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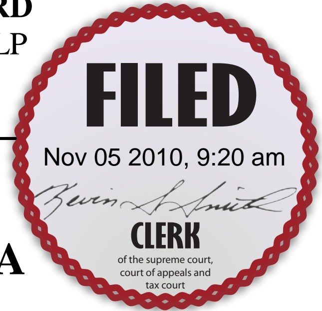

IN THE COURT OF APPEALS OF INDIANA

JEANETTE DANIELS and CHEVELLE RUSSELL,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A02-1003-PL-279
AAA FIRE & CASUALTY INSURANCE COMPANY, HIDDEN BAY HOMEOWNERS ASSOCIATION, INC., KIRKPATRICK MANAGEMENT, ERNEST GILLENWATERS, JEANETTE BARNETT, H.M.C. INSURANCE AGENCY, INC., and CRG RESIDENTIAL, LLC,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Shaheed, Judge
Cause No. 49D01-0804-PL-18007

November 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Jeanette Daniels owns a condominium that is subject to the Hidden Bay Homeowners Association ("Hidden Bay"), which is managed by Kirkpatrick Management ("Kirkpatrick"). On June 2, 2007, a fire started at the breaker box in Daniels's condominium. Daniels believes that water leaking from the roof damaged the breaker box, which in turn caused the fire. Because Hidden Bay and Kirkpatrick are responsible for maintaining the roof, Daniels filed suit against them, hoping to recover for the damage to her condominium and her personal property. Daniels's daughter, Chevelle Russell, was also living in the condominium at the time of the fire, and she joined as a plaintiff, seeking to recover for the loss of her personal property. Believing that Daniels's insurance coverage was inadequate, Daniels and Russell also sued Daniels's insurance agent, Ernest Gillenwaters, and his employer, H.M.C. Insurance Agency, Inc. ("H.M.C.").

The defendants moved for summary judgment, which the trial court granted. On appeal, Russell makes no argument that she has a cause of action against either Gillenwaters or H.M.C.[1] We determine that Daniels has waived her argument that Gillenwaters assumed a duty to advise her and that the designated evidence does not show that he breached his

[1] Gillenwaters and H.M.C. assert that Russell conceded at the summary judgment hearing that she has no claim against them. In the transcript, the concession is attributed to John Mervilde, who is an attorney for Hidden Bay and Kirkpatrick. Gillenwaters and H.M.C. assert that they have filed a motion to correct the transcript pursuant to Indiana Appellate Rule 32, but the record does not reflect the status of that motion. Russell has not acknowledged making this concession, but she also has not responded to Gillenwaters and H.M.C.'s argument that they owed her no duty. Russell admitted in her deposition that she had never spoken to Gillenwaters before the fire, that she was not listed as an insured on Daniels's policy, and that she did not assist Daniels in obtaining the policy. Daniels admitted that she told Gillenwaters that she was the only person living in her condominium and that she never thought about requesting coverage for Russell. We are hard pressed to see how Russell could make a bona fide argument that Gillenwaters and H.M.C. owed her a duty, and it would have saved valuable court resources had she simply admitted such.

general duty of care. Further, Daniels and Russell did not designate evidence that would demonstrate that there is a genuine issue of material fact as to the cause of the fire. Therefore, summary judgment was properly granted for all four defendants, and we affirm.

Facts and Procedural History

The facts, construed in favor of Daniels and Russell, the non-movants, are as follows. In March 2007, Daniels met with Gillenwaters to complete an insurance application. According to Daniels, Gillenwaters did not ask for or review Hidden Bay's covenants and restrictions, its bylaws, or its homeowners manual. He did not ask how much coverage existed under Hidden Bay's insurance policy. The application requested policy limits of $5,000 for structural damage and $43,100 for damage to personal property, and a policy was issued with those limits. Gillenwaters told Daniels that the policy was sufficient to cover her insurance needs. Daniels did not tell Gillenwaters that anyone was living with her.

Hidden Bay is responsible for maintaining the roofs of the condominiums. Hidden Bay hired CRG Residential ("CRG") to put a new roof on the condominiums toward the end of 2006. In March 2007, when the snow began to melt and the weather became rainy, Daniels began to notice "significant water intrusion" in her "garage, hallways, skylights and other locations." Appellants' App. at 239. Daniels reported the problem, and on at least two occasions, someone came to her condominium to look for the source of the problem and to make repairs. In late March or early April, after repairs were made, the leaking stopped.

