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Industrial Development Associates v. F.T.P., Inc.N.J.Super.A.D.,1991.
Superior Court of New Jersey,Appellate Division.
INDUSTRIAL DEVELOPMENT ASSOCIATES a/k/a Industrial Development Association, A New Jersey Limited Partnership, Plaintiff-Appellant,
v.
F.T.P., INC., A Corporation of the State of New Jersey, Defendant-Respondent,
andCommercial Union Surplus Lines Insurance Company, A Corporation of the State of Delaware; Executive Excess Ltd.; Antonio Suarez d/b/a I.C.P.; Associated Financial Services, A New Jersey Corporation; P.P.G., Industries, Inc., A Corporation of the State of Pennsylvania and Pugliese Swimming Pools Corporation, A New Jersey Corporation, Defendants.
No. A-3809-88T2

Argued Oct. 23, 1990.
Decided May 31, 1991.

On insured's appeal from judgment for fire insurers, the Superior Court, Appellate Division, 222 N.J.Super. 281, 536 A.2d 787, reversed and remanded in part. On remand, the Superior Court, Law Division, Essex County, granted judgment for insurer notwithstanding verdict for insured, who appealed. The Superior Court, Appellate Division, Gruccio, J.A.D., held that insured was not required to present expert testimony establishing standard of insurance broker's competence, in light of evidence that broker failed to take any action upon discovering inoperative status of insured's sprinkler system during course of his inspection of insured's facility despite knowledge of existence of automatic sprinkler clause of policy's protective safeguard endorsement.

Reversed.

Michels, P.J.A.D., dissented and filed opinion.
West Headnotes

[1] Insurance 217 1671

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1671 k. Failure to Procure Coverage. Most Cited Cases
(Formerly 217k103.1(1))
Insurance broker may be held liable for his failure to exercise requisite skill or diligence if he fails to issue policy he has promised to procure, assures insured that he is covered whereas he is not, or procures policy which is materially deficient, but broker's liability is not necessarily limited to these circumstances.

[2] Insurance 217 1673

217 Insurance
217XI Agents and Agency
217XI(D) Agents for Applicants or Insureds
217k1668 Duties and Liabilities to Insureds or Others
217k1673 k. Actions. Most Cited Cases
(Formerly 217k103.1(2))
Insured was not required to present expert testimony to establish standard by which insurance broker's conduct in connection with issuance of fire policy was to be judged in light of testimony that, during course of his inspection of insured's facility, broker was made aware that sprinkler system was inoperative but took no steps whatsoever to either follow up on status of system or to notify any party of its inoperative status despite knowledge of existence of automatic sprinkler clause of policy's protective safeguard endorsement.

****683*469 Glenn A. Bergenfield**, for plaintiff-appellant (Michael F. Chazkel, attorney and on the brief), East Brunswick.
Robert H. Tell, Mountainside, for defendant-respondent, attorney for respondent (Lynch, Martin & Philibosian, attorneys, North Brunswick).

Before Judges MICHELS, GRUCCIO and D'ANNUNZIO.

The opinion of the court was delivered by
GRUCCIO, J.A.D.
Following our remand pursuant to our decision in *Industrial Development Assoc. v. Commercial Union*, 222 *N.J.Super.* 281, 536 *A.*2d 787 (App.Div.1988), plaintiff Industrial Development Association (I.D.A.) appeals from the decision of the trial court granting defendant F.T.P., Inc.'s (F.T.P.) motion for judgment notwithstanding the verdict (j.n.o.v.). For the purposes of this opinion, we adopt the facts as presented in our earlier ***470** opinion with the exception that defendant Antonio Suarez remains a defendant. *See id.* at 284-87, 536 *A.*2d 787. We here address the narrow issue of whether I.D.A. was required to present expert testimony to establish the standard by which F.T.P. broker Thomas Guthrie's conduct should be judged. As to the issue of the necessity for expert testimony, we reverse. Accordingly, the verdict of the jury is reinstated.

On remand, the jury found that "defendant F.T.P. failed to exercise on plaintiff's behalf the requisite degree of skill, knowledge and care in obtaining the insurance policy in question." However, the trial judge granted defendant's motion for j.n.o.v. holding that expert testimony was necessary to establish the duty of F.T.P.'s broker Guthrie. We disagree and find the trial judge's holding in direct conflict with the well-established duty of an insurance broker as laid out in New Jersey case law. As early as 1900, New Jersey has held that
[a] broker is a specialist employed as a middleman to negotiate between the parties to a sale or other business contract, and they must exercise customary skill in the preparation of such documents as are required to effectuate the business which they have in hand.

Milliken v. Woodward, 64 *N.J.L.* 444, 448, 45 *A.* 796 (1900); *see Barton v. Marlow*, 47 *N.J.Super.* 255, 259, 135 *A.*2d 670 (App.Div.1957); *Marano v. Sabbio*, 26 *N.J.Super.* 201, 205-06, 97 *A.*2d 732 (App.Div.1953). As an insurance broker invites his clients to rely upon his expertise in procuring insurance that best suits their particular requirements,[o]ne who holds himself out to the public as an insurance broker is required to have the degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook****684** to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby.

Rider v. Lynch, 42 *N.J.* 465, 476-77, 201 *A.*2d 561 (1964); *Bates v. Gambino*, 72 *N.J.* 219, 224-25, 370 *A.*2d 10 (1977).

***471** [1] In *Cox v. Santoro*, 98 *N.J.Super.* 360, 237 *A.*2d 491 (App.Div.1967), we found that three circumstances existed in which a *prima facia* case of negligence could be established against a broker.
An insurance broker may be held liable for his failure to exercise the requisite skill or diligence if he fails to issue the insurance policy he has promised to procure, *Marano v. Sabbio*, 26 *N.J.Super.* 201 [97 *A.*2d 732] (App.Div.1953); if he assures the insured that he is covered whereas he is not, *Barton v. Marlow*, 47 *N.J.Super.* 255 [135 *A.*2d 670] (App.Div.1957), or if he procures a policy which is materially deficient, *Rider v. Lynch*, *supra*, [42 *N.J.* at 476, 201 *A.*2d 561].

Cox, *supra*, 98 *N.J.Super.* at 365, 237 *A.*2d 491. However, a broker's liability is not necessarily limited to these three circumstances. *Bates*, *supra*, 72 *N.J.* at 225 n. 2, 370 *A.*2d 10.

[2] Where a broker fails to meet the established minimum standards, expert testimony is not necessary to establish the culpability of the broker. *DiMarino v. Wishkin*, 195 *N.J.Super.* 390, 394, 479 *A.*2d 444 (App.Div.1984). In *Bates*, the Supreme Court found that "plaintiffs were not obligated to present evidence of what a similarly situated competent broker in the community would have done under the circumstances. Where conduct falls below a certain standard, establishing the standard of competence generally expected of like practitioners becomes irrelevant." *Bates*, *supra*, 72 *N.J.* at 225, 370 *A.*2d 10.

At trial, the jury found that F.T.P. had been contributorily negligent and allocated to F.T.P. 15% of fault. Presumably, this was based on Guthrie's failure to take any action upon his alleged discovery of I.D.A.'s inoperative sprinkler system. Both the trial court and counsel for F.T.P. seem to base their assertions that expert testimony is needed on the lack of clarity as to exactly what action Guthrie should have taken. This lack of clarity led the trial court to the conclusion that expert testimony is required to set out for the jury what Guthrie should have done. The trial court factually distinguished *Bates* from the case at hand. While we agree that factual differences exist, we, nevertheless, find that the principles applied in *Bates* ***472** and early cases dealing with broker liability should be applied to this case.

The record here contains sufficient credible evidence from which a jury could conclude that Guthrie's conduct fell sufficiently below the established minimum standards for a broker such that the jury could find his conduct negligent without expert testimony as to the standard of competence expected of similarly situated brokers. *See Bates*, *supra*, 72 *N.J.* at 225, 370 *A.*2d 10. Guthrie was a broker whose duties included making an assessment of the risks against which I.D.A. was insuring. There is testimony in the record which indicates that during the course of his inspection of plaintiff's facility, he was made aware that the sprinkler system was inoperative. Despite this knowledge of the existence of the automatic sprinkler clause of the protective safeguard endorsement of the insurance policy, Guthrie took *no steps whatsoever* to either follow-up on the status of the system or to notify any party of the inoperative status. These facts could permit a jury to find that Guthrie failed to exercise "reasonable skill, care and diligence" in the execution of his commission. *See Rider*, *supra*, 42 *N.J.* at 476-77, 201 *A.*2d 561; *Bates*, *supra*, 72 *N.J.* at 224-25, 370 *A.*2d 10.

Our decision should not be read to suggest that the same standards of liability which apply to a common market underwriter necessarily apply to an excess insurance underwriter. Rather, we limit our application of the *Bates* standards to the excess underwriter market where instances of the conduct of the particular broker clearly violates conduct which could be expected from a reasonable broker regardless of the market in which he dealt.

****685** We find the other issues raised by plaintiff concerning contributory negligence, the damages verdict and joint tort feasance to be without merit. *R.* 2:11-3(e)(1)(E). We reverse ***473** because of the erroneous grant of j.n.o.v. and remand for reinstatement of the jury's verdict.

Reversed and remanded.

MICHELS, P.J.A.D., dissenting.
I respectfully disagree with the majority that would reverse the judgment in favor of defendant F.T.P., Inc. (F.T.P.) notwithstanding the verdict, and then, reinstate the jury verdict.

My colleagues believe that Thomas Guthrie's (Guthrie) conduct as a surplus lines insurance agent "fell sufficiently below the established minimum standards" of "fail[ing] to exercise 'reasonable skill, care and diligence' in the execution of his commission" as to forego the necessity of expert testimony to establish the competence generally expected of like insurance agents. In my view, however, the evidence does not create such a clear cut breach of any applicable standard to find that plaintiff proved a prima facie case of negligence on the part of Guthrie.

We must not lose sight of the fact that Guthrie was not a traditional insurance agent attempting to place traditional insurance coverage, but rather, was a surplus lines insurance agent placing surplus lines insurance. Surplus lines insurance is coverage that insurance companies authorized or admitted to do business in this State have refused to cover by virtue of the nature of the risk. The duties of surplus lines agents are regulated by statute and differ from those of a traditional insurance agent. Expert testimony is necessary to establish the applicable standard of care and professionalism to which similarly situated surplus lines insurance agents must adhere and whether any deviation from that standard occurred. Without such testimony, a jury can not properly or reasonably determine whether a surplus lines insurance agent is negligent.

Consequently, to have made out a prima facie case against F.T.P., plaintiff was required to present expert testimony to establish the appropriate standard of care to be exercised by ***474** similarly situated surplus lines insurance agents and whether Guthrie deviated from that standard. Having failed to present such expert testimony and from my review of the record, I am convinced that the trial court properly granted judgment notwithstanding the verdict in favor of F.T.P. Therefore, I would affirm the judgment under review substantially for the reasons expressed by Judge Yanoff in his oral opinion of March 3, 1989.

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248 N.J.Super. 468, 591 A.2d 682

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