d at 626-27; see also Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F.Supp.2d 371, 383 (E.D. Pa. 1998) (adopting this sentiment).

4. "A plaintiff acquires a cause of action against his broker or agent where the broker 'neglects to procure insurance, or does not follow instructions, or if the policy is void or materially defective through the agent's fault . . .'" Laventhol & Horwath v. Dependable Ins. Assoc., Inc., 579 A.2d 388, 391 (Pa. Super. 1990).

5. Insurance agents or brokers may be held liable where they fail "to exercise the care that a reasonably prudent businessman in the brokerage field would exercise under similar circumstances . . ." Consolidated Sun Ray v. Lea, 401 F.2d 650, 656 (3d. Cir. 1968).

6. Section 299A of the Second Restatement of Torts sets forth the applicable duty of care for professionals: that "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Restatement (Second) of Torts §299A (1965).

7. Section 299A of the Second Restatement of Torts has been rejected as a per se duty of care for insurance brokers. See Wisniski v. Brown & Brown Ins. Co. of PA, 852 A.2d 1206 (Pa. Super. 2004) rev'd 887 A.2d 1238 (Pa. 2005) (vacating Superior Court's Order applying §299A as per se duty of care for insurance brokers and "remand[ing] to the Superior Court for reconsideration of whether a duty exists by applying the five prong test as set forth in Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (2000)") [hereinafter "Wisniski I"].

8. To determine the existence of a duty of care as to insurance agents or brokers, the Court must analyze the following five factors set forth in Althaus: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." Wisniski v. Brown & Brown Ins. Co. of PA, 906 A.2d 571, 576 (Pa. Super. 2006) [hereinafter "Wisniski II"].

9. Here, as to the first prong, the relationship between insurance agent and insured was arm's-length due to lack of agent's ability to legally bind insureds and the absence of any allegation of a special relationship.

10. Here, as to the second prong, there is little social utility to imposing a duty on insurance

brokers to predict and explain all potential consequences of insurance policies where insureds are required as a matter of law to determine the effects of his chosen policy.

11. Here, as to the third prong, an insurance agent failing to advise insureds of certain potential consequences or alternative options to conflicting car insurance policies does not yield an unreasonable risk of harm; risking lack of coverage in hypothetical or potential future scenarios is a reasonable risk that every insured must weigh in deciding what type of coverage they seek.

12. Here, as to the fourth prong, imposing a duty on insurance agents to advise and explain all alternatives and consequences which could arise where the insured has one policy that allows for stacking, and one policy that does not, would effectuate and promulgate buyer's remorse as a valid basis for recovery where a previously purchased insurance policy prohibits such recovery.

13. Here, as to the fifth prong, where an issue appears to be superficially cognizable at the time of waiver of stacking and purchase of both stacking and non-stacking policies, the court does not find great overall public policy in imposing a duty on insurance agents to explain, without prompting by the insured, any possible alternatives or consequences of purchasing one stacking policy and one non-stacking policy.

14. Here, based on analysis of the five prongs to determine duty under Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (2000), the Court did not impose a duty on the insurance broker to inform the insured of all possible consequences of carrying one auto policy with stacking, and another auto policy without stacking.

Relationships Between Parties

15. The relationship between an insurance broker/agent and the insured can be categorized as either arm's-length, agency, or confidential. Wisniski II, 906 A.2d at 576-77.

16. The difference between an insurance broker and insurance agent has an effect on the type of relationship each share with their insureds. Wisniski II, 906 A.2d at 578.

17. "Brokers and insureds are ordinarily involved in what can be viewed as a series of discrete transactions, while agents and insurers tend to be under some duty to each other during the entire length of the relationship." Wisniski II, 906 A.2d at 578.

18. Insurance agency was considered a broker because it was not exclusively employed by one insurance company, but would instead use its discretion to provide advice to customers on the scope and type of coverage available. Wisniski II, 906 A.2d at 578.

19. An agency relationship is identified by the agent's power to "bind the principal or alter the principal's legal relations." Wisniski II, 906 A.2d at 577.

20. Insurance agency did not have the ability to bind its insureds to legal obligations, so there was no agency relationship. Wisniski II, 906 A.2d at 578.