On June 2, 2007, a fire started at the breaker box in Daniels's condominium. The fire rendered the condominium uninhabitable. Daniels's damages exceeded the limits of the

policy that she had obtained through H.M.C. Hidden Bay's insurance paid for some of the repairs, and Daniels was able to move back into her condominium in April 2008.

Daniels and Russell believe that water leaking from the roof damaged the breaker box, which in turn started the fire. They observed a water stain extending from the top of the wall to a few inches above the breaker box. Daniels and Russell hired David McVey, a fire investigator, to determine whether water intrusion could have caused the fire. McVey noted that Daniels had a "Type 1 breaker box," which is not water resistant. *Id*. at 493. He observed that the breaker box was rusty. McVey issued a report, which explained how water intrusion could cause a fire; however, he did not render an opinion as to whether water damage had in fact caused the fire in Daniels's condominium.

Daniels and Russell filed a complaint against Hidden Bay, Kirkpatrick, Gillenwaters, and H.M.C.[2] Daniels and Russell alleged that Hidden Bay's and Kirkpatrick's negligence in maintaining the roof caused the fire. They also alleged that Gillenwaters and H.M.C. were negligent by not securing sufficient insurance and misrepresenting the amount of coverage needed. Hidden Bay and Kirkpatrick jointly filed a motion for summary judgment, as did Gillenwaters and H.M.C.

Hidden Bay and Kirkpatrick designated the affidavit and report of their own expert, Patrick Murphy. Murphy claimed that he saw no evidence of water intrusion in the breaker

[2] The second amended complaint also names AAA Fire & Casualty Insurance Company, CRG Residential LLC, and Jeanette Barnette. These parties are not involved in the current appeal.

box and that it was not rusty. Murphy discovered that "the power busses for the circuit breaker panel had loosened and dropped down against the bonding strap for the neutral/grounding busses." *Id*. at 172. This contact "resulted in energizing the non-current carrying portion of the circuit breaker panel," which in turn "resulted in a resistance heating condition that inevitably ignited the surrounding combustible material." *Id*. Murphy did not determine the reason for "the power buss fastener failure," *id*. at 173, but opined that water damage would not have caused it to come loose. Thus, Hidden Bay and Kirkpatrick argued that water intrusion had not caused the fire. Alternatively, they argued that they were not liable for the roofing work done by CRG, an independent contractor, and that the covenants placed on Daniels the responsibility for insuring her condominium and its contents.

Gillenwaters and H.M.C. designated portions of Daniels's affidavit. She stated that she had reviewed the policy when she received it, and she felt satisfied with the coverage at that time. She acknowledged that she had received copies of Hidden Bay's covenants, bylaws, and homeowners manual, and she was sure that she had reviewed them at some point in time.

Gillenwaters did not have any independent recollection of his meeting with Daniels. He stated that it was his practice to recommend the "standard" amount of coverage, based on the square footage of the condominium and other questions that he would ask a customer. *Id*. at 256. He believed that he would have asked Daniels if she was part of a homeowners association and who would be responsible in the event of a fire. He believed that he would have recommended policy limits of $43,100 for both structural damage and property damage

because he typically recommends the same limit for both types of damage. The minimum amount of structural coverage that could be purchased was $5,000, and Gillenwaters did not believe that was a sufficient amount to cover structural damage for a condominium.

The trial court granted both motions for summary judgment. Daniels and Russell now appeal.

Discussion and Decision

Daniels and Russell argue that the trial court erred by granting summary judgment for Hidden Bay, Kirkpatrick, Gillenwaters, and H.M.C. Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). We review a trial court's grant of summary judgment de novo, construing all facts and reasonable inferences from those facts in favor of the non-moving party. *Garriott v. Peters*, 878 N.E.2d 431, 435 (Ind. Ct. App. 2007), *trans. denied*. "A genuine issue of material fact exists where facts concerning an issue, which would dispose of the litigation are in dispute, or where the undisputed material facts are capable of supporting conflicting inferences on such an issue." *Bd. of Tr. of Ball State Univ. v. Strain*, 771 N.E.2d 78, 81 (Ind. Ct. App. 2002). Once the moving party makes a prima facie showing that there are no genuine issues of material fact as to any determinative issue, the non-moving party then has the burden to come forward with contrary evidence. *Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell*, 848 N.E.2d 738, 747 (Ind. Ct. App. 2006). "The non-moving party may not rest upon the

pleadings but must instead set forth specific facts, using supporting materials contemplated under Trial Rule 56, which show the existence of a genuine issue for trial." *Id*.

