



Missouri Court of Appeals  
Southern District

Division One

GAY TAYLOR, Individually and as Personal )  
Representative of the Estate of )  
LARRY GENE TAYLOR, Deceased, )  
 )  
Appellant, )  
 )  
vs. ) No. SD29102  
 ) Opinion Filed  
FIRE INSURANCE EXCHANGE, ) 02-09-09  
NAPOLEON ROYBAL, and )  
APEX ENVIRONMENTAL CONSULTANTS, INC., )  
 )  
Respondents. )

APPEAL FROM THE CIRCUIT COURT OF BARRY COUNTY

Honorable Alan Blankenship, Special Judge

*Before Barney and Bates, JJ., and Scott, P.J.*

**AFFIRMED**

**PER CURIAM.** Gay and Larry Taylor sued Defendants Fire Insurance Exchange (FIE), Roybal, and Apex in tort after FIE paid its policy limit for tornado damage to the

Taylor's home. After six years of legal maneuvering irrelevant to this appeal, Plaintiff's third amended petition was dismissed for failure to state a claim.<sup>1</sup> Plaintiff appeals.

A motion to dismiss for failure to state a claim is solely a test of the petition's adequacy. The court assumes the truth of all facts alleged, without attempting to determine if they are credible or persuasive, and reviews the petition in an almost academic manner to decide if the pleaded facts invoke a recognized or potential cause of action. See *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo. banc 2008); *Pennington v. Dobbs*, 235 S.W.3d 77, 79 (Mo.App. 2007).

### **Allegations and Claims**

According to the petition, a tornado tore the roof off the Taylors' home on April 15, 2001, causing serious water intrusion and forcing the Taylors to move out. Roybal, FIE's adjuster, made timely contact with the Taylors and their contractor, Haney Construction. On April 21, Larry Taylor's physician notified FIE that Mr. Taylor, a liver transplant recipient, was immunocompromised and should avoid exposure to molds or mildews. Two weeks later, after the Taylors voiced concern about possible mold growth in the home, FIE hired Apex to conduct testing.

Apex discovered the "presence" of several potentially harmful molds, and notified Roybal "that persons who were immunocompromised should not be allowed in the home." Later, Apex's May 31 report identified the molds found; noted they could produce toxins possibly harmful if inhaled; and specifically recommended "that access to

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<sup>1</sup> Larry Taylor died in the interim, and as his estate's personal representative, Gay Taylor was substituted as plaintiff. There is no alleged link between Plaintiff's claims and Mr. Taylor's death.

the residence be restricted for those who are hypersensitive/allergic to mold spores, immunocompromised, or under the age of seven.” No one notified the Taylors, although FIE and Roybal knew Gay Taylor was frequenting the home to gather belongings and meet with contractors, sometimes at Roybal’s request.

Roybal arranged a June 12 meeting at the home to evaluate the damage and some repair estimates. Roybal never mentioned the Apex findings to anyone at the meeting, which lasted several hours and was attended by the Taylors, their lawyer, and persons from Haney Construction. Roybal indicated the home need not be demolished, but was repairable for less than policy limits, and told the Taylors to get the roof patched and carpet out as soon as possible.

Roybal and FIE, according to the petition, repeatedly sought to mislead the Taylors and minimize their claim, both at and prior to the June 12 meeting. Indeed, Plaintiff claims this is why Roybal did not disclose Apex’s warnings and report; presumably since a total loss might result if Larry Taylor no longer could live in the home.

On June 13, Larry Taylor returned with Haney Construction to have the roof patched and the carpet removed. Remediators hired by FIE arrived, dressed in protective gear, and said persons could not be in the house because “what was in there could kill you.” Larry Taylor contacted his lawyer, who requested the Apex report from Roybal and received it the next day. The Taylors got their own environmental report on July 9, which showed much worse contamination than the Apex report. On August 2, after

receiving the Taylors' report, FIE agreed to demolish the home and paid the \$98,000 insurance policy limit.

Building on these general allegations, and alleging the Taylors' personal injuries from mold exposure, Plaintiff charged Defendants with fraudulent misrepresentation, negligence, and civil conspiracy during the claim negotiation process. As previously noted, the trial court eventually dismissed all claims.

Our review is de novo. *Jackson v. Williams, Robinson, White & Rigler, P.C.*, 230 S.W.3d 345, 348 (Mo.App. 2007). We will affirm the judgment if it can be sustained on any ground supported by the motion to dismiss. *Bohac v. Walsh*, 223 S.W.3d 858, 861 (Mo.App. 2007).

