Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-101

SEPTEMBER TERM, 2020

Michael Johnson* & Joseph M. Finnigan II* v. Smith Brothers Insurance LLC & Scott J. Garcia	}	APPEALED FROM:
	}	Superior Court, Chittenden Unit, Civil Division
	}	DOCKET NO. 1062-12-18 Cncv
	}	Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal the civil division's orders granting defendants summary judgment and denying plaintiffs' motion to amend their complaint with respect to their contractual and tortious claims against defendants concerning a professional liability insurance contract. We affirm.

The following material facts are taken from the civil division's summary judgment order, defendants' statement of undisputed material facts, and plaintiffs' responses to that statement. See Madowitz v. Woods at Killington Owners' Ass'n, 2010 VT 37, ¶ 9, 188 Vt. 197 ("[S]ummary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." (quotation omitted)); see also V.R.C.P. 56(a). Plaintiffs Michael Johnson and Joseph M. Finnigan II are the sole owners of the Vermont law firm Johnson & Finnigan. The law firm's areas of practice include real estate, business formations, civil litigation, commercial and corporate litigation, and estate and probate work. Defendant Smith Brothers Insurance LLC is an insurance agency with its principal place of business in Connecticut, and defendant Scott J. Garcia is an agent employed by Smith Brothers.

On June 11, 2014, plaintiffs attended a continuing-legal-education (CLE) seminar presented by the Vermont Attorneys Title Insurance Corporation. Garcia, though not listed as a speaker at the seminar, gave a presentation on professional liability insurance allegedly focusing on cybersecurity issues, including fraudulent wire scams. Finnegan averred that he spoke to Garcia after the presentation and "expressed an interest in securing the proper malpractice insurance policy with cyber security coverage, including circumstances involving email scams resulting in fraudulent wire transactions." According to Finnegan, Garcia "generally indicated that he was going to have to review [plaintiffs'] current policy, but he felt confident that he could provide better coverage." Finnegan averred that before his firm purchased a professional liability policy through Smith Brothers a month later, he provided Garcia or "someone" from Smith Brothers a complete copy of his firm's then-current policy either by email or facsimile. Plaintiffs were not able to produce any record of having done so, however, and defendants claimed to have no record

of having received the policy before plaintiffs purchased a new policy through Smith Brothers. Finnegan's conversation with Garcia was plaintiffs' only in-person communication with defendants, although there were subsequent written communications between plaintiffs and defendants—none of which discussed cybersecurity coverage—that were produced during discovery.

On July 17, 2014, more than one month after the June 11 seminar, plaintiffs submitted an online "Quick Quote" application for professional liability insurance through the Smith Brothers' website. The application neither referenced Finnegan's June 11 conversation with Garcia nor specifically requested cybersecurity coverage. In response to plaintiffs' application, defendants sent plaintiffs a Hanover Group Lawyers Professional Liability Insurance New Business Application. On July 23, 2014, plaintiffs emailed defendants the completed and signed Hanover Application. Plaintiffs' email indicated that they were still trying to "track down" their then-current professional liability insurance policy. Two days later, on July 25, Garcia emailed plaintiffs a proposal in response to their Hanover Application and requested a copy of the Declarations Page of plaintiffs' then-current policy to make sure there was no gap in coverage. That same day, plaintiffs emailed Garcia a copy of their existing Certificate of Liability Insurance but did not send a copy of the policy. On July 29, 2014, Smith Brothers emailed plaintiffs a Hanover Lawyers Professional Liability Policy covering a one-year period from July 28, 2014, to July 28, 2015. That correspondence stated: "Once you have an opportunity to review your policy, please let me know if you have any questions or feel that a change is required." The policy included a provision entitled, "Network or Information Security Breach Coverage," which provided coverage of up to $10,000 for losses resulting from a network or security breach in the performance of professional services. On July 29, 2014, plaintiffs acknowledged receipt of the Hanover policy, indicating that they would review the policy and respond with any questions or changes.

