

IN THE SUPREME COURT OF THE STATE OF NEVADA

O.P.H. OF LAS VEGAS, INC.,

Appellant,

v.

OREGON MUTUAL INSURANCE COMPANY;
DAVE SANDIN; AND SANDIN & CO.,

Respondents.

Supreme Court No. 76966

Electronically Filed
District Court No. A-12-872138
Feb 22 2019 08:59 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
**APPELLANT'S
APPENDIX VOL. 2 OF 4**

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1 19. On August 17, 2012, a fire destroyed the Restaurant.

2 20. On August 17, 2012, after a fire destroyed the Restaurant and after the Policy
3 had already been cancelled, the Sandin defendants became aware that the Policy had been
4 cancelled.

5 21. On August 17, 2012 after the Sandin defendants became aware that the Policy
6 had been cancelled, Dave Sandin contacted Plaintiff and notified Plaintiff that the Policy had
7 been cancelled.

8 22. As a result of the cancellation of Plaintiff's Policy for non-payment on August
9 16, 2012, Oregon Mutual has denied coverage for the loss caused by the fire.

10 23. The sole reason for cancellation of the Policy was due to Plaintiff's failure to
11 pay its July 26, 2012 premium on or before August 15, 2012.

12 24. Had Plaintiff paid its July 26, 2012 premium by August 15, 2012, the Policy
13 would have been in full force and effect on August 16, 2012 and August 17, 2012.

14 25. Had the Policy not been cancelled, Oregon Mutual would have continued to
15 adjust the claim for the fire and Oregon Mutual would have paid losses covered under the
16 Policy subject to the terms, conditions, exclusions and limitations of the Policy.

17 **Conclusions of Law**

18 **The Sandin defendants did not have a legal duty to notify O.P.H. of the late premium and**
19 **pending cancellation.**

20 1. In Nevada, insurance agents do not have a fiduciary relationship with their
21 clients. An "insurance agent is obliged to use reasonable diligence to place the insurance and
22 seasonably to notify the client if he is unable to do so." *Keddie v. Beneficial Insurance, Inc.*, 94
23 Nev. 418, 420, 580 P.2d 955, 956 (1978).¹

24 2. Because the Sandin defendants recommended an insurer and secured a policy
25 for Plaintiff that met all of its coverage needs, the Sandin defendants satisfied their legal duty

26 ¹ See also *Havas v. Carter*, 89 Nev 497, 499-500, 515 P.2d 397, 399 (1973) ("[T]he general
27 rule [is] that an insurance agent or broker who undertakes to procure insurance for another owes an
28 obligation to his client to use reasonable diligence in attempting to place the insurance and to
seasonably notify the client if he, the agent or broker, is unable to obtain the insurance.").

1 to Plaintiff as Plaintiff's broker.

2 3. Plaintiff's claim was denied solely because of non-payment.

3 4. Had Plaintiff paid its July 26, 2012 premium by August 15, 2012, the Policy
4 would have been in full force and effect on August 16, 2012 and August 17, 2012.

5 5. Had the Policy not been cancelled, Oregon Mutual would have continued to
6 adjust the claim for the fire and Oregon Mutual would have paid losses covered under the
7 Policy subject to the terms, conditions, exclusions and limitations of the Policy.

8 6. The Court finds persuasive case law from other jurisdictions that an insurance
9 agent does not have the legal duty to notify an insured of a late premium and/or pending
10 cancellation.² "[W]hether a defendant owes a plaintiff a duty of care is a question of law."
11 *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996).

12 7. The Court finds that there is no express or implied agreement between the
13 Sandin defendants and OPH that required the Sandin defendants to notify OPH of a late
14 premium and/or a pending cancellation.

15 8. The Sandin defendants did not have a legal duty to notify OPH of the pending
16 cancellation based on prior course of dealing.

