

STATE OF MICHIGAN
COURT OF APPEALS

ZAREMBA EQUIPMENT, INC.,

Plaintiff-Appellee,

v

HARCO NATIONAL INSURANCE COMPANY
and PATRICK MUSALL,

Defendants-Appellants.

FOR PUBLICATION

July 31, 2008

No. 274745

Otsego Circuit Court

LC No. 04-010930-CK

Advance Sheets Version

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

O’CONNELL, P.J. (*concurring in part and dissenting in part*).

I concur with the majority opinion in all respects except for its determination that an expert witness was not required for the negligence claim. I do not disagree with the conclusion that whether expert testimony is required must be determined on a case-by-case basis; I disagree with the conclusion that it was not necessary in this case.

To the extent that the question before a jury is whether the insurance agent did not provide the type of coverage requested, I agree that no expert testimony is necessary. But, to the extent that the issues go beyond such simple questions, expert testimony is required. See *Humiston Grain Co v Rowley Interstate Transportation Co, Inc*, 512 NW2d 573, 576 (Iowa, 1994) (“[W]here an insurance agent is alleged to have breached a professional duty, if the error or omission extends beyond the agent’s mere failure to procure coverage requested and paid for by the client, proof of the standard of care applicable to the circumstances must be established by expert testimony.”); *Atwater Creamery Co v Western Nat’l Mut Ins Co*, 366 NW2d 271, 279 (Minn, 1985) (holding that expert testimony was required to establish standard of care because “the issue center[ed] around the professional judgment of the agent in the absence of requests for action”); *Todd v Malafronte*, 3 Conn App 16, 19; 484 A2d 463 (1984) (“Insofar as the sale of insurance requires specialized knowledge, we agree that this case differs from the ordinary negligence action since matters within that specialized body of knowledge are crucial to the determination of the issues raised.”).

In the present case, there were significant questions that the jury needed to answer by the that fell far outside a layperson’s general knowledge. Was it reasonable or standard practice for an agent to use the Marshall & Swift calculation? Do/should agents generally voluntarily elect to perform the calculation; should they? Do/should agents generally explain to the insured that

such a calculation is not an appraisal value; should they? Does/should an agent generally recommend that an insured seek an independent appraisal? Given that terms in insurance contracts often have meanings separate and apart from their common meaning, do agents have a responsibility to explain what various terms, such as “replacement value,” mean? To what extent should agents explain the terms and limitations of a policy to an insured? How often? These are matters of specialized knowledge that require an expert to help the jury with its fact-finding. Like the plaintiff in *Nofar v Eikenberry*, unpublished memorandum opinion of the Court of Appeals, issued October 30, 1998 (Docket No. 197231), p 2, plaintiff “failed to present any evidence as to the standard of care applicable to insurance professionals.” Reversal is required.

Because we are remanding this case to the trial court for a new trial on the negligence claim, albeit for a different reason, I concur in the result.¹

/s/ Peter D. O’Connell

¹ I concur with the majority opinion that the settlement letters are not admissible on retrial.