Plaintiffs did not communicate further with defendants regarding the policy, which they renewed the following two years. In an August 2, 2016 email containing plaintiffs' renewed policy for 2016-2017, defendants included a bulletin entitled, "Email Wire Fraud Scam Affecting Lawyers and Law Firms." The four-page bulletin warned of the dangers of email wire fraud scams, provided tips for avoiding such scams, stated that coverage for losses resulting from such scams was not a given, and advised attorneys to discuss with their insurance agent coverage as to potential scenarios described in the email. There is no indication in the record that plaintiffs discussed with defendants their Hanover policy's coverage with respect to potential wire fraud scams.

On September 16, 2016, plaintiffs conducted a residential real estate closing, representing the buyers. At the closing, plaintiffs provided the sellers with a $100,744 check for the net proceeds of the sale. That same day, plaintiffs received an email purportedly from the sellers' attorney stating that the sellers wanted the buyers to stop payment on the check and instead have the money wired to their bank in Texas. Plaintiffs complied with the request that same day. On September 25, 2016, the sellers' attorney called plaintiffs to inform them that the sellers had not received the money. During the ensuing conversation, plaintiffs learned that the sellers' attorney had never asked plaintiffs to send the money to a Texas bank. A subsequent investigation revealed that plaintiffs were the victim of a wire fraud scam. Plaintiffs sought coverage under the Hanover policy. Hanover initially denied coverage but eventually paid $50,000 as part of a settlement of the sellers' lawsuit against plaintiffs.

On December 5, 2018, plaintiffs filed a complaint against defendants, alleging breach of contract, negligent misrepresentation, and violation of the Vermont Consumer Protection Act (VCPA). Following discovery, defendants moved for summary judgment. In addition to opposing defendants' motion, plaintiffs moved for permission to amend their complaint by adding counts of negligence and breach of the covenant of good faith and fair dealing. In two separate February 18, 2020 decisions, the civil division granted defendants' motion for summary judgment and denied plaintiffs' motion to amend their complaint. The court ruled that defendants were entitled to summary judgment on plaintiffs' three initial claims because plaintiffs never entered into an enforceable contract concerning cybersecurity coverage and no reasonable jury could conclude that plaintiffs justifiably relied on Finnegan's informal conversation with Garcia at the CLE seminar a month earlier in assuming that the Hanover policy they purchased through defendants would include cybersecurity coverage without plaintiffs' specifically requesting such coverage in their application. In a separate order, the court denied plaintiffs' motion to amend their complaint, ruling that adding counts of negligence and breach of the covenant of good faith and fair dealing would be futile because: (1) defendants had no duty to provide cybersecurity coverage, given plaintiffs' failure to seek such coverage when applying for the Hanover policy, based solely on Finnegan's informal conversation with Garcia at the CLE seminar over a month earlier; and (2) there could be no breach of the covenant of good faith and fair dealing absent a contract to procure coverage for cybersecurity.

On appeal, plaintiffs argue that there are disputed material facts foreclosing summary judgment with respect to each of their claims against defendants. In plaintiffs' view, the civil division failed to give them the benefit of all reasonable doubts and inferences to which they were entitled as the nonmoving party. We review an award of summary judgment using the same standard as the trial court: we consider whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. See Kremer v. Lawyers Title Ins. Corp., 2004 VT 91, ¶ 7, 177 Vt. 553 (mem.); see also V.R.C.P. 56(a). "Summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to [its] case and on which [it] has the burden of proof at trial." Kremer, 2004 VT 91, ¶ 7 (quotations and alterations omitted). "We give the opposing party the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists." Id. Plaintiffs may not, however, "rely on bare allegations alone to meet the[ir] burden of demonstrating a disputed issue of fact." Burgess v. Lamoille Hous. P'ship, 2016 VT 31, ¶ 17, 201 Vt. 450; see also V.R.C.P. 56(e)(2)-(3) (allowing trial court to consider unchallenged fact as undisputed and to grant summary judgment as long as motion and accompanying materials, including undisputed facts, demonstrate that moving party is entitled to judgment as matter of law).