17
18 ² See *GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 388 (2d
19 Cir. 2006) ("GlobalNet is unable to prevail on its claims because Crystal was not the cause of
20 the cancellation of coverage. . . It was GlobalNet's negligence that caused the cancellation of
21 the insurance coverage."); *Guardian Life Ins. Co. of Am. v. Goduti-Moore*, 36 F. Supp. 2d 657,
22 665-66 (D.N.J. 1999) *reversed on other grounds*, 229 F.3d 212 (3d Cir. 2000) ("It would be
23 unduly onerous for brokers to warn every client who misses a monthly premium due date that
24 the client must pay the amount by the end of the grace period or face forfeiture."); *Quintana v.*
25 *Tennessee Farmers Mut. Ins. Co.*, 774 S.W.2d 630, 634 (Tenn. Ct. App. 1989) ("The
26 Quintanas' long business relationship with Mr. Willis did not require him to notify them of the
27 policy's cancellation. In the absence of an agreement creating continuing responsibilities, an
28 insurance agent's obligation to a client ends when the agent obtains the insurance for the client.
Thus, an agent has no duty to inform a client of a policy's cancellation if the client knew or
should have known of the cancellation by other means."); *Rocque v. Coop. Fire Ins. Ass'n of*
Vermont, 438 A.2d 383, 386 (Vt. 1981) ("[W]here an insurance company is required to give
direct notice of cancellation to the insured, as is the case here, an insurance agent is not liable
for a failure to notify, since he is justified in assuming that the insured would be made aware of
the cancellation from other sources.").

1 9. The Court finds that Dave Sandin previously notified OPH of a pending
2 cancellation at most one time on or about May 2009. Because “the nonmoving party is entitled
3 to have the evidence and all reasonable inferences accepted as true,” this fact is not in dispute.
4 *Wiltzie v. Baby Grand Corp.*, 105 Nev. 291, 292, 774 P.2d 432, 433 (1989). However, Dave
5 Sandin’s *one-time* notification to OPH of a pending cancellation does not create a legal duty on
6 the Sandin defendants to continually notify OPH of missed payments and pending cancellations
7 in the future.

8 10. The Court finds that the Sandin defendants did not receive notice of the pending
9 cancellation and could not inform OPH to pay its premium. Therefore, whether the Sandin
10 defendants had a legal duty to notify OPH of the pending cancellation, the Sandin defendants
11 could not inform OPH of the pending cancellation. Absent receipt of the notice, any purported
12 duty to inform Plaintiff of its failure to pay never arose. *See Shindler v. Mid-Continent Life*
13 *Ins. Co.*, 768 S.W.2d 331, 334 (Tex. App. 1989) (“Because there is no proof that [the agent]
14 had notice of premiums due or policy termination, we hold that [the agent] had no duty, as a
15 matter of law, to give notice to appellants.”).

16 **The status of Dave Sandin’s Nevada license is irrelevant and cannot be the basis for**
17 **Plaintiff’s negligence or fraud claims.**

18 11. The Policy identifies Sandin & Co. as the agent for the OPH, not Dave Sandin.
19 Therefore, Sandin & Co., not Dave Sandin, was the agent for the Policy.

20 12. Plaintiff’s alleged damages were not caused by Dave Sandin’s licensing status.
21 For every cause of action Plaintiff pleaded, there must be a nexus between the alleged bad act
22 (Dave Sandin’s lack of an appropriate non-resident license) and the damages alleged. *See*
23 *Nelson v. Heer*, 123 Nev. 217, 225-26, 163 P.3d 420, 426 (2007) (“Proximate cause limits
24 liability to foreseeable consequences that are reasonably connected to both the defendant’s
25 misrepresentation or omission and the harm that the misrepresentation or omission created.”);
26 *see also Foster v. Dingwall*, 126 Nev. Adv. Op. 6, 227 P.3d 1042, 1052 (2010) (“[B]oth
27 intentional and negligent misrepresentation require a showing that the claimed damages were
28 caused by the alleged misrepresentations.”); *Yamaha Motor Co., USA v. Arnoult*, 114 Nev.

1 233, 238, 955 P.2d 661, 664 (1998) ("This court has long recognized that to establish
2 proximate causation 'it must appear that the injury was the natural and probable consequence
3 of the negligence or wrongful act, and that it ought to have been foreseen in the light of the
4 attending circumstances.'") (internal citations omitted).

5 13. The Court finds that Dave Sandin's licensee status did not cause or contribute to
6 Plaintiff's alleged damages, nor did any alleged misrepresentations concerning his licensing
7 status result in Plaintiff's failure to pay its policy premium, Oregon Mutual's subsequent
8 cancellation of Plaintiff's policy, and Oregon Mutual's denial of Plaintiff's claim of loss based
9 on the cancellation.

10 14. The licensing status of a non-resident agent is purely an administrative matter.
11 See NRS 683A.201(1) & (3). NRS 683A.201 does not provide for a private right of action.
12 Rather, NRS 683A.201 provides for an administrative fine.

