

STATE OF VERMONT
WINDSOR COUNTY, SSRalph Currier
Plaintiff

v.

Woodstock Insurance Services, et. al
DefendantsSUPERIOR COURT
Docket No. 587-9-07 WrcvDECISION ON MOTION IN LIMINE

Plaintiff has apparently served an amended expert disclosure upon defendants, purporting to disclose an expert, one Burl Daniel, to provide expert opinions in this matter. Defendants have filed a motion in limine seeking to preclude the expert from testifying as to certain matters. Although the expert disclosure is referenced as being attached to the defendants' motion, it was not. Nevertheless, the Court has sufficient information in the motion pleading to consider the issues raised. No opposition has been filed to the motion in limine.

The motion is directed at the following five "opinions" of the expert, as set forth in the pleading:

- a) that the insurance agent in this case owed a fiduciary duty to offer a personal umbrella policy to its customer, Suzanne Schipper;
- b) based upon Ms. Schipper's financial circumstances she should have been offered the option to purchase a personal umbrella policy;
- c) there is no documentation to show evidence a personal umbrella policy was recommended to the customer in this case;
- d) there is no documentation to show evidence of an actual offer of a personal umbrella policy to the customer in this case;
- e) if a personal umbrella policy was offered to Suzanne Schipper, there was no documentation that anybody followed up to inquire whether she wanted to exercise her option to buy the policy.

Discussion

Testimony by experts is governed as a threshold matter by V.R.E. 702. Where scientific, technical or otherwise specialized knowledge will assist the trier of fact to determine a fact in issue, an expert having such specialized knowledge or training may testify in the form of opinion or otherwise.

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The court has no evidence before it to determine if the witness possesses the necessary specialized skill or training to render opinions of any sort in this matter. That aside, three of the "opinions" listed above, namely (c), (d) & (e), are merely recitations of facts which may or may not come into evidence and/or which may or may not form the basis of other opinions by the expert.

Standing alone, (c), (d) & (e) do not constitute "opinions" by the expert. Their mere recitation by the expert is not proper expert opinion. It is possible that the facts described in (c), (d) & (e) may form the basis of some opinion by the expert which is admissible. As such, the expert could testify about those facts as the basis for his opinion pursuant to V.R.E. 703. Absent those facts forming the basis of some other admissible opinion, recitation of (c), (d) & (e) by the expert is improper.

A professional malpractice case, such as this, ordinarily requires expert testimony to prove the standard of care and causation elements necessary to prove such a claim. *Wilkins v. Lamoille County Mental Health Services, Inc.*, 179 Vt. 107 (2005); *Begin v. Richmond*, 150 Vt. 517 (1988). However, in claims against insurance agencies for failure to procure insurance, our court has established the required duty of care as a matter of law. This impacts on the propriety of the claimed proffered opinions (a) & (b) in this case.

In *Booska v. Hubbard Insurance Agency, Inc.*, 160 Vt. 305 (1993), the court stated as follows:

Such far-reaching expectations would have imposed on Wheeling, not the duty of a reasonable insurance agent, but that of a soothsayer. The trial court correctly ruled that the duty of Hubbard and Wheeling was rather "to use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured." *Rocque v. Co-Operative Fire Ins. Ass'n*, 140 Vt. 321, 326, 438 A.2d 383, 386 (1981). Once a policy is procured as requested and is consistent with the applicable standard of care, no further duty is owed to the insured by the agent with respect to this insurance. *Id.* at 326-27, 438 A.2d at 386.

Put another way, if we take all of plaintiffs' factual assertions about the length of time they were served by Hubbard and Wheeling as true, these circumstances do not support the legal theory of a "higher duty," in effect a fiduciary duty, between the agent and the purchaser. The agent's task is to be generally fair and truthful in explaining the nature of a policy, not to warn the insured about the impact of necessarily complex contract language on every eventuality. As long as the agent does the job without

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negligence, as between the agent and the purchaser, the task of reading and understanding the policy text is that of the purchasers. As we said in *Hill v. Grandey*:

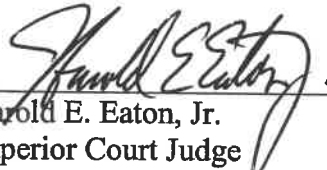
An agent may point out to [an insured] the advantages of additional coverage and may ferret out additional facts from the insured applicable to such coverage, but he is under no obligation to do so; nor is the insured under an obligation to respond. 132 Vt. 460 (1974).

160 Vt. 309, 310 (emphasis added).

Because it has been established as a matter of law that the duty of care does not require an insurance agent to inquire of its customer concerning additional coverage, the expert's proffered opinions that the duty of care requires something more need not be reached. The expert's opinions in (a) & (b) are inconsistent with the duty established under Vermont law. Accordingly, those opinions will not aid the trier of fact in determining a fact in issue and are therefore outside of V.R.E. 702.

For the reasons stated herein, the Motion in Limine is **GRANTED**.

Dated at Woodstock this 27th day of August, 2009.



Harold E. Eaton, Jr.
Superior Court Judge

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