

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

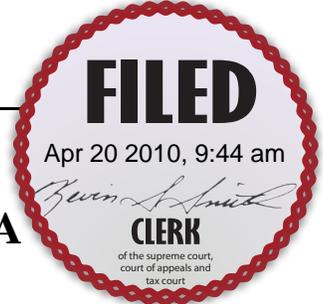
ATTORNEYS FOR APPELLANT:

**SCOTT A. WEATHERS
TRAVIS W. MONTGOMERY**
The Weathers Law Office, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**MICHAEL R. BAIN
SAMUEL D. ELLINGWOOD**
Hume Smith Geddes Green & Simmons, LLP
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



STANDARD INVESTMENTS CORPORATION,)

Appellant-Plaintiff,)

vs.)

MERRITT HALL ENTERPRISES, INC.,)

Appellee-Defendant.)

No. 49A05-0909-CV-519

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Dreyer, Judge
Cause No. 49D10-0801-PL-4521

April 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Standard Investments Corporation (“Standard”) appeals the trial court’s grant of summary judgment in favor of Appellee-Defendant Merritt Hall Enterprises, Inc. (“Merritt Hall”) upon Standard’s negligence claim of failure to advise. We affirm.

Issue

Standard raises the following issue on appeal: whether the trial court erred in granting summary judgment to Merritt Hall.

Facts and Procedural History

Standard is a commercial real estate investment company that is owned and operated by D. Veer Khurana. In 1989, Standard purchased a restaurant located on Dr. Martin Luther Drive (“the Property”) in Indianapolis. In 2001, Standard executed a contract for a five-year lease of the Property to Catherine Stanford, where she opened her restaurant, the Shrimp Hut. In November 2003, Standard contacted Richmond Insurance because Standard’s current carrier had decided that Standard’s properties did not fall within its underwriting guidelines. After obtaining the information regarding the properties Standard wanted insured, Richmond Ins. procured an insurance policy from Allied Insurance for Standard. When it came time to renew the year-long insurance policy, Richmond Ins. had merged with Merritt Hall. Standard renewed its Allied policy through Merritt Hall at the beginning of the year for 2005, 2006 and 2007.

Each of these insurance policies contained a provision regarding vacancy:

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damages occurs, we will:

- 1) Not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
 - a. Vandalism; . . .

Appendix at 91. The policy also provided that “[s]uch building is vacant when 70% or more of its total square footage: i) is not rented, or ii) is not used to conduct customary operations.”

App. at 39. However, “[b]uildings under construction or renovation are not considered vacant.” Id.

The Shrimp Hut lease expired on August 31, 2006, and was not renewed. At the end of the year 2006, Standard again renewed its Allied Ins. policy through Merritt Hall for coverage during 2007. On February 6, 2007, vandals damaged the Property. Standard reported the loss to Allied Ins., but the claim was denied based on the vacancy provision.

On January 30, 2008, Standard filed a complaint, naming Allied Ins. and Merritt Hall as defendants. Standard alleged a claim of breach of contract against Allied Ins. and a claim of negligent failure to advise against Merritt Hall. On December 18, 2008, Allied Ins. and Merritt Hall filed a motion for summary judgment. After hearing arguments, the trial court granted the motion as to Merritt Hall but denied the motion as to Allied Ins. Merritt Hall then filed a Motion for Entry of Final Judgment, which was granted. Standard now appeals the grant of summary judgment in favor of Merritt Hall.

Discussion and Decision

I. Standard of Review

A party seeking summary judgment bears the burden of making a prima facie demonstration that there are no genuine issues of material fact and that the movant is entitled

to judgment as a matter of law. Warren v. IOOF Cemetery, 901 N.E.2d 615, 617 (Ind. Ct. App. 2009), trans. denied. Upon the satisfaction of this burden through evidence designated to the trial court pursuant to Indiana Trial Rule 56, the non-movant must designate specific facts demonstrating the existence of a genuine issue for trial. Id.