Plaintiffs first argue that they produced sufficient facts to support their VCPA claim. The VCPA prohibits "unfair or deceptive acts or practices in commerce." 9 V.S.A. § 2453(a). Plaintiffs seek relief under the private remedy section of the VCPA, which provides, in relevant part, that "[a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 of this title, or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453,"

may recover damages from the seller, solicitor, or other violator. Id. § 2461(b).[1] Plaintiffs also rely on 9 V.S.A. § 2457, which provides, in relevant part, that failing "to sell any goods or services in the manner and of the nature advertised or offered . . . creates a rebuttable presumption of an intent to violate" the Act. See also Gregory v. Poulin Auto Sales, Inc., 2012 VT 28, ¶ 14, 191 Vt. 611 (mem.) ("We have squarely held that lack of intent to deceive, good faith, or lack of knowledge about the defect are not defenses to claims under the VC[P]A.").

The three elements of a VCPA claim are: "(1) there must be a representation, practice, or omission likely to mislead the consumer; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be 'material,' that is, likely to affect the consumer's conduct or decision with regard to a product." Id. ¶ 12 (quotation omitted). Plaintiffs contend that defendants' conduct in this case amounts to "bait advertising" and that they made a sufficient showing on each of the three elements to survive summary judgment on their VCPA claim. See Winey v. William E. Dailey, Inc., 161 Vt. 129, 136 (1993) ("The language of the [VCPA] addresses the classic bait-and-switch technique by which a seller induces consumer interest with an attractive offer and switches to other merchandise or terms, considerably less advantageous to the consumer."). According to plaintiffs, the civil division erred by not allowing a jury to consider the reasonableness of their belief or reliance concerning defendants' conduct at the CLE seminar leading up to the purchase of the Hanover policy through Smith Brothers. See Morway v. Trombly, 173 Vt. 266, 275 (2001) (noting that reasonableness is ordinarily question for factfinder unless no reasonable factfinder could find plaintiff's belief and actions reasonable under circumstances), superseded by statute on other grounds, 24 V.S.A. § 901a, as recognized in Civetti v. Turner, 2020 VT 23, ¶¶ 26-29.

We conclude, as a matter of law, that the circumstances in this case do not support plaintiffs' VCPA claim. At the CLE seminar, Garcia spoke about the importance of cybersecurity coverage. Finnegan approached Garcia after his talk expressing an interest in obtaining such coverage. Garcia explained to Finnegan that he would first need to review plaintiffs' then-current policy, but he felt confident Smith Brothers could get plaintiffs better coverage in that regard. More than a month later, Finnegan completed an application on defendants' website for professional liability insurance without specifically seeking cybersecurity coverage or referring to his conversation with Garcia or the CLE seminar. Plaintiffs were unable to provide documentation to support their claim that they sent their then-current policy to defendants before applying for insurance from them, and they have not disputed defendants' assertion that defendants never received a copy of the policy before then. Defendants asked plaintiffs to review the Hanover policy and respond with any questions or concerns. Plaintiffs signed the policy without positing any questions or concerns regarding the coverage provided therein.

[1] This Court has yet to consider whether amendments to the VCPA have effectively overruled our earlier holding that insurance contracts are not included within the scope of the VCPA. See Greene v. Stevens Gas Serv., 2004 VT 67, ¶ 10, 177 Vt. 90 (declining to consider whether amendments to VCPA had effectively overruled our holding in Wilder v. Aetna Life & Cas. Ins. Co., 140 Vt. 16, 18 (1981), that sale of insurance policy is not contract for goods and services within meaning of VCPA). Like the civil division, we need not consider this issue, given our determination that plaintiffs have failed to show that they can produce evidence to satisfy the elements of their VCPA claim.

Given these circumstances, no reasonable factfinder could conclude that plaintiffs reasonably interpreted and relied upon Garcia's representation that he was confident defendants could provide plaintiffs with better coverage once he had had an opportunity to review plaintiffs' then-current policy. No reasonable factfinder could conclude that such specialized coverage would be supplied in the professional liability policy plaintiffs requested and acquired on defendants' website over a month later without any mention of cybersecurity coverage and with no evidence that defendants had had an opportunity to review plaintiffs' then-current policy. We reject plaintiffs' argument that such a determination fails to give them the benefit of all reasonable doubts and inferences. Rather, our determination is based on the undisputed facts contained in the record.

