SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

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RE: *Montgomery, et al. v. William Moore Agency, et al.*
C.A. No. N11C-11-047 FSS

Dear Counsel:

After oral argument, two teleconferences, and further supplementation, there are distinct issues ripe for trial.[1] As an initial matter, the parties agree that

[1] *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962) ("Generally speaking, issues of negligence are not susceptible of summary adjudication. . . . Similarly, questions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury for

Defendant Lynn Hitchens should be dismissed because it is conceded he acted as Defendant William Moore Agency's agent. Accordingly, summary judgment is granted as to Lynn Hitchens.

There are two core disputes best left to a jury: 1) whether Defendants met the standard of care for an insurance agent under the circumstances and 2) whether Mark Achenbach, the tortfeasor, was the Christmas Shop's employee/agent. Other disputes about coverage, the statute of limitations, and damages are more obvious.

I.

As to the standard of care, both parties submitted expert opinions. Plaintiffs' expert originally opined it is industry custom to automatically include, or at least offer, the Hired Auto and Non-Owned Auto Liability endorsement to commercial clients. He stated: "By custom and practice in the insurance industry," both Hired and Non-Owned Automobile Liability coverage and Umbrella Liability coverage "is considered to be an essential part of every commercial insurance program." The expert further opined that Hitchens breached the standard of care by failing "to provide the Poynters the option to obtain coverage for Hired and Non-Owned automobile liability coverage [and] . . . Umbrella Liability coverage." In a

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decision.").

supplemental report, Plaintiffs' expert narrowed his opinion:

> It is the custom and practice in the insurance industry for agents and brokers to automatically include Non-Owned Auto coverage when they provide insurance to commercial accounts. This is accomplished either by including this coverage under a Commercial Auto Policy or by adding an endorsement to a Commercial General Liability policy or Business Owners Policy (BOP). By failing to automatically provide this coverage for the Christmas Tree Shop, the defendant failed to meet the standard of care for agents and brokers.

In summary, Plaintiffs argue Defendants breached the standard of care because a reasonably competent agent would have "automatically" included the Hired and Non-Owned Automobile Liability in the Poynters' policy. Plaintiffs further argue that if it was not automatically included, Hitchens had a duty to advise the Poynters about the additional coverage based on their insurance agent-insured relationship.

Defendants' expert offered no opinion regarding the industry standard for commercial clients. He stated, generally, that an "agent ordinarily does not have a duty to give advice simply because of the agency relationship." He also said the agent's duty "is to follow the client's instructions and obtain the best insurance at the most commercially reasonable price and terms using reasonable skill and ordinary diligence." Defendants' expert further opined that Hitchens had no duty "to point out the need for additional coverage" absent a special relationship with the Poynters.

The court holds that an insurance agent must offer coverage in the way that a reasonably competent agent would under the circumstances.[2] And, generally, an insurance agent has no duty to advise a client.[3] This general rule, however, turns largely on the relationship between the agent and the client and will not apply if 1) the agent "voluntarily assume[s] the responsibility for selecting the appropriate policy for the insured"[4] or 2) the insured makes an ambiguous request for coverage that requires clarification.[5]

The record presents issues of material fact as to whether Moore, through Hitchens, breached its duty to the Poynters. First, as mentioned, Plaintiffs' expert opined that it is industry standard to automatically include the Hired Auto and Non-

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[2] *See Ins. Co. of N. Am. v. Waterhouse*, 424 A.2d 675, 677 (Del. Super. 1980).

[3] *Sinex v. Wallis*, 611 A.2d 31 (Del. Super. 1991); *see also, Harts v. Farmers Ins. Exch.*, 597 N.W. 2d 47, 51 (Mich. 1999) ("[T]he general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured.").

[4] *Peter v. Schumacher Enters., Inc.*, 22 P.3d 481, 486–87 (Ala. 2001) (citing *Harts*, 597 N.W. 2d at 52; *see also, Blanchfield v. State Farm Mut. Auto. Ins. Co.*, Civ. A. No. 82C–DE–721985, WL 189320, at *2 (Del. Super. Nov. 27, 1985) ("[N]egligence is generally found...upon evidence of the previous conduct of the agent acting to procure insurance without specific instructions of the applicant to do so...This analysis rests...upon the reasonable expectation of the applicant that the agent will procure the coverage requested, or, in reliance upon the agent's expertise, that the agent will procure adequate amounts of the requested coverage, or...the types of coverage that the applicant has been lead to expect will be procured.")

[5] *See Harts*, 597 N.W. 2d at 53, n. 11 ("An example of an ambiguous request for coverage that might in certain circumstances require clarification is the request for 'full coverage.'"); *see also*, *Peter*, 22 P.3d at 486–87 ("[A]n insurance agent may have a duty to clarify an ambiguous request before providing coverage.").

Owned Auto Liability coverage to commercial clients like the Poynters. On this issue, the jury will hear the experts and decide whether failing to "automatically" include the coverage was a breach of Moore's duty.

Second, William Moore Agency has been Mr. Poynter's insurance carrier for more than 60 years. Hitchens bought Moore in 1977, a couple years after the Poynters opened the Christmas Shop. Since then, Hitchens has been Mr. Poynter's insurance agent for both the tree farm and Christmas Shop. Mr. Poynter testified that, relying on Hitchens, "we bought what we were told we needed." Poynter further testified ambiguously that the discussions about the insured's coverage needs were "no more than saying that we needed liability. We needed whatever coverage we thought we needed." Furthermore, the parties agree that Hitchens said nothing to the Poynters to clarify the ambiguity about what the Poynters wanted. When asked about his discussions with the Poynters, Hitchens testified, also ambiguously, that it was "a collaborative effort on the part of both parties to arrive at what's best for them."

If the jury finds that Hitchens should merely have offered the endorsement based on his relationship with the Poynters, as Plaintiffs' expert opines, rather than automatically providing it, as Plaintiffs' expert ultimately opined, then it will have to decide whether the Poynters probably would have purchased the

additional coverage. As to that, the court intends to include an instruction along the lines of:

> It is difficult to know what another person probably would have done under given circumstances. Therefore, you are permitted to draw an inference, or in other words reach a conclusion, about the Poynters' probable behavior from all the facts and circumstances here. In reaching this conclusion about whether the Poynters probably would have bought coverage, you may consider, without benefit of hindsight, whether a reasonable person in the Poynters' circumstances would have purchased it. You should always remember, however, that it is the Poynters' probable conduct that is at issue, and the Poynters bear the burden of proof as to whether they would have bought additional coverage had it been offered.

II.

As to the other core dispute, whether Achenbach was an agent, this must be left for the jury. Defendants land heavily on a finding in an order issued in the underlying litigation to which the insurance company was not a party. In that case, Plaintiffs received a judgment against Poynters' Farm and the Christmas Shop after the court found that Achenbach was not an employee or agent. The actual parties to that litigation, however, agreed that the court should vacate its finding, which the court did. Accordingly, now it has no force anywhere, including here.

Meanwhile, Defendants' argument to the contrary notwithstanding, there is substantial evidence from which a jury could conclude that Achenbach was the

Christmas Shop's employee or agent. For example, there was testimony that he worked at the Christmas Shop. On the day of the collision, he was driving an exterminator to property, leased by the insured, to obtain an estimate for spraying bug-infested trees. The exterminator's invoice refers to "Pointer Tree Farm" as the customer. Additionally, Poynter's Tree Farm & Christmas Shop paid the bill and took it as a tax deduction, calling it a business expense. Moreover, the exterminator testified that he sprayed both boundary and interior trees, which he referred to as Christmas trees.

In summary, the jury will hear evidence about what Mark Achenbach was doing and for whom. If it determines he probably was an employee or agent, then this claim would be covered under the Westfield Hired Auto and Non-Owned Auto Liability endorsement, which the parties agree is the standard endorsement Hitchens would have offered to the Poynters were he under the duty to do so. Under this endorsement, the Christmas Shop would be the named insured, i.e. "you." The parties essentially agree that the endorsement would provide coverage to the Christmas Shop and its employees. If the jury finds he is an employee or agent, Achenbach would have been covered because none of the endorsement's exclusions apply here. Accordingly, if the insured had purchased the endorsement, if Achenbach

were the Christmas Shop's employee, and if he were on its business when he crashed, this claim would have been covered.

III.

