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COURT OF APPEALS

STATE OF NEW YORK

VOSS,

Appellant,

-against-

No. 11

THE NETHERLANDS INSURANCE COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
January 09, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 11, Voss v. The Netherlands Insurance
3 Company.

4 Counsel, do you want any rebuttal time?

5 MR. OUDEMOOL: Yes. May I please reserve
6 two minutes for rebuttal?

7 CHIEF JUDGE LIPPMAN: Two minutes? Sure,
8 go ahead. You're on.

9 MR. OUDEMOOL: May it please the court, I
10 represent the plaintiff-appellant, in this lawsuit
11 against the defendant, an insurance broker.

12 CHIEF JUDGE LIPPMAN: What's the nature of
13 the relationship between the insurance broker and
14 this business entity or the person who ran the
15 business entity? And could you categorize it as
16 special?

17 MR. OUDEMOOL: Yes, sir. We believe - - -

18 CHIEF JUDGE LIPPMAN: Why so?

19 MR. OUDEMOOL: The record demonstrates the
20 interaction between Ms. Voss, who is the principal-
21 plaintiff, and the insurance broker, in which they
22 discussed at the outset what she was interested in
23 doing by way of insurance and - - -

24 JUDGE PIGOTT: When does that never - - -

25 MR. OUDEMOOL: - - - he may - - -

1 JUDGE PIGOTT: - - - when does that never
2 occur in terms of an insurance agent and a - - - and
3 a person who needs insurance? What's - - - what's
4 different from the way she went about getting this
5 insurance and every other person who goes and tries
6 to get homeowners' insurance for a business - - -

7 MR. OUDEMOOL: Well - - -

8 JUDGE PIGOTT: - - - the property?

9 MR. OUDEMOOL: - - - what's different is
10 that - - - the way she went about it's no different
11 than she called a person up said I'm interested in
12 insuring; let's talk about it. And it's a result of
13 their interaction, Your Honor, and it's what was said
14 by each of them, that the ration - - - relationship
15 developed.

16 In other words she had - - -

17 JUDGE READ: Is that a question - - -

18 MR. OUDEMOOL: - - - certain expectations.

19 JUDGE READ: - - - is that a question of
20 fact?

21 MR. OUDEMOOL: - - - as to - - -

22 JUDGE READ: Is that a question of fact?

23 MR. OUDEMOOL: That is a question of fact,
24 without question. And - - - and that's the whole - - -

25 -

1 JUDGE GRAFFEO: But wouldn't that mean that
2 all - - - whenever you have a situation where there's
3 commercial property and you're looking for business
4 interruption insurance, there's going to be some
5 discussion between the potential insured and the
6 broker about the nature of the business and the - - -
7 and the term and that type of thing. Does that mean
8 those situations are always a special relationship?

9 MR. OUDEMOOL: No, absolutely not. This -
10 - - this is a special - - -

11 JUDGE GRAFFEO: So what - - - so what needs
12 to be there? I think that's what everyone's asking.

13 MR. OUDEMOOL: Okay. It's the discussion.
14 It's the representations made. In other words, in
15 this case, the - - - the record demonstrates the fact
16 that the broker made a representation as to what he
17 could do.

18 JUDGE SMITH: This was not - - -

19 MR. OUDEMOOL: He said - - -

20 JUDGE SMITH: This was back in 2004, right?
21 Three years before the first - - - the first loss?

22 MR. OUDEMOOL: Yes.

23 CHIEF JUDGE LIPPMAN: What's the - - -
24 what's the legal test that the facts in this
25 situation fit into? What do you have to show that

1 makes it a special relationship in the legal context?

2 MR. OUDEMOOL: Okay. What you have to show
3 is the difference between the regular situation, the
4 common law situation which is that you go - - - you
5 say to the broker, I need insurance, please get me
6 this insurance and get me a good price on it, but
7 this is what I want you to get for me - - -

8 CHIEF JUDGE LIPPMAN: Did it - - - did it
9 matter in this case that the broker says this is
10 sufficient, unless the building really was to just
11 totally fall down? Does it matter - - - does the
12 broker give you an assurance that you have the right
13 amount of ins - - - of an assurance that you have the
14 right amount of insurance? Is that what you're
15 arguing, that because he said, gee, this is the - - -
16 this is the right amount, and then later when they
17 discussed it, she sent him information, she
18 discussed, gee, I'm expanding my business; I'll
19 follow this as you expand the business.

20 Is that the contours of what's shaping, in
21 your mind, the special relationship?

22 MR. OUDEMOOL: Yes, it is. In other words,
23 she - - - she is saying - - - she's relying on him to
24 make - - -

25 CHIEF JUDGE LIPPMAN: But how does it - - -

1 MR. OUDEMOOL: - - - the judgments.

2 CHIEF JUDGE LIPPMAN: What I guess what I'm
3 getting at, I see the - - - we see the things in the
4 record as to why you allege this. What's the
5 dividing line between where it becomes a special - -
6 - everyone relies on their insurance broker to some
7 degree to steer them in the right direction. And I
8 think we all kind of mentioned that to you.

9 We understand the insurance broker gives
10 guidance. What's the line? How do we know - - -

11 MR. OUDEMOOL: The line is - - -

12 CHIEF JUDGE LIPPMAN: - - - that it goes
13 into this special relationship?

14 MR. OUDEMOOL: The line is drawn based upon
15 what the insured says to the broker at the outset.
16 Does the broker say - - - does the insured say to the
17 broker at the outset, get me this, this, and this; or
18 does the insured say to the broker, I'm going into
19 such a business; I'm going to get involved in this
20 type of activity - - -

21 CHIEF JUDGE LIPPMAN: So if the - - - if
22 the insured says to the broker, I'm depending on you
23 to your expertise to - - - to make sure I have the
24 right insurance, and here are the circumstances,
25 that's basically what makes this different?