Review of a summary judgment motion is limited to those materials designated to the trial court. *Bennett v. CrownLife Ins. Co.*, 776 N.E.2d 1264, 1268 (Ind. Ct. App. 2002). We must carefully review a decision on a summary judgment motion to ensure that a party was not improperly denied its day in court. *Id*. This court will affirm an order granting summary judgment on any legal basis supported by the designated evidence. *Merrill v. Knauf*, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002), *trans. denied*.

I. Summary Judgment for Hidden Bay and Kirkpatrick

Daniels and Russell argue that they designated sufficient evidence to create a genuine issue of material fact as to the cause of the fire. Daniels and Russell designated evidence that there was water damage near the breaker box and that water might have rusted the breaker box. McVey explained how water damage to a breaker box could start a fire, but he did not state that water damage had in fact caused the fire in Daniels's condominium, nor did he state the likelihood that water damage had caused the fire. Hidden Bay and Kirkpatrick designated evidence that a dislodged power buss started the fire, and that water damage would not have caused the power buss to come loose. The designated evidence establishes, at most, only a possibility that water damage caused the fire. *See Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722, 731 (Ind. 1982) ("an opinion which lacks reasonable certainty or probability is not sufficient evidence by itself to support a verdict"). Therefore, Daniels and Russell have not designated evidence that would demonstrate that there is a genuine issue of

material fact as to the cause of the fire, and summary judgment was properly granted in favor of Hidden Bay and Kirkpatrick. *See Bennett v. Richmond*, 932 N.E.2d 704, 711 (Ind. Ct. App. 2010) (plaintiff began experiencing memory loss after auto accident and attempted to prove that he had sustained an injury to his brain; however, his psychologist's opinion that plaintiff's memory loss was consistent with traumatic brain injury and explanation of how even a minor whiplash injury can cause brain damage was not probative of the cause of plaintiff's memory loss).

II. Summary Judgment for Gillenwaters and H.M.C.

"Insurance agents potentially have both a general duty of care and a duty to advise their clients. Which duty governs in a particular case is a matter of law." *Filip v. Block*, 879 N.E.2d 1076, 1085 (Ind. 2008). The agent has a duty to advise "only upon a showing of an intimate long term relationship between the parties or some other special circumstance." *Craven v. State Farm Mut. Auto. Ins. Co.*, 588 N.E.2d 1294, 1297 (Ind. Ct. App. 1992). An agent may assume a duty to advise. *See Filip*, 879 N.E.2d at 1086 (finding a genuine issue of material fact as to whether agent assumed a duty to advise when she told the insureds that their personal property would be covered and promised to visit the premises).

> In the absence of a special duty, "[a]n insurance agent who undertakes to procure insurance for another is an agent of the insured and owes the insured a general duty to exercise reasonable care, skill, and good faith diligence in obtaining insurance." Included in this general duty is a duty of care to procure the insurance asked for by the potential insured. The agent does not have a duty, however, to tell the potential insured about the adequacy of the coverage or any alternative coverage that is available.

Id. at 1085 (citations omitted).

Daniels argues that her affidavit, in which she stated that Gillenwaters told her that the policy was sufficient to cover her needs, creates a genuine issue of material fact as to whether Gillenwaters assumed a duty to advise her. Gillenwaters and H.M.C. argue that Daniels has waived this issue because she did not raise it in the trial court. *See Hardiman v. Governmental Interinsurance Exch.*, 588 N.E.2d 1331, 1333 (Ind. Ct. App. 1992) ("Generally, a party may not raise an issue on appeal which was not raised in the trial court.… This rule also applies to summary judgment proceedings."), *trans. denied*. In response, Daniels points to a single sentence in her response to Gillenwaters and H.M.C.'s motion for summary judgment: "Based on the law, Gillenwater[s] and HMC owed Daniels a duty to procure insurance and, after Ms. Daniels asked Gillenwaters if the coverage was sufficient, a duty to advise Ms. Daniels on the adequacy of her coverage." Appellants' App. at 231. This statement is unaccompanied by any citation to the designated evidence, and Daniels's response did not develop any argument based on the duty to advise. At the summary judgment hearing, Daniels did not make any argument based on an assumed duty to advise. We conclude that the single passing reference to a duty to advise was insufficient to bring the issue to the trial court's attention, and the argument is therefore waived. *See Morris v. McDonald's Corp.*, 650 N.E.2d 1219, 1221 (Ind. Ct. App. 1995) (finding an issue waived where it was "mentioned in only one unsupported sentence of McDonalds' motion for summary judgment").