21. A confidential relationship "is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." Wisniski II, 906 A.2d at 577.

22. The pivotal question in determining whether a confidential relationship exists "goes beyond mere reliance on superior skill, and into a relationship characterized by overmastering influence on one side or weakness, dependence, or trust, justifiably reposed on the other side." Wisniski II, 906 A.2d at 577.

23. The inquiry as to the existence of a confidential relationship is "intensely fact-specific." Wisniski II, 906 A.2d at 578.

24. Although not always the case, the Court presumes that "for the majority of broker-client

interactions, the relationship will not be so extremely one-sided as to be confidential." Wisniski II, 906 A.2d at 578-79.

25. The burden of establishing this confidential relationship is on the party claiming such relationship. Wisniski II, 906 A.2d at 579.

Appearances:

Joseph Nypaver, Esq. *for Plaintiffs*

Daniel J. Twill, Esq. *for Defendants*

OPINION

Before Meyers, J.

PROCEDURAL HISTORY

The Plaintiffs Jason and Karen Fox [jointly, "the Foxes"] initiated this action by filing a Complaint against State Farm Mutual Automobile Insurance [hereinafter "State Farm"] and David W. Stauffer Insurance Agency, Inc. [hereinafter "Stauffer Insurance"] [collectively, "the Defendants"], on October 12, 2017. On November 8, 2017, the Defendants filed Preliminary Objections to Count Three of the Foxes' Complaint. In response, the Court issued an Order scheduling oral argument for January 4, 2018. The Defendants filed their Brief in Support of Preliminary Objections on December 5, 2017. The Foxes filed their Brief in Opposition to Defendants' Preliminary Objections on December 6, 2017.

On December 28, 2017, Stauffer Insurance filed its own Motion for Protective Order, arguing that they should not be compelled to comply with the Foxes' extensive discovery requests until disposition of the Defendants' Preliminary Objections. On January 16, 2018, the Foxes filed an Answer to Defendant Stauffer Insurance's Motion for Protective Order. As of the date of this Opinion, Defendant Stauffer's Motion for Protective Order has not yet been decided.

This matter is now ripe for decision.

FACTUAL HISTORY

On December 14, 2015, Mr. Fox was driving his 2008 Dodge Ram 1500 truck west bound on Route 30 in Franklin County, PA. Complaint ¶9. Neil M. Strausburg, now deceased, was travelling east bound on Route 30, entered the west bound lane to pass vehicles in the east bound lane, which caused him to collide head-on with Mr. Fox's truck. Id. Mr. Fox

suffered substantial physical injuries as a result. Id. The Foxes aver that Mr. Strausburg was an underinsured driver maintaining automobile liability insurance coverage in the amount of $15,000.00. Id. at ¶11.

At the time of the accident, the Foxes were insured under two separate automobile policies sold to them by State Farm through Stauffer insurance. Id. at ¶¶5-6. Policy No. 721 0074-D10-38M [hereinafter "the truck policy"] provided for underinsured motorist (UIM) coverage for one vehicle, Mr. Fox's truck involved in the collision, in the amount of $15,000.00 *with stacking*. Id. at ¶5. Policy No. 45 5561-A27-38D [hereinafter "the two vehicle policy"] provided for UIM coverage for two other vehicles owned by the Foxes in the amount of $15,000.00, but *without stacking*. Id. at ¶¶6, 66. The Foxes signed a Rejection of Stacked Uninsured Coverage Limits on October 27, 2008. Id. at Ex. D. After Mr. Fox's accident, State Farm distributed $15,000 to the Foxes under the UIM coverage of the truck policy. Id. at ¶76. However, because the truck policy did not allow stacking, State Farm would not allow the Foxes to stack the UIM coverage of the two-vehicle policy, which did permit stacking. Id. at ¶¶77-78. The Foxes allege that they are entitled to stack the UIM coverage from the two vehicle policy because the Rejection of Stacked Uninsured Coverage Limits form signed by the Foxes refers only to *intra-policy* stacking, not *inter-policy* stacking. Id. at ¶¶71, 77.