13 15. In order to prevail on a cause of action for negligence per se, the injury must be
14 of the type against which the statute was intended to protect. See *Anderson v. Baltrusaitis*, 113
15 Nev. 963, 944 P.2d 797 (1997); *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 660 P.2d 1013
16 (1983) ("[V]iolation of a statute may constitute negligence *per se* only if the injured party
17 belongs to the class of persons that the statute was intended to protect, and the injury is of the
18 type that the statute was intended to prevent."). "Whether a legislative enactment provides a
19 standard of conduct in the particular situation presented by the plaintiff is a question of
20 statutory interpretation and construction for the court." *Sagebrush*, 99 Nev. at 208, 660 P.2d at
21 1015.

22 16. Oregon Mutual's cancellation of Plaintiff's insurance policy due to Plaintiff's
23 failure to pay the premium is not the type of injury that NRS 683A.201 is intended to prevent.

24 17. NRS 686A.015(1) provides that "[n]otwithstanding any other provision of law,
25 the Commissioner has exclusive jurisdiction in regulating the subject of trade practices in the
26 business of insurance in this state."

27 18. The Nevada Supreme Court has held that matters within Title 57, including the
28 licensing of agents, are administrative matters. See *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565,

1 572, 170 P.3d 989, 994 (2007).

2 **Plaintiff's claims of breach of fiduciary duty, negligence and negligence per se, fraud, and**
3 **fraud in the inducement.**

4 19. Based on the foregoing, Plaintiff's cause of action for breach of fiduciary duty
5 fails as a matter of law and the Sandin defendants are entitled to summary judgment on this
6 claim.

7 20. Plaintiff's negligence claim based on the alleged duty by the Sandin defendants
8 to notify OPH of a pending cancellation is barred by the economic loss doctrine. *Terracan*
9 *Consultants Western, Inc. v. Mandalay Resorts*, 125 Nev 66, 206 P.3d 81 (2009).

10 21. Based on the foregoing, Plaintiff's cause of action for negligence and negligence
11 per se fails as a matter of law and the Sandin defendants are entitled to summary judgment on
12 these claims.

13 22. Plaintiff cannot prove the elements required to prove fraud and fraud in the
14 inducement. Namely, Plaintiff has not shown a misrepresentation by the Sandin defendants
15 and causation.

16 23. Based on the foregoing, Plaintiff's cause of action for fraud in the inducement
17 fails as a matter of law and the Sandin defendants are entitled to summary judgment on this
18 claim.

19 24. Based on the foregoing, Plaintiff's cause of action for fraud fails as a matter of
20 law and the Sandin defendants are entitled to summary judgment on this claim.

21 **Plaintiff's claim of Violation of NRS 686A.310**

22 25. NRS 686A.310(2) provides that "an insurer is liable to its insured for any
23 damages sustained by the insured as a result of the commission of any act set forth in
24 subsection 1 as an unfair practice."

25 26. The Nevada Supreme Court has held that only an insurer can be liable for unfair
26 claims practices proscribed in NRS 686A.310. *See Albert H. Wohlers & Co. v. Bartgis*, 114
27 Nev. 1249, 1263-64, 969 P.2d 949, 959-60 (1998).

28 ///

1 27. As insurance agents, the Sandin defendants cannot be liable for violation of
2 NRS 686A.310 pursuant to the statute's plain terms and the Supreme Court's holding in
3 *Bartgis*.

4 28. In its opposition, OPH did not oppose the Sandin defendants' motion for
5 summary judgment on the claim for violation of NRS 686A.310. See Plaintiff's opposition at
6 12, n.1. Plaintiff's failure to oppose the motion on the this claim constitutes consent to
7 granting summary judgment. See EDCR 2.20(c).

8 29. The Sandin defendants are entitled to judgment as a matter of law on Plaintiff's
9 claim for violation fo NRS 686A.310.

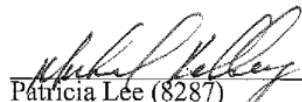
10 WHEREFORE, the Sandin Defendants are entitled to summary judgment on all
11 Plaintiff's claims as a matter of law.

12 IT IS SO ORDERED.

13 DATED this 26 day of June, 2015.

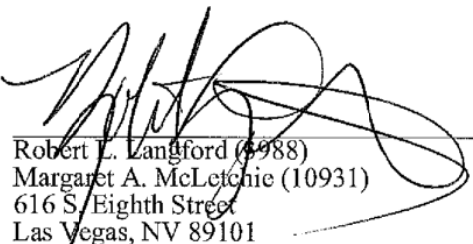
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