IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Brown and Brown of Florida, Inc.,

Appellant(s),

v.

Houligan's Pub and Club, Inc. and Ormond Wine Company, LLC,

Appellee(s).

Case No. 5D2024-2352
L.T. No.: 2021-031544-CICI

_____

AMICUS BRIEF OF FLORIDA ASSOCIATION OF INSURANCE AGENTS IN SUPPORT OF APPELLANT BROWN AND BROWN OF FLORIDA, INC.

J. Breck Brannen
Florida Bar No. 609447
Brian E. Chojnowski
Florida Bar No. 55536
Thomas J. Schulte, III
Florida Bar No. 1059404
PENNINGTON, P.A.
215 S. Monroe Street, 2nd Floor (32301)
P.O. Box 10095 (32302-2095)
Tallahassee, Florida
(850) 222-3533 – Telephone
(850) 222-2126 – Facsimile
E-Mail:
breck@penningtonlaw.com
bchojnowski@penningtonlaw.com
tschulte@penningtonlaw.com
Counsel for FLORIDA ASSOCIATION OF INSURANCE AGENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF IDENTITY AND INTEREST

Florida Association of Insurance Agents ("FAIA") is a nonprofit state trade association of nearly 2,000 independent property and casualty agencies who employ close to 25,000 licensed agents. FAIA supports its constituents through education, legislation, communication, and advocacy initiatives. Over the past 120 years, FAIA has been a leader in educating agents and agencies on significant legal issues involved with their practice, including those issues central to this appeal. FAIA intends to assist the Court in its disposition of this case with insight it has obtained over its years of advocacy on behalf of its constituent members. FAIA will also address the issues raised in this appeal from the viewpoint of the broader independent insurance agency landscape in light of the unique challenges posed by Florida's overburdened insurance marketplace.

This Honorable Court's decision on this appeal is likely to impact FAIA's constituent members with regard to a plaintiff's burden to prove damages in negligent procurement of insurance and breach of fiduciary duty cases against insurance agents. Additionally, FAIA is concerned about the chilling effect that the broadening agents' fiduciary duties would have on Florida's insurance industry.

SUMMARY OF ARGUMENT

At trial, Appellees failed to satisfy their burden of proving breach of a fiduciary duty and damages. Numerous rulings by the trial court resulted in the case being submitted to the jury despite insufficient evidence that Appellant had breached any fiduciary duty imposed by Florida law. Additionally, the trial court's failure to hold Appellees to their evidentiary duty to submit proof that an insurance policy was available in the 2016-17 marketplace that would have provided coverage for the perils that damaged Appellees' property opened the door for the jury to enter a verdict based on insufficient evidence and a damages award lacking any factual basis.

In effect, the trial court significantly expanded the fiduciary duties of insurance agents in the State of Florida. The jury was allowed to find that Appellant was liable for not procuring insurance that experts for both sides agreed did not exist. Appellant was held liable for not foreseeing Appellees' unexpressed insurance needs or taking steps far beyond its fiduciary duties as an insurance agent. The trial court also rejected binding appellate authority—including authority issued by the Fifth District—and allowed the jury to award damages without evidentiary support. The numerous procedural and evidentiary defects in this case, if allowed to stand, will have a significant impact on insurance agents throughout the State of Florida.

ARGUMENT

In this suit, Appellant Brown and Brown of Florida, Inc. was found liable at trial for breach of fiduciary duty and negligent misrepresentation regarding its procurement of property insurance for Appellees Houligan's Pub and Club, Inc. and Ormond Wine Company, LLC. Erroneous rulings by the trial court below created a lower burden for Appellees to prove their claims and significantly expanded the fiduciary duties owed by Appellant as an insurance agency.

In addition, throughout the case, Appellant argued that Appellees bore the burden to prove under each cause of action that there was insurance coverage available at the time that Appellant could have procured, but negligently failed to procure, that would have provided insurance coverage for the damages they were seeking at trial. Under binding Florida case law, this is a necessary element of a negligent procurement/breach of fiduciary duty claim brought against an insurance agent or broker. Despite this, the trial court improperly denied Appellant's motions seeking a favorable ruling on this issue and issued jury instructions that did not inform the jury of this legal requirement.