As to other issues, Defendants contend that Plaintiffs' claim is time-barred. Plaintiffs argue that Defendants are precluded from invoking the three-year time bar because Defendants failed to comply with 18 *Del. C* § 3914's notice requirement.[6] Defendants reply that § 3914 was never triggered because when Plaintiffs sent Moore a demand letter, they neither had a contract with Defendants nor a claim pending against Defendants, so Defendants had no statutory obligation to notify and inform Plaintiffs.

Section 3914 requires the insurance company give written notice "during the pendency of any claim."[7] Absent notice to the claimant, the statute of limitations does not begin to run.[8] The statutory notice requirement, however, is not restricted to those in a contractual relationship with the insurer.[9] Moreover, the term "claim"

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[6] 18 *Del. C.* § 3914 ("An insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages.").

[7] *Id*.

[8] *Stop & Shop Cos., Inc. v. Gonzales*, 619 A.2d 896, 898 (Del. 1993) ("This tolling is mandated in the absence of affirmative action by the insurer providing written notice to the claimant.").

[9] *See Stop & Shop Cos., Inc.*, 619 A.2d at 899 ("[W]e conclude that [§ 3914] embraces third-party claimants and is not restricted to the relationship between an insurer and its insured.").

is not limited to the filing of a formal lawsuit.[10]

Although Plaintiffs had yet to file a formal claim against Defendants, the record shows Defendants knew of the operative facts and theories on which Plaintiffs based their demand.[11] Accordingly, Moore had notice of Plaintiffs' claim within the period of limitations and was required to give notice pursuant to § 3914 in order to now invoke the statute of limitations. It is undisputed that Defendants failed to send any notice, so the limitations period never started to run. Therefore, Plaintiffs' claim is not time-barred.

Defendants also make arguments about damages. They assert that if successful, Plaintiffs cannot recover more than $500,000, the amount for which the Christmas Shop was insured. Plaintiffs allege that due to Defendants' wrongful conduct, the Poynters were exposed to a two million dollar judgment. Accordingly, Plaintiffs argue they are entitled to the judgement's full amount.

Plaintiffs are not limited to the amount for which the Christmas Shop

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[10] See *Murphy v. Lucas*, C.A. No. 04C–10–005 RFS, 2006 WL 1173893, at *2 (Del. Super. Apr. 28, 2006) (citing *Black's Law Dictionary*). A "claim" is:

> The aggregate of operative facts giving rise to a right enforceable by a court; the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional; a demand for money or property to which one asserts a right....

Black's Law Dictionary 240–41 (7th ed. 1999).

[11] *See Murphy*, 2006 WL 1173893, at *3 (holding that § 3914 is triggered when the insurance company is aware that at least a provisional claim is pending and does not require that a claimant file formal claim).

was actually insured. An insurance agent "who wrongfully fails to provide insurance...is, in the case of loss, liable to the insured for the amount which the insured would have received from the insurer had the coverage been placed."[12] At this point, however, the record offers little guidance as to what the endorsement's limits would be. Accordingly, this also can be sorted out by the jury later if Plaintiffs prevail, as the parties prefer.

IV.

The court is satisfied that, viewed in the light most favorable to Plaintiffs, there is evidence from which the jury could conclude that 1) Hitchens breached his duty by failing to offer the insured additional coverage and 2) the additional coverage would extend to Achenbach. Further, Plaintiffs are not barred by the statute of limitations. Finally, the question about damages will also be resolved, if necessary.

For the foregoing reasons, Defendant Lynn Hitchens's unopposed Motion for Summary Judgment is **GRANTED**, and Defendant William Moore Agency's Motion for Summary Judgment is **DENIED**. The parties must now focus

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[12] *Giangrant v. Richard A. Parsons Agency, Inc.*, No. 83C–JN–26, 1987 WL 25495, at *2 (Del. Super. Nov. 19, 1987) (citing *Conestoga Chem. Corp. v. F. H. Simonton, Inc.*, 269 A.2d 237, 239 (Del. 1970) ((“We accept the general rule that a broker who has wrongfully failed to provide insurance according to his agreement is, in case of loss, liable to the insured for the amount which the insured would have received from the insurer had the coverage been placed.”)).

on the impending trial.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
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