In reviewing the grant or denial of such motion, we apply the same standard as the trial court: whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Ind. T.R. 56(C), (H). In our review, we only consider those portions of the pleadings, depositions and other matters specifically designated to the trial court for the purposes of the motion. Id. We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence, and resolve all doubts against the moving party. Cleary v. Manning, 884 N.E.2d 335, 337 (Ind. Ct. App. 2008). We will affirm summary judgment if it may be sustained on any legal theory or basis found in the record. Indianapolis Car Exch., Inc. v. Alderson, 910 N.E.2d 802, 804 (Ind. Ct. App. 2009).

II. Analysis

The parties address arguments based on the statute of limitations barring the claim as well as whether Merritt Hall had a duty to advise Standard as to its insurance coverage needs. We resolve the appeal based on Standard's claim of negligence, specifically negligence in failure to advise. Recovery for a claim of negligence requires a plaintiff to establish: "(1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to that standard of

care, and (3) an injury to the plaintiff proximately caused by the breach.” Estate of Mintz v. Conn. Gen. Life Ins. Co., 905 N.E.2d 994, 998-99 (Ind. 2009) (quoting Estate of Heck ex rel. Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003)).

Our Indiana Supreme Court was explicit in Filip v. Block that insurance agents¹ potentially have two duties: a general duty of care and a duty to advise their clients. Filip v. Block, 879 N.E.2d 1076, 1085 (Ind. 2008). The general duty of care arises when an insurance agent undertakes the task of procuring insurance for another. Id. However, the duty to advise only arises when there is a special relationship between the agent and the insured or special circumstances. Id. “Which duty governs in a particular case is a matter of law.” Id.

To successfully allege that an insurer had the duty to advise him, the insured must demonstrate the existence of an intimate long-term relationship between the parties or some other special circumstance. Am. Family Mut. Ins. Co. v. Dye, 634 N.E.2d 844, 847 (Ind. Ct. App. 1994), trans. denied. Relevant factors in showing a special relationship include “(1) exercising broad discretion to service the insured’s needs; (2) counseling the insured concerning specialized insurance coverage; (3) holding oneself out as a highly-skilled insurance expert, coupled with the insured’s reliance upon the expertise; and (4) receiving compensation, above the customary premium paid, for the expert advice provided.” Court View Centre, L.L.C. v. Witt, 753 N.E.2d 75, 87 (Ind. Ct. App. 2001) (quoting Am. Family

¹ While expressed in terms of “agent,” it is clear that these duties apply to both insurance agents and brokers. The facts in Filip v. Block involved an insurance broker. Filip v. Block, 879 N.E.2d 1076, 1078-79 (Ind. 2008).

Mut. Ins. Co., 634 N.E.2d at 848).

The circumstances here do not constitute a special relationship between Standard and Merritt Hall. When told that its current insurance company would no longer provide coverage, Standard chose Richmond Insurance, which later merged with Merritt Hall, as its new insurer by looking through the Yellow Pages in late 2003. While Merritt Hall did assist Standard in obtaining a higher payment from Allied Ins. on a policy claim in 2006, there is no evidence that Standard relied on Merritt Hall for expert advice as to insurance coverage. Nor is there evidence that Merritt Hall exercised broad discretion in servicing Standard's insurance needs, the circumstances involved specialized insurance coverage, or the premium paid was above the customary rate. Standard acquired a typical commercial insurance policy and renewed it yearly.

Moreover, Veer, the president of Standard, admitted in his deposition that after a theft incident occurred in June of 2006 at another property owned by Standard he read the insurance policy and was aware of the vacancy provision. Veer stated that he was not concerned about obtaining additional coverage because that building was currently occupied and the policy included an exception for construction or renovation of the building. With this knowledge of the vacancy provision, Standard contacted Merritt Hall in November of 2006 seeking to "delete all property coverage on both policies and carry only liability." Appendix at 198 (original in all caps).

Standard has not demonstrated the existence of a special relationship or special circumstances as to its relationship with Merritt Hall. Without such, Merritt Hall did not

have a duty to advise Standard on its insurance coverage. Therefore, the trial court properly granted summary judgment to Merritt Hall.

Affirmed.

MAY, J., and BARNES, J., concur.