This unreasonable expansion of an agent's fiduciary duties, combined with the unlimited damages imposed by the trial court, effectively put Brown

& Brown in the place of a guarantor of the Appellees' damages without limitation. Permitting the jury's verdict to stand will have far-reaching implications for insurance agents and the insurance industry in the State of Florida.

I. This Honorable Court Should Not Allow the Unreasonable Expansion of Fiduciary Duties Owed by Insurance Agents

The trial court's rejection of Appellant's arguments and proposed jury instructions effectively broadened the fiduciary duties of Florida insurance agents beyond those imposed by common law. An insurance agent's overarching duty is to "use *reasonable* care in procuring" insurance for its client. *Medina v. State Farm. Mut. Auto. Ins. Co.*, 707 F. Supp. 3d 1315, 1319 (S.D. Fla. 2023) (emphasis added). This duty includes "obtain[ing] coverage which is specifically requested or clearly warranted by the insured's expressed needs." *Adams v. Aetna Cas. & Sur. Co.*, 574 So. 2d 1142, 1155 (Fla. 1st DCA 1991). Agents must also "inform and explain the coverage" to their client as well as advise of changes to coverage. *Wachovia Ins. Servs., Inc. v. Toomey*, 994 So. 2d 980, 987 (Fla. 2008).[1]

[1] Though Appellant was not found liable for negligent failure to procure insurance, the duty principles at issue in breach of fiduciary duty and negligent failure to procure insurance cases have been treated relatively interchangeably by Florida courts. *See Toomey*, 994 So. 2d at 990 (holding that "negligence and breach of fiduciary duty can be pled in the alternative" in cases against insurance agents).

Significant to this case, the duty to obtain coverage is addressed in terms of "the insured's expressed needs." *Adams*, 574 So. 2d at 1155. Florida common law offers numerous examples of scenarios where liability could be imposed on an agent for failing to account for the insured's expressed needs. *See, e.g.*, *Tri-City Used Cars, Inc. v. Grim*, 566 So. 2d 922 (Fla. 1st DCA 1990) (insured had requested coverage for car theft, but agent obtained coverage that excluded car theft); *Caplan v. La Chance*, 219 So. 2d 89 (Fla. 3d DCA 1969) (agent was aware that vessel would be used for charter parties but failed to obtain coverage for charter parties); *Warehouse Foods, Inc. v. Corporate Risk Man. Svcs.*, 530 So. 2d 422 (Fla. 1st DCA 1988) (client expressed a desire to be insured against "everything," including acts of God, but agent obtained a policy that failed to include coverage for food spoilage); *Southtrust Bank and Right Equip. Co. v. Export Ins. Servs., Inc.*, 190 F. Supp. 2d 1304 (M.D. Fla. 2002) (agents were asked to procure coverage for two specific shipments and failed to do so).

Appellees' corporate representative testified at trial that he did not request coverage for sewer back-up because was not concerned about a sewer back-up occurring at his businesses prior to the date of loss. (Tr. R.[2]

[2] "Tr. R." refers to the trial transcript record, which was filed separately from the record on appeal by the Clerk of the Circuit Court on December 23, 2024.

253:6-254:11). Applying the terminology of *Adams*, Mr. Curtis never expressed a need for sewer back-up or microorganism contamination coverage. Yet this matter proceeded to trial and liability was imposed on Appellant for not anticipating these unexpressed needs. The loss suffered by Appellees was not solely the result of a broad risk category, but rather the confluence of multiple, specific risks: flood waters from a hurricane, a failed city utility, and a lack of appropriate plumbing protections (such as backflow valves). This is certainly an unforeseeable event—a fact that Appellees' own corporate representative tacitly admitted. Indeed, extensive coverage litigation and ultimately a ruling from this Honorable Court was required before it was conclusively determined that the policy excluded the loss.

