

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL D. FLAHERTY, IN HIS  
CAPACITY AS TRUSTEE OF AMF  
IRREVOCABLE TRUST DATED  
JANUARY 11, 2005 AND IN HIS  
CAPACITY AS THE  
REPRESENTATIVE OF THE ESTATE  
OF ANDREW MARTIN FLAHERTY;  
AND PIERCE FLAHERTY, AN  
INDIVIDUAL,  
Appellants,  
vs.  
JOHN K. KELLY, AN INDIVIDUAL;  
AND INTEGRATED FINANCIAL  
GROUP, INC., AN ARIZONA  
CORPORATION,  
Respondents.

No. 59582

FILED

DEC 18 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court summary judgment in a professional negligence action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Michael Flaherty is the trustee of an irrevocable life insurance trust, AMF Trust, set up by his brother Andrew Flaherty. In 2005, AMF Trust secured a policy from Prudential Insurance Company, insuring Andrew's life. A year later, respondent John Kelly, an insurance broker, brokered a replacement of that policy with two different policies: one from AXA Equitable Life Insurance Company and one from Protective Life Insurance Company. The policies contained exclusionary provisions that limited payment of the death benefit if the insured were to commit suicide within the first two years of the policy. This case arose after

Andrew committed suicide within the two-year contestability period and AXA and Protective refused to pay death benefits to AMF Trust.

Kelly never advised Michael regarding replacement of the original Prudential policy. Nevertheless, Michael signed the replacement policy disclosure forms from each company and admitted that he read each policy. His signature was required to obtain each policy because he was the trustee of AMF Trust and AMF Trust owned the policies. Michael also wrote the premium checks, on behalf of AMF Trust, for the Prudential policy and the AXA and Protective policies.

After AXA and Protective refused to pay the death benefits, Michael, as representative of Andrew's estate and trustee of AMF Trust, filed suit against Kelly and his company, Integrated Financial. Michael alleged that Kelly committed professional negligence in replacing the Prudential policy. The district court granted summary judgment, finding no genuine issues of material fact regarding the duty, breach, and causation elements of the negligence claim. We affirm.

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Foster v. Costco Wholesale Corp.*, 128 Nev. \_\_\_, \_\_\_, 291 P.3d 150, 153 (2012). Evidence is to be considered "in a light most favorable to the nonmoving party." *Id.* (quoting *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). "Summary judgment is proper only if no genuine issue of material fact exists 'and the moving party is entitled to judgment as a matter of law.'" *Foster*, 128 Nev. at \_\_\_, 291 P.3d at 153 (quoting *Cervantes v. Health Plan of Nev.*, 127 Nev. \_\_\_, \_\_\_, 263 P.3d 261, 264 (2011)).

In negligence cases, this court is “reluctant to affirm summary judgment . . . because, generally, the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve.” *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). In a negligence case, the moving defendant must establish that one of the elements of negligence “is ‘clearly lacking as a matter of law.’” *Id.* (quoting *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996)).

Whether a duty exists is a question of law for the court. *Scialabba*, 112 Nev. at 968, 921 P.2d at 930. “Because the existence of ‘duty’ is a question of law, if this court determines that no duty exists, it will affirm summary judgment for the defendant in a case involving negligence.” *Bayer*, 123 Nev. at 461, 168 P.3d at 1063.

In Nevada, an agent or broker has a duty “to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so.” *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978). An insurance agent or broker does not owe the insured any additional duties other than procuring the requested insurance. *Cf. Havas v. Carter*, 89 Nev. 497, 500, 515 P.2d 397, 399 (1973). Other jurisdictions likewise have held that “[i]nsurance companies and brokers have no affirmative duty to advise their insureds to procure particular or different kinds of coverage.” *Am. Way Cellular, Inc., v. Travelers Prop. Cas. Co.*, 157 Cal. Rptr. 3d 385, 394 (Ct. App. 2013) (alteration in original) (quoting *Ray v. Valley Forge Ins. Co.*, 92 Cal. Rptr. 2d 473, 479 (Ct. App. 1999)). Here, it is undisputed that Kelly met his duty of timely procuring the requested insurance.

Many jurisdictions, however, recognize that insurance brokers may *assume* additional duties in special circumstances. *See, e.g.,* Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 256-263 (1991); Barbara A. O'Donnell, *An Overview of Insurance Agent/Broker Liability*, 25 *The Brief*, Summer 1996, at 35-36; 44 C.J.S. *Insurance* § 309 (2007); 3 *Couch on Insurance* § 46:38 (3d ed. 2011). For example, a broker's representations, *see Wallman v. Suddock*, 134 Cal. Rptr. 3d 566, 582 (Ct. App. 2011), or the existence of a special relationship between a broker and the insured, *see Trupiano v. Cincinatti Insurance Co.*, 654 N.E.2d 886, 889 (Ind. Ct. App. 1995), may create additional duties toward the insured. But here, Michael does not present any facts showing that Kelly assumed such additional duties toward AMF Trust.<sup>1</sup> In addition, Nevada statutorily imposes on insurers an additional duty to warn of the risks of replacing policies, NRS 686A.060, NAC 686A.555(1), NAC 686A.563, but the district court held that this statutory duty was met and Michael does not appeal that decision. Therefore there is no issue of material fact regarding Kelly's duty to Michael.

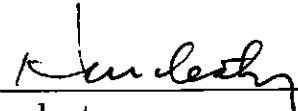
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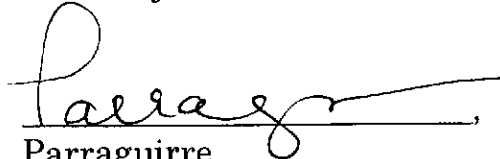
<sup>1</sup>Although there was a special relationship between Kelly and Andrew, Andrew, or rather his estate, does not have standing to make a negligence claim. Only the owner of the policy, not the insured life or another related party, has standing to sue for breach of duty. *Address v. Millstone*, 56 A.3d 323, 333 (Md. Ct. Spec. App. 2012); *Pike v. N.Y. Life Ins. Co.*, 901 N.Y.S.2d 76, 82 (App. Div. 2010); *Berardino v. Ochlan*, 770 N.Y.S.2d 75, 77 (App. Div. 2003). In this case, the owner of the life insurance policies was AMF Trust, not Andrew. Thus, Andrew's estate does not have standing to bring a professional negligence claim.

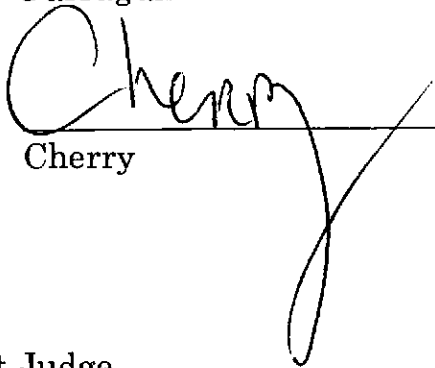
Because we conclude that there is no issue of material fact regarding whether Kelly owed a duty to Michael and AMF Trust, we have no occasion to address the subsequent elements of the negligence claim.

Accordingly, we

ORDER the judgment AFFIRMED

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Cherry

cc: Hon. Valerie Adair, District Judge  
E. Paul Richitt, Jr., Settlement Judge  
Martin & Allison, Ltd.  
McKay Law Firm Chtd.  
Eighth District Court Clerk