

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JAMSHIB JAMSHAB,)
as personal representative of the estate of)
Azita Jamshab,)

Plaintiff)

v.)

Docket No. 04-50-P-C

NATIONWIDE INSURANCE)
COMPANY,)

Defendant)

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT¹**

The defendant, Nationwide Insurance Company, moves for summary judgment on all claims in this action arising out of its issuance of a life insurance policy to Azita Jamshab. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token,

¹ The plaintiff has requested oral argument on this motion. Motion for Setting of Hearing and Oral Argument, etc. (Docket No. 40), a request opposed by the defendant, Response to Plaintiff’s Motion for Oral Argument (Docket No. 42). Because the parties’ papers provide a sufficient basis on which to decide the motion, the request is denied.

‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The following material facts are appropriately supported in the parties’ respective statements of material facts, submitted in accordance with this court’s Local Rule 56.

In March 1999 Philip O’Hearn, as principal of O’Hearn Insurance Agency, and Santanu Basu entered into a contract by which Basu became associated with the O’Hearn agency to sell various forms of insurance, including life insurance. Defendant’s Statement of Material Facts (“Defendant’s SMF”) (Docket No. 25) ¶ 1; Plaintiff’s Response to Defendant’s Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 28) ¶ 1. O’Hearn sells Nationwide Insurance products; his agency contracted with

Nationwide to sell its products. *Id.* ¶¶ 2, 5. O’Hearn’s agency is authorized to sell insurance for approximately 20 other companies as well. *Id.* ¶ 3. An associate agent like Basu has the same authority to sell non-Nationwide products as a primary agent like the O’Hearn agency. *Id.* ¶ 4.

A three-party contract among Basu, Nationwide and O’Hearn effective on March 1, 1999 stated, in part, that O’Hearn was solely responsible for compensating Basu and that the training, expenses and activities of Basu were the responsibility of O’Hearn. *Id.* ¶ 9. Basu received no benefits and O’Hearn did not withhold or make FICA payments on his behalf. *Id.* ¶ 15. Basu was required to pay the O’Hearn agency rent, to be withheld from his commission payments, for the office space he used. *Id.* ¶ 17. O’Hearn did not review life insurance applications generated by Basu. *Id.* ¶ 19. Nationwide does not supervise the performance of associate agents. *Id.* ¶ 21. Nationwide never communicates directly with an associate agent about his job performance. *Id.* ¶ 24. Nationwide makes any payments for a policy sold by an associate agent to the named agent, such as O’Hearn. *Id.* ¶ 25. Nationwide never has direct contact with a life insurance policyholder concerning underwriting matters. *Id.* ¶ 26. Nationwide has a guideline to the effect that a beneficiary of one of its policies should have an insurable interest. *Id.* ¶ 27.

On January 4, 2002 Azita Jamshab met with Basu and signed an application for life insurance coverage with Nationwide Life Insurance Company. *Id.* ¶ 29. According to the application, Jamshab was to be the owner of the policy and her life was the one to be insured. *Id.* ¶ 30. She made the required payment when she applied. *Id.* ¶ 31. She named Basu as the primary beneficiary of the policy and Ahmad Khojaspehzed as the contingent beneficiary. *Id.* ¶ 32. Submission of the policy with Basu as a beneficiary should have been questioned by Nationwide, but it was not. Plaintiff’s Statement of Additional Material Facts (“Plaintiff’s SMF”) (Docket No. 29) ¶ 23; Defendant’s Response to Plaintiff’s Statement of Additional Material Facts (“Defendant’s Responsive SMF”) (Docket No. 33) ¶ 23. The policy was

delivered to Jamshab by Basu on February 8, 2002. Defendant’s SMF ¶ 34; Plaintiff’s Responsive SMF ¶ 34.

Jamshab was close friends with Kathy Bailey. *Id.* ¶ 35. Jamshab discussed her life insurance policy with Bailey in January 2002; they discussed the meaning of the term beneficiary and who should be a beneficiary on the policy. *Id.* ¶ 36. Jamshab had been romantically involved with Khojaspehzed in the months before her death. *Id.* ¶ 37. He also discussed with Jamshab the nature of her life insurance policy, repeatedly urging her to change the beneficiary. *Id.* ¶ 38. Khojaspehzed suggested almost daily that Jamshab remove both him and Basu from the policies. *Id.* ¶ 39. Basu was aware that his being named as a beneficiary on a policy purchased from him was something no one in the life insurance industry would ever recommend. *Id.* ¶ 40.

On March 7, 2002 Jamshab’s body was discovered in a gravel pit off Goose Pond Road in Cumberland, Maine. *Id.* ¶ 42. She had died of multiple gunshot wounds. *Id.* ¶ 43. No request to change the beneficiary on the life insurance policy was filed before Jamshab’s death. *Id.* ¶ 45. At his trial for Jamshab’s murder, Basu claimed that Khojaspehzed had killed Jamshab. *Id.* ¶ 44. Basu was convicted of murder on September 30, 2003. *Id.* ¶ 47. On July 6, 2004 Basu appealed his conviction to the Maine Supreme Judicial Court. *Id.* ¶ 49.

Shortly after the murder, Khojaspehzed and Jamshab’s estate retained counsel for the plaintiff to ensure that the proceeds of the life insurance policy were not paid to Basu and were instead paid to Jamshab’s estate or to Khojaspehzed, who would pay them to the estate. Plaintiff’s SMF ¶ 10; Defendant’s Responsive SMF ¶ 10. On June 21, 2002 counsel for the plaintiff contacted Nationwide Insurance Company and asked that “the process for making a claim and disbursement of funds begin.” *Id.* ¶ 11. On July 3, 2002, Nationwide stated that any determination of rights under the policy must await the

conclusion of the criminal proceedings. *Id.* ¶ 12. On November 20, 2002 counsel for the plaintiff again contacted Nationwide requesting payment under the policy and asking for authority to support Nationwide's position. *Id.* ¶ 13. Nationwide responded by letter dated December 20, 2002 requesting the legal basis for the plaintiff's position. Defendant's Responsive SMF ¶ 13. Following Basu's conviction, counsel for the plaintiff again contacted Nationwide and requested payment under the policy. Plaintiff's SMF ¶ 15; Defendant's Responsive SMF ¶ 15.

On January 15, 2004 counsel for the plaintiff submitted a draft qualified disclaimer and asked Nationwide to confirm that it would pay the proceeds of the policy to Jamshab's estate if the qualified disclaimer were executed. *Id.* ¶ 19. By correspondence dated April 15, 2004 counsel for the plaintiff sent to counsel for the defendant documents entitled "Qualified Disclaimer" apparently signed by Khojaspehzed and Basu. Defendant's SMF ¶ 46; Plaintiff's Responsive SMF ¶ 46. By correspondence dated May 5, 2004 counsel for the defendant informed counsel for the plaintiff that Nationwide might require the approval of the Probate Court before paying the proceeds of the life insurance policy to Jamshab's estate. *Id.* ¶ 50. On June 11, 2004 a representative of Nationwide contacted the Cumberland County Probate Court to determine the appropriate procedure by which to seek approval of the payment. *Id.* ¶ 51. On June 25, 2004 notices to the parties were prepared by counsel for the defendant together with a motion for court approval of the distribution of the proceeds of the life insurance policy. *Id.* ¶¶ 52-53. Notices were sent to counsel for the plaintiff, Basu's attorney and Khojaspehzed. *Id.* ¶ 54. A hearing was held in the probate court on August 4, 2004. *Id.* ¶ 56. On August 6, 2004 the probate court approved the distribution of the proceeds of the policy to Jamshab's estate. *Id.* ¶ 57. A check in the amount of \$100,000 payable to the plaintiff as personal representative of Jamshab's estate was delivered on August 13, 2004. *Id.* ¶ 58.

On June 28, 2004 counsel for the plaintiff informed counsel for the defendant that too much time had passed in paying out the proceeds of the policy to the estate and that the complaint in this action would be amended to assert bad faith counts. *Id.* ¶ 55.

III. Discussion

The amended complaint asserts claims alleging negligence, a survival action under 18-A M.R.S.A. § 3-817, intentional and negligent infliction of emotional distress, breach of an implied covenant of good faith and fair dealing, conversion and violation of 24-A M.R.S.A. § 2436-A(1)(E) (unfair insurance claim practices). Amended Complaint (Docket No. 17) at 2-9. It also seeks punitive damages. *Id.* Count VIII. The defendant seeks summary judgment on each count, based on various legal theories.

A. Negligence (Counts II(A) and II(B))

The defendant first contends that it owed no duty to Jamshab. Defendant's Motion for Summary Judgment, etc. ("Motion") (Docket No. 24) at 8-11. This argument addresses two slightly differentiated claims of negligence: that the defendant caused Jamshab's wrongful death by negligently issuing the policy naming its agent as the beneficiary and by negligently allowing Basu to name himself as the beneficiary on the policy. Amended Complaint ¶¶ 13, 16. The defendant acknowledges that courts in jurisdictions outside Maine have recognized wrongful death claims against insurers where the beneficiary purchased the policy without the knowledge and consent of the insured and subsequently caused the death of the insured. Motion at 9. It contends that this case is distinguishable because Jamshab herself purchased the policy and was aware that Basu was the named beneficiary. *Id.* The plaintiff responds that the defendant had a duty to Jamshab that was created by 24-A M.R.S.A. § 2404, its own internal policy and the standards of the insurance industry, as well as a common-law duty because harm to Jamshab as a result of issuing the policy

naming Basu as beneficiary was reasonably foreseeable. Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment (“Opposition”) (Docket No. 27) at 2, 5.

The state statute invoked by the plaintiff states, in relevant part:

Any individual of competent legal capacity may procure or effect an insurance contract upon his own life or body for the benefit of any person. But no person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable to the individual insured or his personal representatives, or to a person having, at the time when such contract was made, an insurable interest in the individual insured.

24-A M.R.S.A. § 2404(1). The plaintiff focuses on the second sentence of this subsection, arguing that it creates a duty running from the defendant to Jamshab because Basu had no insurable interest in Jamshab. Opposition at 2. That contention is correct, as far as it goes. *See* 24-A M.R.S.A. § 2404(3) (defining “insurable interest”). However, the plaintiff’s accompanying assertion that “[t]here is no question that Basu caused the insurance policy to be procured,” Opposition at 2, is incorrect. In the context of the statutory scheme of which section 2404(1) is a part, the individual who “procures” a policy can only be the person who pays the premium. *See, e.g.,* 24-A § 2405(1) (creating an exception to section 2404(1) when the person or entity “paying the consideration for the insurance” has no insurable interest in the life of the individual insured but irrevocably designates charitable and other specified entities as beneficiary). The plaintiff relies on paragraph 3 of his statement of material facts in support of his assertion that Basu “caused the insurance policy to be procured,” Opposition at 2, but that paragraph was denied by the defendant, Defendant’s Responsive SMF ¶ 3, which also correctly pointed out that the plaintiff’s citation of eight pages of the transcript of Basu’s criminal trial in support of this assertion does not comply with this court’s Local Rule 56(e), which requires a citation to a specific page or paragraph of identified record material in support of each factual assertion included in a party’s statement of material facts. I have nonetheless reviewed all

eight pages of the transcript cited by the plaintiff, Exh. 5 to Plaintiff's SMF, and I agree with the defendant, Defendant's Responsive SMF ¶ 3, that the testimony in those pages does not support the assertion that Basu caused Jamshab to procure the policy. The only evidence in the summary judgment record on this point is that Jamshab procured the policy and that she herself initiated the process of procuring it.

In any event, the plaintiff's argument would require the court to ignore the first sentence of section 2404(1). That sentence clearly provides that a competent adult may procure an insurance contract on her own life "for the benefit of any person." From all that appears in the summary judgment record, that is what Jamshab did. To read the second sentence of subsection (1) as the plaintiff suggests would be to read the first sentence out of the statute, a violation of basic principles of statutory construction. In addition, the statute provides a specific remedy for its violation. 24-A M.R.S.A. § 2404(2). Under such circumstances, this court will not find that a cause of action in negligence is created by the statute. *See Hudson v. S.D. Warren Co.*, 608 F. Supp. 477, 479-80 (D. Me. 1985).

With respect to the plaintiff's remaining contentions as to the basis for his negligence claim, finding that a duty is created by the defendant's internal guidelines or as a matter of common law would require this court to extend Maine common law beyond what could reasonably be construed as its current status. I seriously doubt that the act of allowing an individual to purchase a policy of insurance on her own life which names the selling agent as the primary beneficiary makes it sufficiently foreseeable that the agent will thereafter kill the policy owner as to impose a duty of care under common law to avoid such an act. This court need not address that issue, however. The plaintiff chose to bring this action in federal court on the basis of diversity jurisdiction. Amended Complaint ¶ 5. The applicable common law, as the parties appear to agree, Motion at 11; Opposition at 5, is that of the state of Maine, *McCann v. Wal-Mart Stores, Inc.*, 210 F.3d 51, 54 (1st Cir. 2000). The Maine Law Court has not addressed the question whether an insurer

has a duty to an individual who purchases from it a policy insuring her own life not to allow her to name the selling agent as the beneficiary. *Cf. Crosswell v Connecticut Indem. Ass'n*, 28 S.E. 200, 201 (S.C. 1897) (“[I]t is also well settled that a person may insure his own life, and make the policy payable to whomsoever he chooses, even though the beneficiary has no insurable interest in his life, provided the transaction is bona fide, and not a mere cover to evade the law against wager policies.”). As far as I can determine, no jurisdiction has published case law on this precise point.

The plaintiff has cited case law in which policies were issued on the life of an individual who was killed but who had no knowledge of the existence of the policy. *E.g., Ramey v. Carolina Life Ins. Co.*, 135 S.E.2d 362, 365 (S.C. 1964) (upholding cause of action in negligence against insurer that issued life insurance policy without knowledge or consent of insured while having reason to know that insured did not know or consent); *Williams v. John Hancock Mut. Life Ins. Co.*, 718 S.W.2d 611, 612-14 (Mo. App. 1986) (insured’s signature on application for life insurance policy was forged with knowledge of selling agent); *Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 939 (4th Cir. 1991) (same; Virginia law). *See also Bacon v. Federal Kemper Life Assurance Co.*, 512 N.E.2d 941, 943 (Mass. 1987) (insurer not liable because no evidence to show that it knew or should have known that change in beneficiary exposed victim to unreasonable risk of harm from criminal conduct by new beneficiary). *See generally Bajwa v. Metropolitan Life Ins. Co.*, 804 N.E.2d 519, 526-29 (Ill. 2004) (discussing case law). This case presents a significant factual difference. Jamshab herself purchased the policy and named Basu as the beneficiary. None of the general language concerning foreseeability and duty in Maine case law cited by the plaintiff requires that the particular cause of action in negligence which he presses in this case be recognized. Under these circumstances, it would not be appropriate for this court to expand Maine

common law; that is the province of Maine's own courts.² See *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1187 (1st Cir. 1996).

The defendant is entitled to summary judgment on the negligence claims asserted in Counts II(A) and II(B) of the amended complaint. See *Burton v. John Hancock Mut. Life Ins. Co.*, 298 S.E.2d 575, 577-78 (Ga. App. 1982).

B. Vicarious Liability (Count II(C))

The plaintiff contends that the defendant is vicariously liable for the torts of Basu against Jamshab because the existence of an agency relationship between Basu and the defendant aided Basu in accomplishing those torts. Amended Complaint ¶¶ 18-19. This claim is presented in the language of section 219(2)(d) of the Restatement of Agency. The defendant contends that it is entitled to summary judgment on this claim because Basu's murder of Jamshab was not aided by any agency relationship within the meaning of that section of the Restatement, Basu was not the agent of the defendant and "it is not clear that Maine will even adopt" this section of the Restatement. Motion at 12-13. The plaintiff responds only to the second of these arguments; he does not mention the Restatement at all. Opposition at 8-11.

The torts alleged in the amended complaint to have been committed by Basu are wrongful death and intentional infliction of emotional distress. Amended Complaint Counts II & IV. The section of the Restatement at issue provides, in relevant part:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

² This issue is not appropriate for certification to the Law Court pursuant to 4 M.R.S.A. § 57. Resolution of this issue would not, in any sense, be dispositive of the entire action. See, e.g., *United States v. Water Quality Ins. Syndicate*, 324 F.Supp.2d 100, 102 (D. Me. 2004).

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency ¶ 219(2) (1958). There can be no question that murder and intentional infliction of emotional distress are outside the scope of employment of an insurance sales agent. While the Law Court has said that it has “not yet expressly adopted” section 219(2)(d), *Mahar v. StoneWood Transp.*, 823 A.2d 540, 545 (Me. 2003), it held in the same case that the section “is limited in its application to cases within the apparent authority of the employee, or when the employee’s conduct involves misrepresentation or deceit,” *id.* at 546, and that the section did not encompass assault by an employee on the plaintiffs, *id.* at 545. Thus, while the fact that the tortfeasor was employed by the defendant in *Mahar* made possible the assault — the tortfeasor would not have been present at the time of the assault were it not for his employment — it did not render the employer vicariously liable for the assault. The same result is required here. While Basu most likely would not have murdered Jamshab or caused her emotional distress were it not for the fact that he sold her one of the defendant’s policies naming Basu as the beneficiary, those torts were not within Basu’s apparent authority nor did they themselves involve misrepresentation or deceit. The defendant is entitled to summary judgment on Count II(C) insofar as it relies on section 219 (d) of the Restatement. *See Harrison v. Correctional Med. Servs.*, 2003 WL 21262100 (D. Me. May 30, 2003), at *1.

The plaintiff suggests, in cursory fashion, that the defendant could be liable under section 219(b) “because a jury could find that Nationwide ‘was negligent or reckless.’” Opposition at 13 n.6. In the

absence of any developed argument, this asserted basis for avoiding summary judgment must be considered to have been waived. *See Pearl Invs., LLC v. Standard I/O, Inc.*, 257 F.Supp.2d 326, 355 (D. Me. 2003).³ The plaintiff also suggests, in a one-sentence argument, that the defendant could be liable because Jamshab's harm was caused by Basu's "deceit and misrepresentations," citing several other sections of the Restatement of Agency and *Bowman v. Home Life Ins. Co. of Am.*, 243 F.2d 331 (3d Cir. 1957). *Id.* at 13. Again, the plaintiff provides no developed argument; he offers no citation to facts in the summary judgment record that would support this theory. In particular, in opposing summary judgment, it is not sufficient to assert in a conclusory manner that the defendant "could" be found liable on a theory not pleaded in the complaint;⁴ it is incumbent upon the plaintiff when opposing the entry of summary judgment to demonstrate why the defendant could or should be held liable on such a theory.

The defendant is entitled to summary judgment on Count II(C).

C. Liability Under 24-A M.R.S.A. § 2422 (Count II(D))

Count II(D) of the amended complaint alleges that the defendant "is liable for the acts of Santanu Basu because he was an authorized agent of the defendant pursuant to 24-A M.R.S.A. § 2422." Amended Complaint ¶ 21. The defendant contends that this statute may not be "used to create tort liability of an insurance carrier for actions of its agents." Motion at 14. The plaintiff responds, in cursory fashion, that it "intends to prove at trial that Basu misled Azita," that the statute binds the defendant by "Basu's misrepresentations with respect to the naming of beneficiaries," that Jamshab "relied on that

³ To the extent that the plaintiff means to rely on his argument concerning Counts II(A) and (B) — the footnote says "See Section A, *infra*," although the only Section A of the memorandum of law appears before, not after, the footnote — I have already recommended that summary judgment be granted to the defendant on those claims.

⁴ The section of the amended complaint at issue, paragraphs 18 and 19, cannot reasonably be read to allege the elements of any of the additional sections of the Restatement mentioned in the plaintiff's memorandum nor even to suggest the possibility that those sections might be at issue.

misrepresentation to her detriment” and that the defendant is therefore responsible “for that tortious conduct.” Opposition at 7. The antecedent of “that tortious conduct” is unclear. The statute at issue provides, in relevant part:

1. An agent authorized by an insurer, if the name of such agent is borne on the policy, is the insurer’s agent in all matters of insurance. . . .

2. The authorized agent of an insurer shall be regarded as in the place of the insurer in all respects regarding any insurance effected by him. The insurer is bound by his knowledge of the risk and all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known to the insurer and waived by it as if noted in the policy.

24-A M.R.S.A. § 2422. This language cannot reasonably be read to impose liability on an insurer for its agent’s torts against its insured. Wrongful death and intentional infliction of emotional distress cannot reasonably be characterized as “matters of insurance.” Nor can they reasonably be considered “matters connected with” “knowledge of the risk” covered by the policy. Whether or not Jamshab relied on a misrepresentation by Basu concerning the naming of beneficiaries and whether or not that reliance led to her death or emotional distress, those matters are not included in the scope of section 2422 on its face.

The defendant is entitled to summary judgment on Count II(D).

D. Fiduciary Duty (Count II(E))

Count II(E) alleges that Basu breached a fiduciary duty to Jamshab, resulting in damages to the plaintiff. Amended Complaint ¶¶ 22-27. As the defendant points out, Motion at 15, this count does not allege that the defendant was liable for Basu’s claimed breach. The plaintiff responds that Basu was the defendant’s employee or agent,⁵ thereby impliedly asserting that this count is asserted against the defendant

⁵ In this regard, the plaintiff relies in part on what he contends is the defendant’s admission that Basu was O’Hearn’s employee. Opposition at 8 (citing Plaintiff’s SMF ¶ 2). In fact, the paragraph of the amended complaint cited in support of this paragraph of the plaintiff’s statement of material facts asserts that Basu “was an agent of the Defendant at all times (*continued on next page*)

on an agency theory. Opposition at 8-11. The defendant does not return to the pleading issue in its reply, responding only to the plaintiff's specific arguments. Defendant's Reply Memorandum in Support of Its Motion for Summary Judgment ("Reply") (Docket No. 32) at 8-9. I therefore conclude that the defendant has waived any claim to summary judgment based on the insufficiency of the amended complaint.

With respect to the merits of this claim, the defendant contends that Basu had no fiduciary duty to Jamshab, that she received advice contrary to that given to her by Basu and thus must have "made up her own mind," that her parents are in fact receiving the policy proceeds as she intended when she purchased the policy, and that if Basu had a fiduciary duty to Jamshab, he was acting as her agent and could not also be acting as the agent of the defendant. Motion at 15-17. The plaintiff responds that "[w]here there is an agency, such as in this case, Nationwide, as principal has a fiduciary duty to third parties such as Azita by virtue of the relationship." Opposition at 13. The authority cited by the plaintiff in support of this proposition, however, merely establishes the definition of the term fiduciary. *Id.* It does not address the question of the existence of a vicarious fiduciary duty, which is the only way in which the defendant could be liable on the claim as it is asserted in the amended complaint. The plaintiff goes on to assert that the defendant entered into a direct fiduciary relationship with Jamshab "[u]pon issuing the life insurance policy in question." *Id.* The defendant does not object to this recasting of Count II(E), nor does it respond to this argument, confining its reply to discussing Basu's relationship with Jamshab. Reply at 8-9. The plaintiff cites case law discussing the duty of insurers to their insureds in general, Opposition at 13-14, but none in which a court found an insurer to have a fiduciary duty to its insureds.

pertinent," Amended Complaint ¶ 4, and does not mention O'Hearn at all. In any event, the defendant's motion for leave to amend its answer has been granted without opposition from the plaintiff (Docket No. 38), and the operative answer now denies the relevant paragraph of the complaint. Amended Answer (Docket No. 39) ¶ 4.

Under Maine law, liability for breach of fiduciary duty consisting of a failure to protect another from harm by a third person exists only where there is a “special relationship” between the defendant and the plaintiff. *Bryan R. v. Watchtower Bible & Tract Soc’y*, 738 A.2d 839, 844-45 (Me. 1999) (finding no such special relationship between a church and its members).

A fiduciary duty will be found to exist, as a matter of law, only in circumstances where the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of specific events at issue. A court, therefore, must have before it specific facts regarding the nature of the relationship that is alleged to have given rise to a fiduciary duty in order to determine whether a duty may exist at law.

Id. at 846. Here, the plaintiff cites no facts to support his conclusory assertion that a “fiduciary relationship . . . resulted upon the purchase of the insurance policy.” Opposition at 13. No facts have been presented that would allow the drawing of an inference that Jamshab trusted the defendant to protect her from bodily harm or emotional injury; at most, one may infer that she trusted the defendant to pay benefits to a named beneficiary upon her death. “[T]he relationship between an insurer and its insured is contractual, not fiduciary, in nature.” *Sharma v. Metropolitan Life Ins. Co.*, 2004 WL 2875085 (Mich.App. Dec. 14, 2004), at *4. *Accord, Monroe v. Board of Regents of Univ. Sys. of Georgia*, 602 S.E.2d 219, 222 (Ga.App. 2004); *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 548 (N.M.App. 2003) (insurer assumes fiduciary obligation to insured only in matters pertaining to performance of obligations in insurance contract); *Murphy v. Kuhn*, 682 N.E.2d 972, 974-75 (N.Y. 1997). *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 119 (1993) (“Most States treat the relationship between insurer and insured as a matter of contract, not a fiduciary relationship.”) (Thomas, J., dissenting). In this case, there is no evidence that would allow the drawing of a reasonable conclusion that a “special relationship” existed between Jamshab and the defendant.

In at least one state there is no fiduciary relationship between an insurer's agent and its insured unless the agent holds himself out as an expert and the insured "must rely upon the expertise of the agent to identify and procure the correct amount or type of insurance," *Nash v. Ohio Nat'l Life Ins. Co.*, 597 S.E.2d 512, 517 (Ga.App. 2004), a factual situation not present here. If there is no such relationship, the insurer obviously cannot be vicariously liable for the agent's breach of it. Maine law is silent on this point, but in any event the plaintiff has not presented sufficient facts, albeit disputed, that would allow a reasonable factfinder to conclude that Jamshab placed trust and confidence in Basu and that there was a great disparity of position and influence between them, *Morris v. Resolution Trust Corp.*, 622 A.2d 708, 712 (Me. 1993), that allowed Basu to convince Jamshab to name him as the beneficiary of the policy, which in turn led to her death. The only entries in the plaintiff's statement of material facts that might allow the drawing of such an inference are not supported by the citations made to the summary judgment record. Plaintiff's SMF ¶¶ 3-9 & Exh. 5 at 99, 263-65, 768-75. At most, the evidence in the summary judgment record indicates that the relationship between Basu and Jamshab was simply that between an individual seeking a life insurance policy and an insurance sales agent. If there is no "special relationship" for purposes of the existence of a fiduciary duty between a church and one of its members under Maine law, *Bryan R.*, 738 A.2d at 844-45, there is certainly nothing about the relationship between Basu and Jamshab, so far as may reasonably be discerned from the summary judgment record, that would allow one to infer that such a special relationship existed in this case.

Even if there were a fiduciary relationship between the insurance agent selling the policy and the purchaser of the policy, *see Morris v. Resolution Trust Corp.*, 622 A.2d 708, 711-12 (Me. 1993), some case law suggests that an insurer cannot be held liable for a breach of that duty unless it actively and knowingly participated in the breach. *Kral, Inc. v. Southwestern Life Ins. Co.*, 999 F.2d 101, 104 (5th

Cir. 1993) (construing fiduciary duty under Employee Retirement Income Security Act). *See also American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 665 (5th Cir. 1988) (fact that insurer knew that agent was acting in manner that could result in injury to plaintiff insufficient to impose respondeat superior liability for agent's breach of fiduciary duty; this did not constitute active and knowing participation in the breach). However, the Maine Superior Court has held that a claim for vicarious liability for breach of fiduciary duty may be pursued in Maine. *Angelica v. Drummond, Woodsum & MacMahon*, 2003 WL 22250354 (Me. Super. Sept. 9, 2003), at *3- *4. This court need not reach this issue due to the lack of evidence in the summary judgment record as cited by the plaintiff to support the claim of breach of fiduciary duty by Basu.

The defendant is entitled to summary judgment on Count II(E).

E. Intentional Infliction of Emotional Distress (Count IV)

The defendant contends that its issuance of the policy naming Basu as primary beneficiary did not meet the legal standard for intentional infliction of emotional distress under Maine law and that it cannot be held liable for any emotional distress inflicted by Basu in the course of killing Jamshab. Motion at 16-17. The plaintiff responds that the defendant's issuance of the policy as written did "exceed[] all possible bounds of decency' because it provided a motive for one of its own agents to murder one of its insureds." Opposition at 17. Under Maine law, in order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must prove that

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it.

Colford v. Chubb Life Ins. Co. of Am., 687 A.2d 609, 616 (Me. 1996) (citation and internal quotation marks omitted). The court may determine whether the defendant’s alleged conduct may reasonably be regarded as sufficiently extreme and outrageous under this standard. *Id.* The parties address their submissions only to this element of the legal test. The issuance of a life insurance policy naming the selling agent as the beneficiary, something that was allowed by Maine law, even if such issuance was in violation of the insurer’s internal policy, cannot, as a matter of law, be considered to be so extreme and outrageous as to exceed all possible bounds of decency, nor must it be regarded as atrocious and utterly intolerable in a civilized community. While Basu may well have killed Jamshab as a result of being named as the beneficiary on the policy he sold to her, that result was not certain or substantially certain upon issuance of the policy. Under these circumstances, the defendant is entitled to summary judgment on Count IV.

E. Negligent Infliction of Emotional Distress (Count V)

Under Maine law, a plaintiff asserting a claim of negligent infliction of emotional distress must show that

- (1) the defendant owed a duty to the plaintiff;
- (2) the defendant breached that duty;
- (3) the plaintiff was harmed; and
- (4) the breach caused the plaintiff’s harm.

Curtis v. Porter, 784 A.2d 18, 25 (Me. 2001). Because “there is no . . . general duty to avoid negligently causing emotional harm to others,” plaintiffs “face a significant hurdle in establishing the requisite duty.” *Id.* Maine recognizes a duty to act reasonably to avoid emotional harm to others “in very limited circumstances: first, in claims commonly referred to as bystander liability actions; and second, in circumstances in which a special relationship exists between the actor and the person emotionally harmed.” *Id.* A plaintiff may also recover for the emotional harm caused by a separate tort. *Id.* at 26. If such recovery is sought in connection with a separate tort, no separate claim need be asserted. *Id.*

The defendant contends that the plaintiff may not recover on this count because he has asserted other tort claims, there is “no bystander theory” in this case and there was no special relationship between Jamshab and the defendant. Motion at 17. The plaintiff in response relies only on a special-relationship theory. Opposition at 17-18. He asserts that there was such a relationship because Basu, “an agent of Nationwide, used his position as an insurance agent to convince Azita to purchase a policy in which he would be the primary beneficiary” and the defendant “accepted this policy, despite the fact that the beneficiary designation was contrary to both industry standards and Nationwide’s own guidelines.” *Id.* at 17-18. As I have previously noted, the plaintiff has not submitted facts supported by cited entries in the summary judgment record that would allow a reasonable factfinder to conclude that Basu “convinced” Jamshab to purchase a policy or to name him as the beneficiary on that policy, whether or not the defendant could be vicariously liable for such actions under Maine law. I have also concluded that there is no special relationship between an insurer and its insured merely due to the issuance of a policy. As I have already stated, there is no suggestion in the evidence submitted in connection with the motion for summary judgment that suggests that Jamshab was trusting the defendant to protect her from being killed or subjected to emotional harm when she purchased the policy at issue.

The defendant is entitled to summary judgment on Count V.

F. Insurer Claims (Counts VI and VII)

Count VI of the amended complaint alleges a violation of an implied covenant of good faith and fair dealing. Complaint ¶¶ 40-43. Count VII alleges a violation of 24-A M.R.S.A. § 2436-A(1)(E). *Id.* ¶¶ 44-47. The defendant contends that these claims are “mooted by subsequent events” or fail to state claims under Maine law. Motion at 18-19. The defendant essentially argues that it could not pay the proceeds of the policy to anyone until a legal determination had been made that Basu murdered Jamshab, that it was

reasonable for the defendant to seek approval from the probate court before paying out the proceeds, that it filed its request with the probate court within a reasonable period of time after receiving waivers from Basu and Khojaspehzed and that it paid the proceeds to Jamshab's estate within a reasonable time after receiving the approval of the probate court. *Id.* The plaintiff responds that the defendant did not respond in a timely or reasonable manner to repeated requests from his counsel for payment of the proceeds and that the probate court action was unnecessary. Opposition at 18-20.

Under Maine law, an insurer owes an implied duty of good faith and fair dealing to its insured. *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 648 (Me. 1993). Whether this duty was breached is ordinarily a question for the jury. *Id.* Resolution of this question depends on whether the defendant establishes a reasonable basis for its actions. *Tait v. Royal Ins. Co.*, 913 F. Supp. 621, 625 (D. Me. 1996).

A named beneficiary of a life insurance policy who “feloniously and intentionally kills the . . . person upon whose life the policy is issued is not entitled to any benefit under the . . . policy.” 18-A M.R.S.A. § 2-803(c). Obviously, an insurer cannot know whether the named beneficiary who is charged with murdering the person whose life was insured falls within this statutory provision until the charge is resolved. Assuming *arguendo* that any delay by the defendant in paying the proceeds of the policy to Jamshab's estate while waiting for resolution of criminal proceedings against Basu was reasonable, that reason for delay became unavailable as soon as disclaimers from both named beneficiaries were tendered to the defendant by correspondence dated April 15, 2004. Defendant's SMF ¶ 46; Plaintiff's Responsive SMF ¶ 46.⁶ Payment was not tendered until August 13, 2004. *Id.* ¶ 58. The defendant attempts to characterize

⁶ Counsel for the plaintiff had submitted a draft qualified disclaimer to the defendant on January 15, 2004. Plaintiff's SMF (*continued on next page*)

this additional four-month delay as reasonable, including its resort to the probate court, because “it was not apparent to Nationwide that [Khojaspehzed] had been represented by counsel when the waiver was executed.”⁷ Opposition at 18. The defendant does not explain how this fact justified its resort to probate court rather than some other means of assuring itself that Khojaspehzed would not have a claim on the proceeds in the future, or indeed why the fact that he did not consult a lawyer before signing the waiver would render it invalid. The defendant is not entitled to summary judgment on Count VI.

The Maine statute invoked by Count VII provides, in relevant part:

A person injured by any of the following actions taken by that person’s own insurer may bring a civil action and recover damages, together with costs and disbursements, reasonable attorney’s fees and interest on damages at the rate of 1½% per month;

* * *

E. Without just cause, failing to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

24-A M.R.S.A. § 2436-A(1)(E). “[A]n insurer acts without just cause if it refuses to settle claims without a reasonable basis to contest liability, the amount of any damages or the extent of any injuries claimed.” 24-A M.R.S.A. § 2436-A(2). The defendant offers no “just cause” for its delay after receiving the signed disclaimers beyond that discussed above. Motion at 19. In his memorandum, the plaintiff also asserts that the defendant violated 24-A M.R.S.A. § 2436-A(1)(B), which provides the same remedies for an insurer’s failure “to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice . . . of a claim by an insured arising under a policy.”