Allowing a jury to determine an agent's liability for failing to procure coverage for unexpressed or denied needs unreasonably expands an insurance agent's fiduciary duties. Insurance agents would then be required to anticipate an insured's unexpressed needs or to procure insurance contrary to an insurer's expressed needs. This is not only unjust, but it also puts agents at odds with other fiduciary duties and raises ethical concerns for insurance agents. Certainly, binding an insured to coverage and paying a premium for insurance they did not intend to obtain would constitute a breach of the agent's duties to the insured. No fiduciary duty would require

an agent to substitute their judgment for the insured's regarding the need for coverage. And even if the agent did not run afoul of their fiduciary duties, insurance agents would face greater ethical concerns related to the extent of the advice they can give an insured about its insurance needs. The agent's role would extend beyond advising about available insurance for expressed needs; an agent would have to become a risk manager for their insured.

II. This Honorable Court Should Follow Its Prior Ruling Regarding Procurement of Coverage That Is "Clearly Warranted"

Florida courts have never expressed an intention to impose liability on insurance agents where an insured did not express a need for a particular coverage or actually denied having a need for a particular coverage. *Adams* discussed an agent's procurement duty arising for coverages "specifically requested or clearly warranted." 574 So. 2d at 1155. The term "clearly warranted" has not been specifically defined, though this Honorable Court conducted a thorough analysis of this term in *Professional Underwriters Ins. Co. v. Freytes & Sons Corp., Inc.*, 565 So. 2d 900 (Fla. 5th DCA 1990).

In *Freytes & Sons*, the insured, a convenience store that sold alcohol to a minor who later died of a self-inflicted gunshot wound, was sued by the minor's estate. *Id.* at 901. The convenience store did not have liquor liability coverage and was denied indemnity and a defense from its insurer due to the exclusion of coverage for injuries arising from the sale of alcoholic

beverages. *Id.* The convenience store alleged that its insurer was estopped from applying the exclusion because the insurance agent who had assisted the store in obtaining coverage had "negligently failed to procure the appropriate coverage for Freytes Deli's clearly warranted needs." *Id.* This Honorable Court, however, found that liquor liability was not "clearly warranted" under the factual circumstances:

> Here, the threshold element of a promise or representation concerning liquor liability coverage is missing. The only "representation" the insured testified to was that the insured had "what it needed" but such a statement does not rise to the level of specificity required to be a "representation" of liquor liability coverage. *Cf. W.R. Grace and Co. v. Geodata Services, Inc.*, 547 So.2d 919, 924 (Fla.1989). There is also no evidence that Freytes understood the statement that he "had what he needed" to mean he had liquor liability coverage. At most, this statement is an expression of opinion that the insured's expressed or understood needs had been met. Such a statement cannot reasonably be interpreted by an insured to mean that he has just purchased insurance that covers any conceivable claim or contingency he may encounter. Freytes' own testimony reveals he knew that much. Every policy has limitations and exclusions; this one had a total of eighteen under the general liability portion of the policy.

Id. at 903.

While it is not FAIA's intention to reargue Appellant's case, the facts of the underlying case provide a stark example of an unreasonable expansion of an insurance agent's fiduciary duties. Appellees' corporate representative testified at trial that he discussed his insurance needs with the Appellee and

its employee in terms of “hurricane insurance” and “[h]urricane coverage, period.” (Tr. R. 191:15-18; 192:13-19). Mr. Curtis also testified that he had a “clear understanding that [Appellees] had an enhanced hurricane coverage policy. And the enhancements were above and beyond what a standard policy was to offer because, again, as we referred to the name [sic] named-storm definition, it extended coverages above and beyond the standard policy.” (Tr. R. 193:20-194:4). While Mr. Curtis claimed on direct examination that he was not told that there “might be exclusions” nor that there “might be limitations” in the policy, he later admitted on cross examination that he was presented a proposal for his 2016-17 insurance policies, he was aware that the policy procured for Appellees contained certain exclusions, and that he had an opportunity to ask Appellant questions about the exclusions. (Tr. R. 245:6-246:19).