The Foxes allege in Count III of their Complaint that Stauffer Insurance was negligent for failing to advise the Foxes to purchase a single policy with stacking or that the two policies could be combined into one policy with stacking. Id. at ¶¶74-75, 80(A)-(B). The Foxes further allege that Stauffer Insurance was negligent for failing to inform them about the inconsistencies of the policy and failure to advise that State Farm would preclude stacking even on policies which allowed stacking. Id. at ¶¶80(C)-(D), 80(G)-(H). Finally, the Foxes assert that because Stauffer Insurance knew the insureds were married and living together, Stauffer Insurance lacked policies to ensure that clients/customers had adequate coverage. Id. at ¶¶80(E)-(F). Because Stauffer Insurance was an agent of State Farm at all relevant times, the Foxes allege that State Farm is liable for the alleged negligence of Stauffer Insurance. Id. at ¶¶55-60, 81.

DISCUSSION

I. APPLICABLE STANDARD: PRELIMINARY OBJECTIONS

The standard for evaluating preliminary objections, including demurrer, is laid out in Allegheny Sportsmen's League v. Ridge:

> [W]hen ruling upon preliminary objections, the Court must

> accept as true all well-pleaded allegations of material fact as well as all reasonable inferences deducible therefrom. The Court is not required to accept as true any conclusions of law or expressions of opinion. In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by refusal to sustain them. A demurrer, which results in the dismissal of a suit, should be sustained only in cases that are free and clear from doubt and only where it appears with certainty that the law permits no recovery under the allegations pleaded.

790 A.2d 350, 354 (Pa. Cmwlth. 2002) (internal citations omitted). Preliminary objections must state specifically the grounds upon which relief should be granted. See Foster v. Peat Marwick Main & Co., 587 A.2d 382 (Pa. Cmwlth. 1991).

II. ANALYSIS

A. DETERMINING THE EXISTENCE OF A DUTY OF CARE AS TO STAUFFER INSURANCE

The Defendants' Preliminary Objections assert demurrer as to Count III of the Foxes' Complaint due to the absence of any special relationship which would establish a fiduciary duty upon the insurance company or agent owed to its client/customer. Defendants' Preliminary Objections ¶¶2-5. The Pennsylvania Superior Court has found an absence of a special relationship between the insurer and insured in cases where an insured sues his own insurance company on the grounds that they did not properly instruct him on all possible consequences of his policy. In Treski v. Kemper, the insureds had purchased full tort protection in Pennsylvania, whose claims under said protection were subsequently denied due to New Jersey's "Deemer Statute." 674 A.2d 1106, 1109 (Pa. Super. 1996). The insureds alleged the insurers had engaged in unfair or deceptive acts and negligent misrepresentation by failing to adequately inform them of consequences of the Deemer Statute. Id. at 1110. The Superior Court upheld the trial court's demurrer because the "insurers complied with the statutory notice and did not intentionally conceal information as [insureds] contend." Id. at 1115. The Treski Court reached this conclusion based on reasoning set forth in Kilmore v. Erie Insurance Company:

> We find no justification in the law to impose the additional burden on insurers that they anticipate and then counsel their insured on the hypothetical, collateral consequences of

> the coverage chosen by the insured. The basic contractual nature of insurance coverage . . . requires fair dealing and good faith on the part of the insurer, not hand holding and substituted judgment. *While we acknowledge insurance is an area in which the contracting parties stand in somewhat special relationship to each other, the relationship is not so unique as to compel this Court to require an insurer to explain every permutation possible from an insured's choice of coverage.* Each insured has the right and obligation to question his insurer at the time the insurance contract is entered into as to the type of coverage desired and the ramifications arising therefrom. Once the insurance contract takes effect, however, the insured must take responsibility for this policy. We, therefore, decline to extend the duties of any insurer to provide ongoing advice concerning the limits of its coverage.

Id. at 1114 (citing Kilmore v. Erie Insurance Company, 595 A.2d 623, 626-27 (Pa. Super. 1991)) (emphasis added). Federal courts have also adopted this sentiment. See Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F.Supp.2d 371, 383 (E.D. Pa. 1998).

Relying upon the emphasized language above, the Defendants argue that without a special relationship, the only obligation imposed upon an insurance company or agent is one of good faith and fair dealing. In the absence of a special relationship beyond that of a standard insurance company or agent and their customer/client, the Defendants assert that there is no duty to provide coverage advice or explain consequences of the customer's choices unless prompted to do so. Defendants' Preliminary Objections ¶9. As such, the Defendants claim that neither State Farm nor Stauffer Insurance was under any duty or obligation to explain the consequences of the Foxes' truck policy, which allowed stacking, and the two vehicle policy, which prohibited stacking via waiver. Id. at ¶1.

