

**IN THE DISTRICT COURT OF KNOX COUNTY, NEBRASKA**

**TROY FUELBERTH and  
JULIE FUELBERTH,**  
Plaintiffs,

Case No. 12338

vs.

**SUMMARY JUDGMENT**

**WAUSA BANSHARES, INC., a Nebraska  
corporation, doing business as WAUSA  
INSURANCE AGENCY, and LOWELL  
ERICKSON, and FARMERS MUTUAL  
INSURANCE COMPANY OF  
NEBRASKA, a Nebraska corporation,**  
Defendants.

**DATE OF HEARING:** November 2, 1998.

**DATE OF DECISION:** December 14, 1998.

**APPEARANCES:**

For plaintiffs: Gregory M. Neuhaus without plaintiffs.

For defendants:

Wausa & Erickson: Alan E. Fredregill and Rita C. Grimm without defendant Erickson.

Farmers: C.J. Gatz and Ronald E. Temple.

**SUBJECT OF ORDER:** (1) defendant Farmers’ motion for reconsideration (filed July 31, 1998) regarding summary judgment motion; (2) defendants Wausa and Erickson’s joinder in motion to reconsider (filed August 4, 1998); and, plaintiffs’ motion to bifurcate (filed August 12, 1998).

**FINDINGS:** The court finds and concludes that:

1. In *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978), the Supreme Court rejected an argument that it was error for the court to allow the renewal of motions for summary judgment without an additional showing of facts. There, as here, a change occurred of the judge assigned to the case. The previous judge had denied the summary judgment motion while his successor sustained the renewed motion. As the Court noted, the previous order overruling the motions was not a final order and was not appealable.

*Pressey v. State of Nebraska*, 173 Neb. 652, 114 N.W.2d 518 (1962). The order was interlocutory and none of the issues considered and decided by the court at the hearing became res judicata. This court has discretion to determine whether and under what circumstances a motion may be renewed.

2. In *Bringewatt*, the Supreme Court approved such reconsideration upon the evidence originally offered on the motions for summary judgment. Here, upon hearing of the motions for reconsideration, the defendants Wausa and Erickson offered additional evidence (Exhibits 25-30). The plaintiffs interposed an objection regarding the form of Exhibit 25, but did not otherwise object to any of the additional exhibits. To the extent that the motions for summary judgment are granted below, the court has disregarded Exhibit 25. However, even if considered, the court finds nothing in Exhibits 25 through 30 of significance to the limited issues for decision on these motions.

3. Counsel for defendant Farmers attempted to argue at the hearing that the previous judge assigned to this case had instigated the defendant's efforts for reconsideration. There is no evidence in the record on such matter, which is wholly extraneous to the decision upon reconsideration, and is entirely disregarded by this court.

4. The issues raised by the motions for reconsideration relate to important questions of law, which this judge must ultimately address in this context or at trial. As such, they deserve proper consideration by the judge now assigned to the case. Because an interlocutory order may be reversed or vacated by the trial court at any time prior to final judgment, a formal motion for reconsideration is probably unnecessary. However, having been raised in that context, the issue should be addressed. To the extent that the motions for reconsideration merely seek reconsideration of the motions for summary judgment (as opposed to how the motions for summary judgment should be decided on the merits), such motions for reconsideration should be sustained. The issue then becomes, of course, how the motions for summary judgment should be decided.

5. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose no genuine issue as to any

material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Popple v. Rose*, 254 Neb. 1, \_\_\_ N.W.2d \_\_\_ (1998).

6. In considering the motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence. *Welsch v. Graves*, 255 Neb. 62, \_\_\_ N.W.2d \_\_\_ (1998).

7. The court first considers the allegations of active negligence against defendant Farmers (paragraph 22 of amended petition, Exhibit 1).

a. In order to prevail on a negligence action, a plaintiff must establish, *inter alia*, a duty of the defendant not to injure the plaintiff. *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

b. A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

c. Whether a legal duty exists is a question of law dependent upon the facts in a particular situation. *Merrick, supra*.

d. The issuance of an insurance policy is merely an offer and must be accepted to have contractual effect. *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993). Until the policy is accepted by the prospective insured, no contractual relationship exists between the applicant and the insurance company. *Moore v. Palmetto State Life Ins. Co.*, 73 S.E.2d 668 (S.C. 1952). If there is no contract, there is no duty. *Id.*

e. Consequently, there was no duty owed by Farmers to the plaintiffs to recognize that the valuation calculation sheet was improperly or only partially completed, or to recognize any inconsistencies between the submitted photograph and the valuation calculation sheet.

f. Because there was no duty from Farmers to the plaintiffs regarding these matters, there can be no liability upon the plaintiffs' claims against Farmers for negligence on the part of Farmers. Thus, Farmers' motion must be sustained as to the plaintiffs' claims for alleged active negligence of Farmers.

8. There still remains the issue of Farmers' vicarious liability for its agent, Erickson. For purposes of these motions, Farmers assumed that Erickson was an agent of Farmers, and the motions will be considered accordingly.

9. The allegations of negligence as to Erickson (imputable to Wausa as Erickson's employer and to Farmers as Erickson's principal) fall into two general categories, failing to obtain coverage (subparagraphs a, c, and d of paragraph 21 of amended petition, Exhibit 1) and negligent misrepresentation (paragraphs b and e of paragraph 21 of amended petition, Exhibit 1).