The claimed representation of “enhanced hurricane coverage,” is analogous to the representation in *Freytes & Sons* that the insured had “what it needed,” though the terminology in the underlying case is certainly more specific. Appellant’s alleged comment that the Appellees had “enhanced hurricane coverage” did not rise to the level of specificity required to be a “representation” of sewer back-up and microorganism contamination coverage. Notably, sewer back-up and microorganism contamination are not

perils uniquely caused by a hurricane. In this case, those perils arose through a more attenuated chain of causation rather than as a direct result of the hurricane. As Appellees' public adjuster, Keith Brenneman, testified: "[p]ower went out, the lift station pump failed, and the sewage flowed through the building from back to front." (Tr. R. 519:14-20). At no time during the trial did Mr. Curtis testify that he understood the term "enhanced hurricane coverage" to include sewer back-up and microorganism contamination, nor does any reasonable interpretation of that term equate to coverage for perils not exclusively related to hurricanes. In fact, Mr. Curtis explicitly acknowledged that he did not request coverage for sewer back-up and that he had no concern that sewer back-up would occur at his property. (Tr. R. 253:6-254:15).

Appellees' contention that their policy should have included coverage for sewer overflow and microorganism contamination is the same fallacy that Freytes relied on when he assumed he "purchased insurance that covers any conceivable claim or contingency he may encounter." *Freytes & Sons Corp., Inc.*, 565 So. 2d at 903. That is not the standard that insurance agents should be held to, yet that is the standard the jury was permitted to apply at trial. By imposing upon Appellant a duty to procure coverage beyond the that requested by the client which, the trial court implied that Appellant and its

employee should have breached the fundamental duties they owed to Appellees. This puts insurance agents in an untenable position of substituting their own judgment for the insured's judgment about their insurance needs.

Though the trial court allowed the jury to apportion liability, comparative fault is not a cure for a lack of evidence. The trial court was duty-bound to grant a directed verdict in favor of Brown & Brown for those claims lacking sufficient evidence to create a material issue of fact. "Florida law imposes a duty upon an insured to learn and know the contents of his insurance policy upon its delivery." *Griffin Bros. Co., Inc. v. Mohammed*, 918 So. 2d 425, 430 (Fla. 4th DCA 2006) (citing *Reliance Ins. Co. v. D'Amico*, 528 So. 2d 533 (Fla. 2d DCA 1988)); *see also See Gust K. Newberg Constr. Co. v. E.H. Crump & Co.*, 818 F.2d 1363, 1366 (7th Cir. 1987) (finding that "[a]n insurance agent is under no duty to detail every term of every policy he offers to his customer" under Florida law). While an insured's failure to read their own policy is a consideration for comparative fault, a court may still make a finding that there is insufficient evidence to support any conclusion of fault on the part of a defendant. *Miles v. AAA Ins. Co.*, 771 So. 2d 607 (Fla. 3d DCA 2000).

Here, Mr. Curtis unequivocally testified that he was not concerned about sewer back-up prior to the hurricane, that his business had not previously experienced sewage back-up, and that he did not request his agent to obtain such coverage. In other words, Mr. Curtis did not establish at trial that he would have acted any differently had sewer back-up coverage been available.

As indicated by the cases discussed above, the linchpin of an agent's fiduciary duties is the requirement to act reasonably. Under this clear principle, an agent does not owe a duty to warn a client of a policy's application to unforeseeable events. Such a duty would be unreasonable and unfairly expose insurance agents to significantly more liability when unforeseen events occur and insurers deny coverage. By permitting the jury to decide the issue of liability instead of granting a directed verdict, the trial court allowed hindsight to govern over reasonable foreseeability. An insurance procurement system that requires agents to predict any conceivable claim or contingency, then holds them liable for any failure in their predictions, is untenable and destined for collapse.

III. The Trial Court's Rejection of Binding Precedent Related to Damages Put Insurance Agents in the Role of Guarantors of Insureds' Losses

Appellant's counsel consistently and correctly cited to *Capell v. Gamble*, 733 So. 2d 534 (Fla. 1st DCA 1998) and *Commercial Insurance Consultants, Inc. v. Frenz Enterprises, Inc.*, 696 So. 2d 871 (Fla. 5th DCA 1997) to support the proposition that Appellees could not prove their damages without evidence that a policy was available in the 2016-17 marketplace that would have provided sewer back-up and microorganism contamination coverage. The trial court stated that it would not "extend *Capell* to basically mean you have to show the specific policy that would have shown the same limits on the policy that he asked for in this case." (Tr. R. 555:8-13). In fact, the court seemed to favor a scenario where it could simply take judicial notice that a policy providing coverage is out there because "pretty much if you're willing to pay whatever you're willing to pay, you can get insurance for pretty much anything." (Tr. R. 549:10-21).