### **Analysis**

The negligence and fraud claims were properly dismissed. As to Counts I and II, the wrongful delay or refusal to pay a first-party insurance claim is simply a breach of contract. Recovery may be enhanced under the vexatious refusal statute, if applicable, but no tort claim supplants or supplements the basic contract claim and remedy. *See Overcast v. Billings Mutual Ins. Co.*, 11 S.W.3d 62, 67, 68 (Mo. banc 2000).<sup>2</sup> As to Count III, a defendant such as Apex who contracts with another generally owes no duty to contractual non-parties, nor can a non-party sue for negligent contract performance. *Hardcore Concrete, LLC v. Fortner Insurance Services, Inc.*, 220 S.W.3d 350, 358

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<sup>2</sup> Like the trial court, we find inapplicable *Overcast's* limited exception (arguably dicta) for tortious conduct "quite distinct" from a breach of contract. *See* 11 S.W.3d at 68. Repeatedly citing alleged duties "under the policy of insurance," Plaintiff's petition complains of conduct during and as part of claim adjustment and negotiation, purportedly to low-ball the policy claim, with no other reason alleged.

(Mo.App. 2007). See also *Akpan v. Farmers Ins. Exchange, Inc.*, 961 So.2d 865, 874 (Ala.App. 2007)(citing and adopting majority view that independent adjuster or investigator, hired by insurer to investigate or adjust insured's claim, owes no duty to insured); *Dagley v. Haag Engineering Co.*, 18 S.W.3d 787, 790-91 (Tex.App. 2000)(collecting Texas cases for proposition that insured cannot sue, for negligence, contractor hired by insurer to perform adjusting or testing services for insurer).

The civil conspiracy claim also was properly dismissed, since it is not actionable in its own right. Failure of Plaintiff's underlying claims means civil conspiracy fails as a matter of law. *Dueker v. Gill*, 175 S.W.3d 662, 673 (Mo.App. 2005).

Moreover, all of Plaintiff's claims hinge on Defendants' alleged duty to disclose Apex's warnings,<sup>3</sup> which as noted above and relevant hereto, were for immunocompromised persons to be kept out of the home. Yet even if this duty existed, the petition describes home entry only by Gay Taylor, who was not alleged to be "hypersensitive/allergic to mold spores [or] immunocompromised." Plaintiff does not allege that Larry Taylor entered the home, and from the arguments on appeal we are satisfied this was not by oversight. The absence of appropriate allegations<sup>4</sup> that Larry

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<sup>3</sup> Fraudulent misrepresentation requires, *inter alia*, a false representation. *Bohac*, 223 S.W.3d at 862. Silence can constitute misrepresentation, *if* there is a duty to speak. *Id.* at 864. "The affirmative duty to disclose and the failure to do so serve as a substitute for the false representation element required in a fraud action." *Id.*

<sup>4</sup> Many of Plaintiff's allegations are conclusory. Our civil procedure rules "demand more than mere conclusions that the pleader alleges without supporting facts." *Pulitzer Pub. v. Transit Cas. Co.*, 43 S.W.3d 293, 302 (Mo. banc 2001), *quoted in Pikey v. Bryant*, 203 S.W.3d 817, 824 (Mo.App. 2006) and *Solberg v. Graven*, 174 S.W.3d 695, 699 (Mo.App. 2005). Courts are to disregard such conclusions, as we have done, in

Taylor did what Apex warned against, or that Apex warned against what Gay Taylor did, is a disconnect fatal to recovery.

### Conclusion

Dismissal was proper. Although we need not here evaluate Defendants' other arguments for affirmance, much of our reasoning in *Haney v. Fire Insurance Exchange, et al.*, No. SD29098, also decided today, applies to this case as well. The judgment is affirmed.

PATRICK M. MARTUCCI, ATTORNEY FOR APPELLANT  
WILLIAM J. LASLEY, ATTORNEY FOR RESPONDENT FIRE INSURANCE  
EXCHANGE  
JEFFREY W. LANEY, ATTORNEY FOR RESPONDENT NAPOLEON ROYBAL  
JAMES C. MORROW AND PEGGY A. WILSON, ATTORNEYS FOR RESPONDENT  
APEX ENVIRONMENTAL CONSULTANTS, INC.

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determining if a petition states a claim. *Pikey*, 203 S.W.3d at 824; *Solberg*, 174 S.W.3d at 699.