10. Regarding the claims concerning failure to obtain coverage, these may be considered as two basic negligence claims, failing to obtain "guaranteed replacement cost coverage" and failure to obtain higher coverage limits (by failing to properly complete the valuation calculation sheet).

a. As to the failure to obtain guaranteed replacement cost coverage, there is no evidence that the plaintiffs could have obtained such coverage from any source, whether through Erickson or any other agent, because of the rural location of the plaintiffs' home. There must be causation between the negligence of the insurance broker or agent and the damage to his principal. *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). Consequently, the evidence shows without dispute that any such failure was not a proximate cause of any damage to the plaintiffs. The motions for summary judgment must be sustained regarding the failure to obtain guaranteed replacement cost coverage.

b. Regarding the failure to obtain higher coverage limits, the situation differs.

(1) There is evidence, when viewed most favorably to the plaintiffs, that the plaintiffs could have acquired higher limit coverage from another agent. (Exhibit 19, 61:9-18)

(2) However, the plaintiffs did not request a specific amount of coverage. Julie was not involved in the insurance procurement process. Troy did not give either agent any idea as to value, copies of prior policies or declaration sheets from policies, or any ideas how much insurance he had from previous coverage. (Exhibit 19, 62:1-11) He simply told the agents that “[he] wanted [his] house fully covered, that in case of a complete loss that it would be replaced.” (Exhibit 19, 61:24-25)

(3) However, when Troy received the policy, it plainly and unambiguously limited coverage to the stated policy limits. An insured cannot disregard a written contract as evidenced by a policy of insurance furnished him by the insurer and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery thereon not warranted by the terms of the policy of insurance. *Rodine v. Iowa Home Mut. Cas. Co.*, 171 Neb. 263, 106 N.W.2d 391 (1960).

(A) Under certain circumstances, an insurance policy may be reformed by an equitable action seeking such relief under certain circumstances. *Id.*

(B) To this date, the plaintiffs have not sought such equitable relief by appropriate motion to amend their petition, with any necessary showing to overcome deadlines for pretrial motions previously imposed by the court. The amended petition, filed March 29, 1996, clearly does not request such relief and this court declines to consider such in the absence of an appropriate pleading properly filed.

(4) The law does not impose upon an insurance agent a duty to anticipate what coverage an individual should have, absent the insured’s requesting coverage in at least a general way. *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Polski v. Powers*, 221 Neb. 361, 377 N.W.2d 106 (1985). Even if the plaintiffs’ request that “[they] wanted [their] house fully covered, that in case of a complete loss that it would be replaced” (Exhibit 19, 61:24-25) constitutes a general request, the

plaintiffs' failure to obtain coverage claim foundered upon the plaintiffs' discovery that such coverage was limited to the face amount of the policy. The failure to provide coverage was not, as a matter of law, a proximate cause of the plaintiffs' loss. *Rodine, supra*.

(5) The motions for summary judgment must also be sustained regarding the failure to obtain higher limit coverage.

11. There remains the plaintiffs' negligent misrepresentation claim that, upon receiving the policy and questioning Erickson about the policy limit, Erickson assured the plaintiffs that the house was insured for full value in case of a complete loss.

a. Unless Erickson's interpretation was patently absurd or, though plausible, conflicted with the plain meaning of the printed policy, sufficient evidence exists to show the existence of a genuine issue of fact. (Exhibit 19, 126:9-127:1, 138:6-139:6)

b. An insured has no right to rely upon an agent's patently absurd interpretation of a policy. *Flamme, supra*; *Bayer v. Lutheran Mut. Life Ins. Co.*, 184 Neb. 826, 172 N.W.2d 400 (1969). He ordinarily may rightfully rely, however, upon an agent's interpretation that is plausible and not in patent conflict with the policy although legally untenable. *Id.*

c. The court assumes that Erickson's interpretation was not patently absurd. However, the court must determine whether the assumedly plausible interpretation is in patent conflict with the policy. The fact that Troy questioned Erickson about the language strongly suggests the existence of a patent conflict. Moreover, this is not an instance in which an insured must search through a policy and follow circuitous wording or provisions to obtain an answer. It appears in close proximity to the replacement cost coverage language. In the end, the court concludes that the determination of whether an interpretation patently conflicts with the policy presents a question of law and answers that question in the affirmative.

d. Accordingly, the motion for summary judgment must also be sustained as to the plaintiffs' negligent misrepresentation claims.

12. Thus, the evidence shows that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts as to all claims asserted in the plaintiffs' amended petition and that the defendants are entitled to judgment as a matter of law. The plaintiffs' amended petition should be dismissed with prejudice.

13. Because of the resolution of the renewed motions for summary judgment, the plaintiffs' motion to bifurcate is moot.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED  
that:

1. The motions for reconsideration are granted to the extent that the court will consider the defendants' prior motions for summary judgment without regard to the prior interlocutory order denying such motions.

2. The defendants' respective, renewed motions for summary judgment are sustained.

3. The plaintiffs' amended petition is dismissed with prejudice at the plaintiffs' cost.

4. The plaintiffs' motion to bifurcate is denied as moot.

5. The order setting jury trial in this case is vacated.

Entered: December 14, 1998.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: 12/14/98 Signed "Summary Judgment" entered granting defendants' motions for reconsideration, granting defendants' renewed motions for summary judgment, dismissing plaintiffs' amended petition with prejudice at plaintiffs' cost, denying plaintiffs' motion to bifurcate as moot, and vacating order setting jury trial.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

**BY THE COURT:**

\_\_\_\_\_  
William B. Cassel, District Judge