Capell cited to *Commercial Insurance* when it held that "[t]he measure of damages in a negligent procurement of insurance case is what would have been covered had the insurance been properly obtained." *Capell*, 733 So. 2d at 535. Incumbent in this standard is that there must be evidence presented at trial that such coverage exists, as well as the extent of such coverage that would have been available. Absent such proof, a plaintiff cannot prove their damages.

It was undisputed at trial that no commercial property insurance policy was available for 2016-17 that would have provided coverage for sewer back-up and/or microorganism contamination. The standard of care experts for both Appellees and Appellant agreed on that fact. (Tr. R. 429:8-25, 430:1-4.

595:2-14, 596:11-14, 599:16-600:10, 602:16-19, 631:24-25. 665:8-15). Put bluntly, Appellees did not prove their damages. By denying Appellants' request for instructions based on the guidance of *Commercial Insurance* and *Capell*, the jury had to resort to the only evidence they had available to them: the 2017-18 policy. The jury's damages verdict, before apportionment of liability, totaled the face value of the 2017-18 policy, yet they were not instructed to apply the policy's $50,000.00 sublimit for sewer overflow. The deficient and defective instructions given to the jury allowed them to enter this inconsistent verdict.

The trial court's rejection of *Commercial Insurance* and *Capell* is alarming. There is no truly conflicting authority, despite Appellees' arguments at the summary judgment stage that *Mondesir v. Delva*, 851 So. 2d 187 (Fla. 3d DCA 2003) and *Gelsomino v. Ace Am. Ins. Co.*, 207 So. 3d 288 (Fla. 4th DCA 2016) receded from *Commercial Insurance* and *Capell*. In *Mondesir*, the jury relied on a certificate of insurance that had been issued by the

insurer that indicated the damages sued upon were covered by a $300,000 general liability limit. In *Gelsomino*, the issue was simply that the agent procured insurance for the wrong corporate entity, so logically the insured only needed to submit a copy of the insurance policy it should have been listed on to prove its damages.

It is undisputed that the 2017-18 policy the jury based its damages award on was not representative of the insurance coverages available in the marketplace in 2016-17. Allowing the jury to base the dollar amount of their verdict on the 2017-18 policy limits—but not apply the $50,000 sewer overflow sublimit—was fundamentally unjust. The phrase "what would have been covered had the insurance been properly obtained," does not call for solely considering the dollar amount of the policy limit. It means considering all other factors that affect "what would have been covered," meaning sublimits, exclusions, limitations, caps, and any other conditions that may have applied under the policy that would have provided coverage.

There is cold comfort in the fact that the jury in this case limited its verdict to only the policy limits of the 2017-18 policy. However, nothing in the trial court's instructions would have prevented them from awarding any greater amount that they had seen fit to award. As to damages, the trial court only instructed the jury that "[t]he measure of damages…is what would have

been covered had the insurance been properly obtained." (Tr. R. 859:22-860:1). Had the jury awarded more than the limits of the 2017-18 policy, perhaps the trial court would have considered remittitur to bring the damages award in line with the 2017-18 policy limits (although that policy was not representative of the actual measure of damages). Error, in this instance, was inevitable because of the trial court's refusal to hold Appellees to their evidentiary burden to present evidence proving what an insurance policy available in the 2016-17 marketplace would have covered.

Should the trial court's logic below be carried forward, significant uncertainty will be injected into insurance agent liability cases. There would be no true limitation on the damages a jury could award. Simply instructing a jury that they may award what would have been covered had the insurance been properly obtained, without holding the plaintiff to their burden to present such evidence, leaves the door wide open for the jury to award any amount they believe an insurance company would have paid with no basis in fact. Even remittitur would be of little use, as there would be no evidence on which the trial court could base its reduction of damages. Insurance agents would not just become the reserve insurer in the event an insured's claim is denied—they would become the full, unlimited guarantor of all the insured's damages, regardless of dollar amount.