In response to the Defendants' argument, the Foxes assert that the Defendants owed a duty based on §299A of the Second Restatement of Torts, rather than some special relationship. Foxes' Brief in Opposition at 8-10. This section states that "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." Restatement (Second) of Torts §299A (1965).

The Pennsylvania Superior Court adopted this standard in Pressley, stating that licensed insurance agents are "required to exercise the skill and

knowledge normally possessed by members of that profession." Pressley v. Travelers Property Cas. Corp., 817 A.2d 1131, 1138 (Pa. Super. 2003). In Pressley, an insured had instructed her insurance agent to add her mother to her automobile insurance policy with the same coverage as the insured. Id. at 1134. When the insured's mother was fatally injured in a car accident, the insured discovered that her agent had not added her mother to the policy as instructed. Id. at 1135. After a bench trial, the trial Court found that the insurance agent and company were jointly and severally liable for the agent's failure to provide the insured with the requested policy by the promised date. Id. at 1134, 1138. The Pennsylvania Superior Court agreed, finding that the agent was negligent in fulfilling his duties pursuant to §299A. Id. at 1138.

The Pennsylvania Superior Court has imposed a similar duty to that of §299A in circumstances where agents are selecting a financially sound insurer for the insured:

> Although the question of whether an agent/broker has a duty under the circumstances presented by the facts averred in this case has not been previously addressed by the appellate courts of this Commonwealth, we find that, by synthesizing the above common law and statutory standards of care, an insurance agent's/broker's recognized duty to act with reasonable care, skill, and judgment extends to selection of the insurer and ascertaining whether it is reputable and financially sound and informing the insured of finding if investigation reveals evidence of financial infirmity, but the agent/broker nonetheless intends to place a policy with that insurer. Failure to comply with such duty may render the agent/broker liable to the insured that is unable to satisfy a claim due to the insolvency of the insurer.

Al's Café, Inc. v. Sanders Ins. Agency, 820 A.2d 745, 751 (Pa. Super. 2003). The Court relied on state and federal case law to reach this determination. Specifically, the Al's Café Court cited Laventhol & Horwath v. Dependable Ins. Assoc., Inc., where the Superior Court held "A plaintiff acquires a cause of action against his broker or agent where the broker 'neglects to procure insurance, or does not follow instructions, or if the policy is void or materially defective through the agent's fault . . .'" 579 A.2d 388, 391 (Pa. Super. 1990). The Al's Café Court also cited a federal case from the Third Circuit Court of Appeals, which applied Pennsylvania law, and determined that insurance agents or brokers may be held liable where they fail "to exercise the care that a reasonably prudent businessman in the brokerage field would exercise under similar circumstances . . ." Consolidated Sun

Ray v. Lea, 401 F.2d 650, 656 (3d. Cir. 1968). In light of these rules of law and upon review of the record, the Al's Café Court reversed the trial court's grant of summary judgment, finding that the insured had produced sufficient evidence that it had relied upon the expertise of the broker, and that the broker was negligent for selecting an insolvent insurer and failing to disclose as much. Id. at 752.

Although the Pennsylvania Supreme Court has not explicitly ruled on this issue, their vacating and remanding of Wisniski v. Brown & Brown Ins. Co. of PA strongly suggests that they reject the adoption of §299A as the *per se* applicable duty owed by insurance agents. 852 A.2d 1206 (Pa. Super. 2004) [hereinafter "Wisniski I"]. In Wisniski I, the Superior Court cited Pressley for the premise that an insurance agent or broker's duty of care comports with §299A. Id. at 1212. The Court further held that "[t]he duty of an insurance agent under §299A necessarily depends on the facts and circumstances of each individual case," and that §299A was merely a "general rule." Id. at 1213. The Superior Court concluded that the plaintiffs had presented sufficient evidence such that a jury could find that the agent's failure to inspect the insured premises and offer flood insurance was within the agent's duty owed to the plaintiffs and was therefore a breach of said duty. Id. On appeal, the Pennsylvania Supreme Court vacated Wisniski I and "remanded to the Superior Court for reconsideration of whether a duty existed by applying the five-prong test as set forth in Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (2000), and for an opinion in support thereof." Wisniski v. Brown & Brown Ins. Co. of PA, 887 A.2d 1238 (Pa. 2005).

On remand, the Superior Court applied the five-factor test from Althaus to determine whether the defendant insurance agent/broker had a duty to investigate the insured premises and offer flood insurance. Wisniski v. Brown & Brown Ins. Co. of PA, 906 A.2d 571 (Pa. Super. 2006) [hereinafter "Wisniski II"]. In Althaus, the Pennsylvania Supreme Court stated the following:

> In determining the existence of a duty of care, it must be remembered that the concept of duty amounts to no more than the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection from the harm suffered[.] To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times. The late Dean Prosser expressed this view as follows:
>
> These are shifting sands, and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with

> which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. When we find a duty, breach and damage, everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.
>
> Thus, the legal concept of duty of care is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice and society. The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.

Id. at 576 (quoting Althaus, 756 A.2d at 1168-69) (internal citations omitted). The Wisniski II Court went on to analyze each of those five factors. Id. at 566.

1. First Prong: Relationship Between Parties

First, the Superior Court addressed the relationship between the plaintiff insured and defendant insurance agent/broker and company, distinguishing between an ordinary arms-length relationship, an agency relationship, and a confidential relationship. Id. at 576-77. The Wisinski II Court held that an agency relationship is identified by the agent's power to "bind the principal or alter the principal's legal relations." Id. at 577 (quoting Basile v. H & R Block, Inc., 761 A.2d 1115, 1120 (2000), which held no agency relationship between defendant and its customers because defendant had no authority to alter the legal relationship between its customers and the IRS). As to confidential relationships, the Wisinski II Court recognized that such a relationship "is marked by such a disparity in position that the

inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." Id. at 577 (quoting eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 23 (Pa. Super. 2002). The pivotal question in determining whether a confidential relationship exists "goes beyond mere reliance on superior skill, and into a relationship characterized by overmastering influence on one side or weakness, dependence, or trust, justifiably reposed on the other side." Id.

In applying these standards, the Court further distinguished insurance brokers and insurance agents. Specifically, the Wisinski II Court found that "brokers and insureds are ordinarily involved in what can be viewed as a series of discrete transactions, while agents and insurers tend to be under some duty to each other during the entire length of the relationship." Id. at 578. Applying this distinction, the Court held that the defendant Brown Agency was a broker because it was not exclusively employed by one insurance company, but would instead use its discretion to provide advice to customers on the scope and type of coverage available. Id. However, since the Brown Agency did not have authority to bind insureds to legal obligations, the Wisniski II Court held that there was no agency relationship. Id.

Turning to the issue of whether a confidential relationship existed between the parties, the Court noted that said inquiry "is intensely fact-specific." Id. Although not always the case, the Court presumed that "for the majority of broker-client interactions, the relationship will not be so extremely one-sided as to be confidential." Id. at 578-79. The burden of establishing this confidential relationship is on the party claiming such relationship. Id. at 579. Furthermore, in a footnote, the Court explained that in Pennsylvania, "the insured has both the capacity and the duty to inquire about the scope of insurance coverage, rather than rely on hand holding and substituted judgment." Id. at 579, n. 6 (citing Kilmore v. Erie Ins. Co., *supra*, at 626, which held that although insurer has duty to explain coverage provided in good faith, insurer is not obligated to warn insured about every possible scenario where they would not be covered)) (internal quotations omitted); see also Treski v. Kemper Nat'l Ins. Co., *supra*, at 1114-15 (approving Kilmore). Therefore, the Wisniski II Court concluded "that for ordinary negligence purposes, the relationship between an insurance broker and client is an arm's-length business relationship."[1] Id.

2. Second Prong: Social Utility of Actor's Conduct

The second prong of the Althaus test addressed by the Wisniski II Court is the social utility of the actor's conduct. The Court held that there was "significant social utility in inspecting a property before advising a

1 The Wisniski II Court did not provide any dicta which would indicate how their finding would change if the defendant was an insurance agent, as opposed to a broker.

client about its insurance needs." Id. at 579. Specifically, an inspection would help the broker understand the client's needs and allow the broker to better apply his expertise to determine the type of insurance best suited for the customer. Id.

3. Third Prong: Nature of the Risk Imposed and Foreseeability of Harm Incurred

The third prong of the Althaus test addressed by the Wisniski II Court is the nature of the risk imposed and foreseeability of harm incurred. As to this question, "a duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." Id. at 580 (quoting R.W. v. Manzek, 888 A.2d 740, 747 (Pa. 2005)). The Court held that the nature of insurance itself is taking into account the risk that something will happen, which will cause damage to an insured or their property; as such, it is difficult to determine how foreseeable a certain risk is in comparison to other risks. Id. at 580.

4. Fourth Prong: Consequence of Imposing Duty on Actor

The fourth prong of the Althaus test analyzed by the Wisniski II Court is the consequences of imposing a duty upon the actor. Id. The Court determined that imposing a duty on brokers to inspect all premises before recommending insurance policies to their customers would be "onerous" due to the "time and expense," and a lack of necessity of said inspections in certain cases. Id. As to brokers specifically, as intermediaries involved in discrete transactions between the company and an insured, some brokers may lack expertise in such inspections. Id. at 581. Relatedly, the Court notes it would be difficult to set a limit on the extent of the duty to inspect from commercial and residential properties to cars and other vehicles. Id. Similarly, if the broker is responsible for performing such inspections, there is no onus on the insured to responsibly determine and request appropriate policies. Id.

Most important to this Court's analysis, the Wisniski II Court indicated that the consequences of imposing this duty would almost certainly result in situations identical to the one presented by the Foxes:

> [B]y creating such a duty insureds would have the opportunity to seek coverage for a loss after it occurred merely by asserting that they would have bought additional coverage if it had been offered. This turns the entire theory of insurance on its ear as individuals, in theory, take an 'intellectual gamble' when purchasing insurance as they weigh the expense of insurance versus the amount of coverage that they purchase. Allowing insureds to seek

> coverage, post-occurrence, allows them to completely circumvent this risk.

Id. (quoting Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82, 86 (Mo. App. 1994)) (emphasis added). The Wisniski II Court held that the possibility of this snowball effect "weigh[ed] heavily against recognizing a duty" to inspect imposed on insurance brokers. Id.

5. Fifth Prong: Overall Public Interest in Proposed Solution

The fifth and final prong of the Althaus test applied by the Wisniski II Court is the overall public interest in the proposed solution. The Court determined that there was little "overall public interest in requiring insurance brokers to inspect business premises and advise clients based on that inspection." Id.

Weighing all of these five factors, the Wisniski II Court held that insurance brokers do not have a "duty to inspect business premises and advise clients based on that inspect" as a matter of law. Id.

B. APPLYING ALTHAUS TO DETERMINE WHETHER STAUFFER INSURANCE HAD A DUTY TO THE FOXES

The question before this Court is whether Stauffer Insurance owed a duty to the Foxes to advise them "of the availability and consequences of being sold" both stacking and non-stacking car insurance policies. Plaintiffs' Brief at 4. This Court cannot and will not accept the assertions of the Foxes or the Defendants that a per se duty exists, respectively, under §299A of the Second Restatement of Torts, or based on a "special relationship." Rather, to determine the answer to this question, this Court must engage in the same five-prong Althaus analysis mandated by the Pennsylvania Supreme Court to be performed in Wisniski II.

1. The relationship between the parties

As in Wisniski II, this Court must determine the nature of the relationship between the Foxes and Stauffer Insurance. Given that this Court is at the Preliminary Objections stage, the Court must accept as true all well-pleaded facts asserted by the Foxes. The Foxes allege that Stauffer Insurance is an agent of State Farm, which means, based on Wisniski II, that Stauffer Insurance is employed by and represents only State Farm. Complaint at ¶¶55-57. As in Wisniski II, there is no agency relationship between Stauffer Insurance and the Foxes because there is no allegation in the pleadings that Stauffer Insurance had the authority to bind the Foxes or alter their legal relations.

Similarly, as stated in Wisniski II, the burden is on the Foxes to

establish the existence of a confidential relationship with Stauffer Insurance. As stated above in Wisniski II, "a confidential relationship is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power." The Defendants allege in their Preliminary Objections that the Foxes have failed to allege a special relationship. Upon this Court's review of the pleadings, the Court finds minimal facts regarding the interactions and relationship between the Foxes and Stauffer Insurance. The Foxes do assert that the Defendants "held themselves out . . . to be there when things go wrong and to help life go right," a popular slogan used by State Farm in marketing materials. Complaint at ¶30. The Foxes also assert that the Defendants owed the Foxes a "commitment to . . . treat them consistent with the requirements of Pennsylvania law." Id. at ¶31. Even accepting the Foxes' allegations of fact as true, the Court cannot find any statement in the record by any party that alleges that the position between the Foxes and Stauffer Insurance was so disparate that the Foxes trusted Stauffer Insurance completely and sought no other counsel such that there was an abuse of power.[2] Therefore, in light of the Foxes' failure to allege a disparity in power or position, this Court cannot find that a confidential relationship existed between the parties.

As such, as in Wisniski II, this Court finds that the relationship between Stauffer Insurance, an agent, and the Foxes, its customers, is an arm's-length business relationship. This factor weighs against imposition of a duty of care.

2. The social utility of the actor's conduct

The next question before this Court is whether there is social utility in an insurance agent explaining without prompting from the insured as to the availability and consequences of having both stacking and non-stacking insurance policies. Certainly there is social utility in being aware of potential consequences arising from the purchase of certain insurance policies. Such an unprompted explanation could help the Foxes and other customers better understand the coverage of their policies. However, as pointed out in Wisniski II, "the insured has both the capacity and the duty to inquire about the scope of insurance coverage, " and "the insurer need not warn the insured about every scenario in which coverage might not be provided." A conflict between multiple policies, especially given the effects of stacking and non-stacking, should reasonably prompt action by

2 If there were even the slightest allegation from the Foxes that they were in such an inferior position of power such that Stauffer Insurance abused its position of superiority over the Foxes, then this Court could possibly require discovery of some sort to develop a factual record to make this "intensely fact-specific inquiry." However, the only allegation is that Stauffer Insurance failed to advise the Foxes on a specific issue regarding their stacking and non-stacking policies, which would have caused them to choose differently. There is no basis by which the Court could conclude or require further factual discovery as to a disparity of position amounting to a confidential relationship.

the insured to question how that conflict will affect their coverage. In light of the insured's responsibility to investigate and understand their coverage, there seems to be little additional social utility to imposing a duty here. This factor weighs against imposition of a duty.

3. The nature of the risk imposed and the foreseeability of the harm incurred

Next, this Court must analyze the nature of the risk imposed by insurance agents failing to advise their customers, without prompting, of conflicting aspects of separate policies retained on separate vehicles and the foreseeability of any resulting harm. As stated in Wisniski II, "a duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." Therefore, a duty arises in the instant case only where an insurance agent's failure to explain the availability of other policies or potential consequences of conflicting stacking provisions on two separate policies, without prompting from the insured, creates an unreasonable risk of harm. As in Wisniski II, the very nature of insurance involves risk of future harm which may or may not be covered. The Court does not find that an insurance agent failing to advise insureds of certain potential consequences or alternative options to conflicting car insurance policies yields an unreasonable risk of harm. Risking lack of coverage in hypothetical or potential future scenarios is a reasonable risk that every insured must weigh in deciding what type of coverage they seek. The insurance agent's failure to foretell the future and react accordingly does not cause an unreasonable risk of harm to insureds. This factor does not support imposition of a duty here.

4. The consequences of imposing a duty upon the actor

As in Wisniski II, this Court places great emphasis and importance on the consequence of finding that insurance agents have a duty to advise and explain all alternatives and consequences which could arise where the insured has one policy that allows for stacking, and one policy that does not. Establishing such a duty would permit insureds to "seek coverage for a loss after it occurred merely by asserting that they would have bought additional coverage if it had been offered." To do so would effectuate and promulgate buyer's remorse as a valid basis for recovery where a previously purchased insurance policy prohibits such recovery. Effectively, an insured would be able to retroactively purchase insurance coverage for present harms which they had not previously raised with their insurance agent. Moreover, the Pennsylvania Superior Court has already held as a matter of law that insurers must in good faith explain the policy provided, but do not need to present every possible scenario in which the insured may be denied coverage. See Kilmore, 595 A.2d at 626.

As in Wisniski II, this Court finds that this factor weights strongly against imposing a duty on insurance agents to advise customers of the availability of other insurance coverage and the consequences of simultaneously retaining one stacking policy and one non-stacking policy.