For similar reasons, we reject plaintiffs' remaining arguments.[2] "With respect to the common law tort of negligent misrepresentation, we have adopted the Restatement (Second) of Tort[s] § 552(1), which provides" that persons who fail to exercise reasonable care in supplying false information to others for pecuniary gain in the course of their business are " 'subject to liability for pecuniary loss caused to [the others] by their justifiable reliance upon the information.' " Burgess, 2016 VT 31, ¶ 21 (quoting Restatement (Second) of Torts § 552(1) (1977)). No reasonable factfinder could conclude that plaintiffs reasonably relied on Garcia's representation at the CLE seminar to mean that they would be provided with some unidentified level of cybersecurity coverage in any professional liability policy that they applied for a month later on defendants' website without any request for such coverage. This case is easily distinguishable from Sutton v. Vt. Reg'l Ctr., 2019 VT 71, ¶¶ 29, 35-36, amended and superseded by 2019 VT 71A, ¶ 29, where the plaintiffs produced evidence showing that defendants induced substantial financial investments from plaintiffs in projects by falsely promising to "provide an unusually high level of oversight over those projects."

Regarding plaintiffs' negligence claim, as a matter of law plaintiffs have failed to make a showing that defendants violated any duty they owed to plaintiffs under the circumstances of this case. An insurance agent has a duty "to use reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured." Roque v. Coop. Fire Ins. Ass'n, 140 Vt. 321, 326 (1981). Defendants had no duty to provide plaintiffs with professional liability insurance that included cybersecurity coverage based on Garcia's informal discussion with Finnegan at a CLE seminar a month before Finnegan's internet application with Smith Brothers, which did not specifically request such coverage. See Hill v. Grandey, 132 Vt. 460, 468 (1974) (stating that it is insured's "responsibility to adequately convey, albeit in laymen's terms, the nature of his wishes, in order to obtain the protection requested"); see also DeWyngaerdt v. Bean Ins. Agency, 855 A.2d 1267, 1270 (N.H. 2004) ("[W]here a specific request is made for a particular type of insurance coverage, an insurance agent owes a duty to the insured to procure such coverage.").

As for their breach-of-contract claim, plaintiffs have made no showing that a contract was formed between the parties at the CLE seminar. The casual conversation between Garcia and

[2] We agree with plaintiffs that—given the civil division's order denying, on grounds of futility, plaintiffs' motion to amend their complaint to add claims of negligence and a violation of the covenant of good faith and fair dealing—the question on appeal as to those two claims, like the other claims, is whether, based on the current state of the record, the claims could survive a motion for summary judgment.

Finnegan following Garcia's presentation, which was nothing more than a preliminary informational discussion, plainly did not amount to a contract to procure insurance, as plaintiffs claim. See J & K Title Co. v. Wright & Morrissey, Inc., 2019 VT 78, ¶ 12 ("To be an enforceable contract, the agreement must manifest the parties' intention to be bound and its terms must be sufficiently definite."); Miller v. Flegenheimer, 2016 VT 125, ¶ 21, 203 Vt. 620 ("While it is true that not all terms of a contract need to be fixed with absolute certainty, it is also true that an agreement in which a material term is left for future negotiations, is unenforceable." (quotation omitted)); see also Harris v. Albrecht, 2004 UT 13, ¶ 30, 86 P.3d 728 ("A contract to procure insurance may arise when the agent has definite directions from the insured to consummate a final contract; when the scope, subject matter, duration, and other elements can be found by implication; and when the insured gives the agent authority to ascertain some of the essential facts."). Nor do we find merit to plaintiffs' equitable estoppel argument, given that plaintiffs have failed to demonstrate any reasonable reliance on Garcia's representations at the CLE seminar.

Finally, because plaintiffs have failed to make a showing that a contract to provide cybersecurity existed, their dependent claim of a breach of the covenant of good faith and fair dealing also fails.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice