**Opinion issued October 19, 2017**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-15-01081-CV**

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**DAVID C. RUCH, GALVESTONVIEWS LLC, ENTRUST OF COLORADO, INC. D/B/A ENTRUST NEW DIRECTION IRA, INC. D/B/A END-IRA, INC. F/B/O DAVID C. RUCH, IRA, IDLE TIME INVESTMENTS, LLC, ROBERT F. ZANT, SUE F. ZANT, RUTHANN CASSIDY, MARI VAN DE VEN, HADFIELD COMMUNICATIONS, INC., MAUREEN ZAMBO, REED A. SKIRPAN, ROBERT C. CARLSON, LYNDA M. CARLSON, BARBARA SHERMAN, RICHARD SHERMAN, AHMAD GHALAMDANCHI, AND SHARON GHALAMDANCHI, Appellants**

**V.**

**TED W. ALLEN & ASSOCIATES, INC., WILLIAM ETHEREDGE, III, INDIVIDUALLY AND D/B/A ETHEREDGE REAL ESTATE & PROPERTY MANAGEMENT AND D/B/A ETHEREDGE REAL ESTATE, Appellees**

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**On Appeal from the 10th District Court**
**Galveston County, Texas**
**Trial Court Case No. 11-CV-0697**

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## MEMORANDUM OPINION

Following a fire at the Maravilla Condominiums in Galveston, Texas, certain unit owners, David C. Ruch, GalvestonViews LLC, Entrust of Colorado, Inc., Idle Time Investments, LLC, Robert F. Zant, Sue F. Zant, Ruthann Cassidy, Mari van de Ven, Hadfield Communications, Inc., Maureen Zambo, Reed A. Skirpan, Robert C. Carlson, Lynda M. Carlson, Barbara Sherman, Richard Sherman, Ahmad Ghalamdanchi, and Sharon Ghalamdanchi (the "Unit Owners"), brought suit. The Unit Owners sued, among others, Ted W. Allen & Associates, Inc. ("TWA") and William Etheredge III for breach of contract and negligence. The trial court granted TWA's and Etheredge's motions for summary judgment. Following a trial with the remaining defendants, the Unit Owners appealed. In one issue on appeal, the Unit Owners argue that the trial court erred in granting TWA's and Etheredge's motions for summary judgment.

We affirm.

## Background

The Maravilla Condominiums is located in Galveston, Texas. It is operated by the Maravilla Homeowners Association, Inc. (the "HOA"), which, in turn, is operated by its board of directors (the "Board"). In 2005, Etheredge entered into an agreement with the HOA to be the property manager for the complex. The agreement was renewed annually through 2009.

The terms of the 2008 agreement between Etheredge and the HOA—the agreement pertinent to the issues raised on appeal—specify, "It shall be the Board's sole responsibility to [e]nsure the proper insurance coverage is in effect." Nevertheless, Etheredge agreed to review and recommend to the Board "from time to time" whether the amount of insurance coverage was adequate. Etheredge also agreed to be responsible for maintenance and upkeep of the premises.

In 2005, Etheredge recommended to the Board to increase the amount of general liability insurance to five million dollars. The Board agreed, and Etheredge assisted in obtaining insurance for that amount. TWA was the insurance agent that assisted in procuring the requested insurance.

In 2007, Etheredge again recommended raising the amount of insurance. He proposed obtaining insurance for about ten million dollars to cover catastrophic loss. The Board tabled the discussion and did not raise the amount of insurance. Etheredge asserted in an affidavit submitted to the trial court in the underlying suit that he "further discussed the status of insurance coverage with the Board and its members over the ensuing months." Etheridge and the Board continued to procure general liability insurance with a five-million-dollar policy limit. TWA was the insurance agent for these policies.

On February 19, 2009, TWA sent a letter to the HOA discussing damages resulting from Hurricane Ike. TWA discussed how many properties in the city were

underinsured for wind and water damage. The letter encouraged Etheredge and the Board to reassess the value of their property and to ensure that the property was sufficiently insured.

The HOA responded through its attorney on March 30, 2009. The attorney asserted in his letter that it was TWA's responsibility to verify that the property was properly insured. TWA did not respond to this letter. No further action was taken by TWA or the HOA.