5. The overall public interest in the proposed solution

Finally, this Court must determine the overall public interest in imposing a duty on insurance agents to advise customers on the availability and consequences of retaining stacking and non-stacking policies. Counsel for the Foxes stated at oral argument that State Farm had notice of similar contradicting policy issues as to stacking, but failed to address the situation or bring it to their future customers' attention. There may be some overall public interest in changing the process by which stacking may be waived in one policy and whether such waiver applies to other policies. However, the question before the Court is whether there is an overall public interest in obligating insurance agents to advise their customers of the availability of other coverage and the consequences of coverage where one policy has stacking and another policy waives it.

In a footnote in Wisniski II, the Court indicates that especially as to flood insurance, people can generally observe floor patterns and geography to make an educated determination about whether they want flood insurance. 906 A.2d at 581, n. 10. Similarly, if the insureds have been offered and accepted two separate vehicle policies where one permits stacking and one does not, it would seem logical for the insured to attempt to reconcile those differences. Therefore, since the issue appears to be superficially cognizable at the time of waiver of stacking and purchase of both stacking and non-stacking policies, the court does not find great overall public policy in imposing a duty on insurance agents to explain, without prompting by the insured, any possible alternatives or consequences of purchasing one stacking policy and one non-stacking policy.

For the foregoing reasons, the Court finds that Stauffer Insurance, as an insurance agent, did not owe a duty to the Foxes or any other customers to advise them of the availability of other insurance coverage as well as the ramifications of maintain one stacking policy with another non-stacking policy. Therefore, the Defendants' Preliminary Objection as to Stauffer Insurance is SUSTAINED and Count III of the Foxes' Complaint as to Stauffer Insurance is DISMISSED.

C. STATE FARM'S LIABILITY AT COUNT III AS PRINCIPAL TO STAUFFER INSURANCE

Because Stauffer Insurance had no duty to the Foxes in this

instance, its principal State Farm similarly cannot be held liable at Count III. Therefore, the Defendants' Preliminary Objection as to State Farm is SUSTAINED and Count III of the Foxes' Complaint as to State Farm is DISMISSED.

D. STAUFFER INSURANCE'S MOTION FOR PROTECTIVE ORDER

As previously stated by this Court, Stauffer Insurance filed a Motion for Protective Order on December 28, 2017. The Foxes filed an Answer to Stauffer Insurance's Motion for Protective Order on January 16, 2018. In light of the Court's aforementioned conclusion that Stauffer Insurance did not have a duty to without prompting advise the Foxes of the availability of other policies and the consequences of having one stacking policy and one stacking policy, this Court has dismissed Count III as to Stauffer Insurance. Count III was the only allegation made against Stauffer Insurance. Therefore, since this Court has dismissed the only count by which the Foxes could recover from Stauffer Insurance, the need for a Protective Order is MOOT.

CONCLUSION

Upon analysis of the five prong test set forth in Althaus used to determine the existence of a duty, this Court finds that Stauffer Insurance did not have a duty to advise the Foxes of other policies or inform them of the consequences of having both a stacking and non-stacking policy without being prompted to provide such information. Therefore, Count III as to Stauffer Insurance is DISMISSED. Similarly, if Stauffer Insurance cannot be held liable as a matter of law at Count III, neither can its principal State Farm. Therefore, Count III as to Stauffer is DISMISSED. The Defendants' Preliminary Objection as to Count III is SUSTAINED.

Moreover, in light of the Foxes' inability to recover from Stauffer Insurance due to the dismissal of the sole Count against it, Stauffer Insurance's Motion for Protective Order is DENIED AS MOOT.

ORDER OF COURT

AND NOW THIS 25th day of January, 2018, upon review of the Defendants' Preliminary Objections to Count III of the Plaintiffs' Complaint, filed on November 8, 2017, and upon review of the record and applicable law,

IT IS HEREBY ORDERED that the Defendants' Preliminary Objection is SUSTAINED as to both Defendants. Count III of Plaintiffs' Complaint is DISMISSED as to both Defendants.

IT IS FURTHER ORDERED that Defendant David W. Stauffer Insurance Agency, Inc.'s Motion for Protective Order, filed on December 28, 2017 is DENIED AS MOOT.

This Order is pursuant to the attached Opinion.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.