Daniels also argues that there is a genuine issue of material fact as to whether Gillenwaters and H.M.C. breached their general duty of care. She points to her affidavit, in

which she stated that Gillenwaters did not ask her how much coverage existed under Hidden Bay's policy and did not ask for or review Hidden Bay's homeowners manual, covenants, or bylaws. Daniels acknowledged, however, that she had copies of the homeowners manual, covenants, and bylaws, and she was certain that she had reviewed them at some point. Furthermore, she agreed that she had reviewed the policy and that she believed at the time that the limits were sufficient.[3]

Daniels compares her case to *Brennan v. Hall*, 904 N.E.2d 383 (Ind. Ct. App. 2009). In *Brennan*, the insured, Patricia Hall, obtained a homeowners insurance policy through Terrence Brennan, an insurance broker. Hall told Brennan that, among other things, she wanted coverage for her dogs. Question nine on the application asked, "Does applicant or any tenant have any animals or exotic pets?" *Id*. at 385. Hall told Brennan that she had dogs, and Brennan asked her if any of them were "vicious." *Id*. Hall said no, and Brennan marked

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[3] Daniels completed an errata sheet, which she used to change several of the answers that she gave in her deposition. Gillenwaters and H.M.C. filed a motion to strike, arguing that she should not be allowed to make substantive changes to her deposition. The trial court granted the motion. On appeal, Daniels argues that the trial court erred by granting the motion to strike. Gillenwaters and H.M.C. had designated three pages of her deposition to which she made changes. On page 29 of her deposition, she was asked, "While you were . . . having this meeting with Mr. Gillenwaters, did he fill out an insurance application?" Appellants' App. at 95. Her original answer was, "Yes," which she changed to "I'm not sure if it was the application." *Id*. at 433. She was also asked, "Did you review the application?" and "Do you remember signing the application?" *Id*. at 95. She originally answered "Yes" to both, but changed those answers to "I don't recall." *Id*. at 433. She was then asked, "Did you get a copy of the application?" *Id*. at 95. She originally answered "Yes," which she changed to "No copy of the application, only the policy in the mail." *Id*. at 433. On page 30 of her deposition, she was asked if she was satisfied with the information that was contained in the application. She changed her answer from "At that time, yes," to "I'm not sure if it was the application." *Id*. at 433. Finally, on page 56 of her deposition, she was asked, "Did you ever pay any money out of pocket for your hotel stay?" *Id*. at 100. She changed her answer from "I don't recall that I did," to "Only phone, food, convenience items, personal items, clothes, shoes." *Id*. at 434. Nevertheless, on page 36 of her deposition, Daniels stated that she received a copy of the policy, reviewed it, and was satisfied with the contents of the policy. Daniels has made no contention that the limits contained in the policy – or any other pertinent information – was different from what was contained in the application. As none of the changes to the deposition affect the outcome of this case, we decline to address the trial court's ruling striking the errata sheet.

a "no" box next to question nine. *Id.* After Brennan finished filling out the application, he gave it to Hall to sign. She signed the application without noticing that Brennan had stated that she had no pets. Later, one of Hall's dogs, a doberman pinscher, bit her niece. When Hall made a claim to the insurance company, the claim was denied and the policy was declared void for a material misrepresentation. The insurance company claimed that it would not have issued a policy if it had known that Hall owned a doberman pinscher.

Hall sued Brennan for negligence in filling out the insurance application. The jury found in favor of Hall, and Brennan appealed, claiming that Hall's action was barred because Hall had an opportunity to review the application and she signed it. We concluded that "if an agent is negligent in assisting a client complete an insurance application, and such negligence leads to a basis for the insurance company to deny coverage to the applicant and/or revoke the policy, the applicant may seek damages from the agent." *Id.* at 388. The fact that Hall had reviewed and signed the application did not bar her action, but was an issue of comparative fault. *Id.* at 389.

We find Daniels's reliance on *Brennan* misplaced. In *Brennan*, the insured provided correct information to an agent, who then incorrectly filled out the application. In Daniels's case, no mistake was made in filling out the application, and Daniels did not provide the agent with any information about her homeowners manual, bylaws, or covenants. In *Brennan*, the insured's fault, if any, was in failing to notice that the application stated that she had no pets, despite the fact that she had requested coverage for her dogs. Daniels, on the other hand, was fully aware of her policy limits, and she admits that she believed them to be

sufficient. The designated evidence does not demonstrate that the application did not reflect the coverage that Daniels asked Gillenwaters to procure for her. Therefore, we conclude that summary judgment for Gillenwaters and H.M.C. was appropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.