¶ 19; Defendant’s Responsive SMF ¶ 19.

⁷ This assertion is somewhat curious given the defendant’s admission that Khojaspehzed retained the same counsel as did the plaintiff “[s]hortly after Azita Jamshab’s murder.” Plaintiff’s SMF ¶ 10; Defendant’s Responsive SMF ¶ 10. On June 21, 2002 that counsel wrote to the defendant requesting payment of the policy proceeds to Khojaspehzed. *Id.* ¶ 11 & Affidavit of Martha C. Gaythwaite (Exh. 6 to Docket No. 29) ¶ 3. A lawyer from the same law firm sent the Khojaspehzed disclaimer to the defendant. Defendant’s SMF ¶ 46; Plaintiff’s Responsive SMF ¶ 46.

Opposition at 19-20. For the reasons already discussed, disputed questions of material fact remain with respect to at least the defendant's delay in paying the proceeds of the policy to Jamshab's estate after receiving the written disclaimers. The defendant is not entitled to summary judgment on Count VII.

G. Punitive Damages (Count VIII)

The plaintiff seeks punitive damages on Counts VI and VII. Complaint ¶¶ 48-50. The defendant contends that because Count VI "involves a contractual breach" and Count VII seeks a statutory remedy, punitive damages are unavailable. Motion at 19. The plaintiff responds that punitive damages are available because the defendant's "deliberate delay of paying the proceeds to the [e]state" demonstrates implied malice. Opposition at 19. Under Maine law, punitive damages may not be awarded for breach of contract. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). The implied duty of good faith and fair dealing is found in the insurance contract and the remedies for its breach are limited to traditional remedies for breach of contract. *Greenvall v. Maine Mut. Fire Ins. Co.*, 715 A.2d 949, 955 (Me. 1998). Accordingly, the plaintiff may not recover punitive damages on Count VI.

The defendant cites no authority in support of its necessarily implied argument that punitive damages are unavailable when a statutory remedy is provided. I am unaware of any such authority in Maine law. In any event, the evidence submitted by the plaintiff in this case would not allow a reasonable juror to conclude that the defendant acted with express or implied malice — ill will toward Jamshab or deliberate conduct so outrageous that malice may be implied, *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) — in delaying the payment of the proceeds of the policy. The defendant is entitled to summary judgment on Count VIII.

H. Conversion (Count IX)

The parties are remarkably cavalier in their treatment of Count IX. The defendant merely states: “Clearly, the count for conversion must be dismissed.” Motion at 19. This assertion follows the statement that the proceeds of the policy were tendered on August 13, 2004. *Id.* The plaintiff responds in even more conclusory fashion that “[t]here is a genuine issue of material fact with respect to whether Nationwide’s actions . . . amount to conversion.” Opposition at 20. In Maine,

[t]he necessary elements to make out a claim for conversion are: (1) a showing that the person claiming that his property was converted has a property interest in the property; (2) that he had the right to possession at the time of the alleged conversion; and (3) that the party with the right to possession made a demand for its return that was denied by the holder.

Withers v. Hackett, 714 A.2d 798, 800 (Me. 1998). Here, the proceeds of the insurance policy were never the “property” of Jamshab’s estate before they came into the possession of the defendant. Nor would they be considered the “property” of the estate unless and until both named beneficiaries were found to be barred by law from taking possession of the proceeds or waived any claim to the proceeds. While the proceeds are no longer in the possession of the defendant, Defendant’s SMF ¶58; Plaintiff’s Responsive SMF ¶ 58, return of the allegedly converted property is not a defense to a claim of conversion under Maine law. *Howe v. Banks*, 566 A.2d 747, 748 (Me. 1989). However, the evidence in the summary judgment record even for the period after the defendant received the disclaimers signed by Basu and Khojaspehzed is inconsistent with any intent on the defendant’s part to exercise dominion and control over the policy proceeds. *See Northeast Bank of Lewiston & Auburn v. Murphy*, 512 A.2d 344, 347 (Me. 1986). For this reason, the defendant is entitled to summary judgment on Count IX.

I. Survival Action (Count III)

The parties agree that the plaintiff may proceed on the remaining count of the amended complaint, which invokes 18-A M.R.S.A. § 3-817, Complaint ¶¶ 28-30, only to the extent that other claims remain

valid. Motion at 16; Opposition at 16. The defendant contends that such a survival action is contingent upon tort claims only, Motion at 16, but no such limitation is apparent in the language of the statute at issue, which provides, in relevant part: “No personal action or cause of action shall be lost by the death of either party, but the same shall survive for . . . the personal representative of the deceased” 18-A M.R.S.A. § 3-817(a). With respect to Counts VI and VII, which will remain for trial if the court adopts my recommendation, Count III appears to be simply a means of stating the plaintiff’s entitlement to bring those claims. Summary judgment for the defendant on Count III does not appear to be appropriate so long as any other count in the amended complaint remains active.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion for summary judgment be **GRANTED** as to Counts I-II, IV-V, and VIII-IX of the amended complaint and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 29th day of December, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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