CONCLUSION

The expansive view of an insurance agent's fiduciary duties adopted by the trial court transforms the role of insurance agents from fiduciaries to soothsaying guarantors. While it is certainly reasonable to expect insurance agents to advise about availability of coverage regarding broad categories of risk, such as hurricanes, sink holes, flood, fire, etc., there must be limits, as this very court recognized in *Freytes & Sons*.

Upholding the trial court's ruling in the instant case would impose an unreasonable duty on insurance agents to advise clients about ambiguous policy provisions and their application to unforeseeable events. It would require agents to engage in complex contractual legal analysis that is more appropriate for an attorney to perform.

Finally, expanding the fiduciary duties owed by insurance agents would result in increased litigation costs for agents that are already overburdened by the crippling impact of recent weather disasters on the property insurance market. Litigation seeking to stretch the limits of this new duty will be prolific. What specific actions must an agent take to ensure that the coverage obtained sufficiently satisfies the purchaser's requests? Must an agent advise their client of every possible event, even those that are unforeseeable (such as in this case)? Imposing such a broad fiduciary duty would raise

expensive and litigious questions and would further burden Florida's distraught insurance industry.

As the Florida Legislature has taken steps to discourage litigation related to property insurance in an effort to relieve an overburdened insurance market, the underlying case is an omen of what is to come. Equating a coverage denial with a breach of an agent's fiduciary duty will increase litigation against agents even in the event of losses that were not reasonably foreseeable. These unreasonably expanded fiduciary duties will result in agents becoming secondary sources of recovery when coverage is not found by an insurer. Failing to hold insureds to their duty to prove the availability of coverage as their measure of damages will result in potentially limitless damages. Agents will become the unlimited guarantor of insureds' damages when coverage is denied. The chilling effect on the insurance market will be significant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail on this 20th day of January, 2025 to:

Lawrence P. Ingram, Esq.
Melissa B. Murphy, Esq.
Hoyt L. Prindle, III
Porter Wright Morris & Arthur LLP
201 N. Franklin Street
Suite 1600
Tampa, FL 33601
lingram@porterwright.com
mmurphy@porterwright.com
hprindle@porterwright.com
pgeer@porterwright.com
tdeleo@porterwright.com
dsmagala@porterwright.com
Counsel for Appellant BROWN AND BROWN OF FLORIDA, INC.

David A. Vukelja, Esq.
595 W. Granada Blvd.
Suite L
Ormond Beach, Florida 32174
davukelja@vukeljalaw.com
cverran@vukeljalaw.com
Counsel for Appellees HOULIGAN'S PUB & CLUB, INC. and ORMOND WINE COMPANY, LLC

PENNINGTON, P.A.

/s/ Brian Chojnowski
J. BRECK BRANNEN
Florida Bar No. 609447
BRIAN CHOJNOWSKI
Florida Bar No. 55536
THOMAS J. SCHULTE, III
Florida Bar No. 1059404
215 S. Monroe Street, 2nd Floor (32301)
P.O. Box 10095 (32302-2095)
Tallahassee, Florida
(850) 222-3533 – Telephone
(850) 222-2126 – Facsimile
E-Mail:
breck@penningtonlaw.com
bchojnowski@penningtonlaw.com
tschulte@penningtonlaw.com

Counsel for FLORIDA ASSOCIATION OF INSURANCE AGENTS

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Amicus Brief complies with the font and word count requirements set forth in Florida Rules of Appellate Procedure 9.370 and 9.210 on this 20th day of January, 2025.

PENNINGTON, P.A.

/s/ Brian Chojnowski

J. BRECK BRANNEN
Florida Bar No. 609447
BRIAN CHOJNOWSKI
Florida Bar No. 55536
THOMAS J. SCHULTE, III
Florida Bar No. 1059404
215 S. Monroe Street, 2nd Floor (32301)
P.O. Box 10095 (32302-2095)
Tallahassee, Florida
(850) 222-3533 – Telephone
(850) 222-2126 – Facsimile
E-Mail:
breck@penningtonlaw.com
bchojnowski@penningtonlaw.com
tschulte@penningtonlaw.com
Counsel for FLORIDA ASSOCIATION OF INSURANCE AGENTS