On June 3, 2009, some welders were working on a metal railing on the premises. A spark from the welding started a fire. The welders present when the fire began stated in a report that they turned on some water hoses, but no water came out. One of the plaintiffs testified in her deposition that, during the fire, "you could tell [the fire suppression equipment] was not in proper working order" because "it was hanging there or the glass was broken." Likewise, notations from the police dispatch log concerning the fire mention "inadequate hydrates," "need water," "additional water delay E1 will not prime," "no more water to the moniotor [sic] hold the water," and "need more pressure."

By the time the fire had been put out, about half of the complex had been damaged. Due to the severity of the damages, the carrier for the general liability insurance paid the full five million dollars on the coverage. The HOA subsequently issued a special assessment to the condominium unit owners, including the plaintiffs

in this case, to cover the remaining cost of repairs. The Unit Owners also lost rental income during the time it took to reconstruct the units.

The Unit Owners brought suit against, among others, Etheredge and TWA. They asserted claims of breach of contract and negligence against Etheredge and TWA.[1] Specifically, the Unit Owners asserted that Etheredge and TWA breached their contract obligations and common-law duties to properly insure the property against fire damage. For Etheredge, the Unit Owners also alleged that he breached his contract and violated his common-law duties to ensure the fire suppression equipment on the premises was in proper working condition.

Etheredge and TWA each filed motions for summary judgment. Each motion raised grounds for a traditional summary judgment and for no-evidence summary judgment. For the no-evidence portion of his motion, Etheredge asserted, among other things, that the Unit Owners had no evidence that any act or omission by Etheredge caused the Unit Owners' damages. For the no-evidence portion of its motion, TWA asserted, among other things, that the Unit Owners had no evidence that TWA breached any contract or owed them any duties.

The trial court granted summary judgment in favor of Etheredge and TWA. The remaining parties proceeded to trial. This appeal followed.

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[1] The Unit Owners asserted other claims against Etheredge and TWA as well. The Unit Owners' appeal concerns only the breach of contract and negligence claims.

## Standard of Review

The summary-judgment movant must conclusively establish its right to judgment as a matter of law. *See MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). Because summary judgment is a question of law, we review a trial court's summary judgment decision de novo. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

To prevail on a "traditional" summary-judgment motion asserted under Rule 166a(c), a movant must prove that there is no genuine issue regarding any material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

A party moving for traditional summary judgment on a claim for which it does not bear the burden of proof must either (1) disprove at least one element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense to rebut the plaintiff's cause. *See Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). If the movant meets its burden, the burden then shifts to the non-movant to raise a genuine issue of material

fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

After an adequate time for discovery, the party without the burden of proof may move for a no-evidence summary judgment on the basis that there is no evidence to support an essential element of the non-moving party's claim. TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). Summary judgment must be granted unless the non-movant produces competent summary judgment evidence raising a genuine issue of material fact on the challenged elements. TEX. R. CIV. P. 166a(i); *Hamilton*, 249 S.W.3d at 426. A non-moving party is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." TEX. R. CIV. P. 166a (Notes & Comments 1997).

A no-evidence summary judgment motion is essentially a motion for a pretrial directed verdict. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). Accordingly, we apply the same legal-sufficiency standard of review that we apply when reviewing a directed verdict. *City of Keller*, 168 S.W.3d at 823. Applying that standard, a no-evidence point will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence

conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *see also City of Keller*, 168 S.W.3d at 810.

To determine whether there is a fact issue in a motion for summary judgment, we review the evidence in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller*, 168 S.W.3d at 827). We indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

**Etheredge**

The Unit Owners allege the same misconduct against Etheredge for both their breach of contract and their negligence claims. For both claims, the Unit Owners allege that Etheredge failed to obtain adequate insurance and that he failed to properly maintain or install the fire suppression equipment. In his motion for summary judgment, Etheredge argued that the Unit Owners had no evidence of any causation between either alleged failure and any damages suffered by the Unit Owners.

In their brief on appeal, the Unit Owners focus their argument on whether they had standing to sue Etheredge. Assuming without deciding that the Unit Owners had standing to sue Etheredge, we hold the Unit Owners failed to provide any

evidence drawing a causal connection between Etheredge's alleged failures and their damages.

"To recover damages for breach of contract, the breach must have caused those damages." *Jerry L. Starkey, TBDL, L.P. v. Graves*, 448 S.W.3d 88, 109 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "[T]he absence of a causal connection between the alleged breach and the damages sought will preclude recovery." *S. Elec. Servs., Inc. v. City of Houston*, 355 S.W.3d 319, 324 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). Accordingly, plaintiffs bear the burden of showing that their losses were the natural, probable, and foreseeable consequence of the defendants' breach. *See Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 64 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

Likewise, for negligence, the alleged breach of duty must proximately cause the alleged harm. *See Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016). "Breach of a duty proximately causes an injury if the breach is a cause in fact of the harm and the injury was foreseeable." *Id.* (citing *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009)). "Cause in fact must be established by proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred." *Akin*, 299 S.W.3d at 122.

## A. Adequacy of Insurance

The agreement between Etheredge and the HOA that was in place during the fire establishes that it was "the Board's sole responsibility to [e]nsure the proper insurance coverage is in effect." Etheredge's responsibilities were limited to reviewing and recommending to the Board "from time to time" whether the amount of insurance coverage was adequate.

The summary-judgment evidence established that Etheredge made recommendations about insurance to the Board in 2005 and again in 2007. The Unit Owners argue that Etheredge breached his contract and violated his duties to them by failing to advise the Board after 2007 that the amount of insurance was inadequate. The Unit Owners allege that this failure caused the injuries they suffered as a result of the complex being insufficiently insured.

In 2005, Etheredge recommended raising the amount of insurance coverage and the Board agreed, increasing the insurance amount to five million dollars. In March 2007, Etheredge again recommended raising the amount of insurance. This time, the Board tabled the discussion without an agreement to raise the amount. Etheredge asserted in his affidavit that he "further discussed the status of insurance coverage with the Board and its members over the ensuing months."

As the Unit Owners point out, there is no evidence in the record that, after 2007, Etheredge again warned the Board that the complex was underinsured. There

is also no evidence, however, that, at any time since 2007, the Board would have followed Etheredge's advice to increase the amount of insurance.[2] The evidence establishes that Etheredge had no responsibility, or even ability, to raise the amount of insurance on his own. For any failure of Etheredge to advise the Board on the amount of insurance to be causally related to any damages suffered from the failure to raise the amount of insurance, there must be proof that another warning that the property was underinsured would have caused the Board to increase the amount of insurance. *See Peterson Grp.*, 417 S.W.3d at 64 (holding plaintiffs bear burden of showing that losses were natural, probable, and foreseeable consequence of defendants' breach); *Stanfield*, 494 S.W.3d at 97 (holding breach of fiduciary duty proximately causes injury if breach is cause in fact of harm and injury was foreseeable).

The summary-judgment evidence establishes that the Board did not always follow Etheredge's advice on increasing insurance coverage. The Unit Owners presented no evidence to establish the Board would have followed Etheredge's advice after 2007. Accordingly, there is no basis for concluding that Etheredge's failure to advise the Board to increase insurance after 2007 caused the Unit Owners' damages.

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[2] Nor is there evidence of the amount by which the Board would have raised the insurance.

## B. Fire Suppression Equipment

Under his agreement with the HOA, Etheredge was responsible for upkeep and maintenance of the complex. No one disputes that this included the fire suppression equipment on the property.[3] There is evidence in the record that the fire suppression equipment was working properly during the fire. There is also evidence in the record that the equipment was not working properly. For example, the welders present when the fire began stated in a report that they turned on some water hoses, but no water came out. One of the plaintiffs testified in her deposition that, during the fire, "you could tell [the fire suppression equipment] was not in proper working order" because "it was hanging there or the glass was broken." Likewise, notations from the police dispatch log concerning the fire mention "inadequate hydrates," "need water," "additional water delay E1 will not prime," "no more water to the moniotor [sic] hold the water," and "need more pressure." Viewing the evidence in the light most favorable to the non-movant, then, we presume that the fire suppression equipment was not working properly. *See Sw. Elec. Power*, 73 S.W.3d at 215 (holding courts indulge every reasonable inference and resolve any doubts in non-movant's favor).

[3] Etheredge argued that the fire hydrants were not part of the fire suppression system, but he did not dispute his responsibility to maintain any other fire suppression equipment.

Even accepting that the equipment was not working properly, however, there is no evidence in the record to show what problem with the fire equipment Etheredge failed to discover and remedy or to show what amount of the fire damage is attributable to any such failure. There is some evidence in the record indicating that the city of Galveston was having issues with water pressure during the time of the fire, suggesting that any failures with the fire suppression equipment may not have been caused by any failing of Etheredge. Nothing in the record rebuts this evidence or creates a fact issue to suggest any equipment failures were attributable to Etheredge.

The Unit Owners point to a report issued after the fire that noted that "[t]he fire pump and riser valves were inspected on March 06, 2008." They point to this as proof that Etheredge failed to properly inspect the pump and valves. Missing from this, however, is any indication of how often the pump and valves should have been inspected, any problems the inspection would have revealed, or how this hypothetical problem was related to any failure to extinguish the fire. To the contrary, the very report the Unit Owners point to says in the same paragraph, "Fire fighters reported there was water to the hose cabinets and they were used during suppression of the fire." This report, then, contradicts any assertion that any failure to properly inspect the equipment resulted in a failure to detect a problem that

exacerbated the damage to the property. No other portion of the summary judgment evidence fills in this gap.

We overrule the Unit Owners' sole issue as it applies to Etheredge.

**TWA**

The Unit Owners argue that TWA breached its contractual obligations to them and breached its duties to them by failing to sufficiently insure the property against fire damage.

## A. Breach of Contract

In their response to TWA's motion for summary judgment, the Unit Owners vaguely reference "TWA's agreement to meet all Maravilla's insurance needs." But they do not supply any proof of the existence of such an agreement, when the agreement arose, the time period of the agreement, the intended beneficiaries of the agreement, or any other term of the agreement. On appeal, the Unit Owners concede their breach of contract claim is not based on any written agreement, such as the insurance policy in effect at the time of the fire. They criticize TWA for "fail[ing] to address its contractual relationship with" the homeowners' association, but undertake no effort to identify that contractual relationship. TWA moved for summary judgment on the ground that there was no evidence of a contract between the Unit Owners and TWA or of a contract with TWA to which the Unit Owners were third-party beneficiaries. It was the Unit Owners' burden to produce some

evidence of such an agreement. *See* TEX. R. CIV. P. 166a(i) (requiring non-movant to produce competent summary judgment evidence raising genuine issue of material fact on challenged elements). They did not carry this burden.

**B. Negligence**

In Texas, a cause of action for negligence requires three elements: (1) there must be a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately caused by the breach. *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). Duty marks the threshold inquiry in a negligence case. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

"Generally, one who has sustained damages because of professional negligence may not proceed against the professional unless there is privity of contract." *W. Hous. Airport, Inc. v. Millennium Ins. Agency, Inc.*, 349 S.W.3d 748, 752 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). As we have held, the Unit Owners have failed to establish that there was any privity of contract between themselves and TWA.

For their negligence claim, the Unit Owners indicate that they have standing because they were unit owners on the insured property and because their ownership interest in the units made them insured persons under the policies. Assuming without deciding that this argument is correct, the Unit Owners have failed to

establish any duty TWA owed them or the homeowners' association to ensure the property was sufficiently insured.

When procuring insurance for a client, an insurance broker owes common-law duties (1) to use reasonable diligence in attempting to place the *requested* insurance and (2) to inform the client promptly if unable to do so. *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992). Any obligation of the insured to obtain a certain amount of insurance does not extend to the insurance agent. *See W. Hous. Airport*, 349 S.W.3d at 753 ("Although [insurance agent] undertook a duty to obtain insurance requested by [insured], [insured] had a contractual obligation to obtain insurance required by the landlord, and we decline to shift [insured]'s responsibilities to [insurance agent]."). The Unit Owners point to a letter sent from the HOA's attorney to TWA asserting that it was TWA's responsibility to assess the value of the property for insurance purposes. Without a showing that this assertion was correct, however, there is no showing of a breach of any duty.

Finally, the Unit Owners argue that, even if they lack privity, TWA still owed them a duty to ensure the property was properly insured because the potential harm was foreseeable. While foreseeability is the primary consideration in determining whether a duty exists, it is not sufficient on its own to justify the imposition of a duty. *City of Waco v. Kirwan*, 298 S.W.3d 618, 624 (Tex. 2009). Courts must also consider factors including the burden of imposing a duty of care. *Id.* We find no

justification for placing a duty on an insurance agent for parties not in privity with the agent that is greater than any existing duty for parties that are in privity with the agent.

We overrule the Unit Owners' sole issue as it applies to TWA.

## Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Massengale.