1 MR. OUDEMOOL: That is part of the
2 conversation.

3 JUDGE SMITH: Well, but if it - - - but
4 does that - - - I mean, if the conversation at the
5 inception is basically, gee, what do you think I
6 should get? Oh, here it is. I think - - - I think
7 this is the right amount; this is the right policy.
8 Does that create a special relationship for all time?
9 I mean, is it - - - three - - - three years later, if
10 - - - I mean, he said - - - he said in 2004, 75,000's
11 enough for now, we'll look at it later. Is it three
12 years later, if they don't look at it, can - - - can
13 she sue them?

14 MR. OUDEMOOL: Depends, Your Honor, at the
15 outset, as to what the relationship was that was
16 established. In this case, the allegation is, is
17 that the broker said, I will calculate for you the
18 type of coverages and amounts of coverage that you
19 need, and I will continue to review it as time goes
20 on and make recommendations to you - - -

21 CHIEF JUDGE LIPPMAN: But is that - - -
22 let's focus on that.

23 MR. OUDEMOOL: Yes, Your Honor.

24 CHIEF JUDGE LIPPMAN: Is that very
25 important, that he says I'm going to follow this?

1 MR. OUDEMOOL: Oh, I think --

2 CHIEF JUDGE LIPPMAN: Is that, again, one
3 of your keystones in terms - - -

4 MR. OUDEMOOL: I - - - well, that is what
5 de - - - defines the relationship.

6 JUDGE PIGOTT: Well, is that unique? I
7 mean, if you get a calendar every year from your
8 insurance agent, is he setting up a special
9 relationship now - - -

10 MR. OUDEMOOL: No.

11 JUDGE PIGOTT: - - - that - - -

12 MR. OUDEMOOL: No.

13 JUDGE PIGOTT: So when - - - when he said
14 75,000 for business interruption loss, and she said
15 fine, and then she's moving her businesses to another
16 - - -

17 MR. OUDEMOOL: Right.

18 JUDGE PIGOTT: - - - she's the only one
19 that knows whether 75,000 dollars is - - - is
20 sufficient for business interruption.

21 MR. OUDEMOOL: That's true. She has - - -
22 in other words, Judge, she has an obligation as well
23 to - - - to keep her broker advised of what happens.
24 In other words - - -

25 JUDGE SMITH: But didn't - - - didn't - - -

1 MR. OUDEMOOL: - - - when she started
2 relying upon him - - -

3 JUDGE SMITH: - - - she know - - -

4 MR. OUDEMOOL: - - - and he says I'm going
5 to take care of you; I'm going to follow you as time
6 goes on, she has an obligation - - -

7 JUDGE SMITH: But didn't she know - - -

8 MR. OUDEMOOL: - - - to participate - - -

9 JUDGE SMITH: - - - didn't she know that he
10 wasn't, in fact, doing that? In fact, she was
11 complaining, saying, hey, what happened to the
12 wonderful attention I used to get. Now all I'm
13 getting faxed things with the wrong numbers on it.

14 MR. OUDEMOOL: Well, it may well be that at
15 some point he decided he wasn't going to render all
16 the service that he first represented - - -

17 JUDGE SMITH: And didn't - - -

18 MR. OUDEMOOL: - - - he was going to do.

19 JUDGE SMITH: - - - and if she's aware of
20 that, is it still a special relationship? Can she
21 still say - - - still sue him when she doesn't get
22 the - - - the right coverage?

23 MR. OUDEMOOL: Judge, that's the - - -
24 that's the question of fact. In other words, I - - -
25 my - - -

1 JUDGE SMITH: Well, isn't that - - - isn't
2 that a question of law? Let's assume that there was
3 a special relationship in 2004, and he said, oh,
4 don't worry, I'm going to take care of you forever;
5 I'm going to hold your hand every time we renew; and
6 that he abandons her; and she knows he abandoned her,
7 and she's annoyed, and she knows she's on her own.
8 Is she - - - can - - - how can she rely on his
9 expertise at that point?

10 MR. OUDEMOOL: And therein lies what I say
11 is the right way for the finder of fact to view this
12 case. She has obligations on a comparative
13 negligence basis, as this court recognized in your
14 American Building Supply case.

15 JUDGE ABDUS-SALAAM: Counsel, whose
16 obligation is it to prove the special or disprove the
17 special relationship on a summary judgment motion?
18 It's not - - - you didn't make the summary judgment
19 motion, did you?

20 MR. OUDEMOOL: I did not.

21 JUDGE ABDUS-SALAAM: It was the broker? So
22 it was - - -

23 MR. OUDEMOOL: That's correct.

24 JUDGE ABDUS-SALAAM: - - - their burden to
25 show that there was no special relationship?

1 MR. OUDEMOOL: That is correct.

2 JUDGE ABDUS-SALAAM: Correct?

3 MR. OUDEMOOL: That is correct. That is
4 correct. And - - - and as the Appellate Division
5 saw, and we believe that there was sufficient
6 allegations and proof in the record to make - - -

7 JUDGE SMITH: Let - - - let me - - - let me
8 ask, if I could - - -

9 MR. OUDEMOOL: - - - question of fact.

10 JUDGE SMITH: - - - even though you're out
11 of time. The - - - I'm a little confused about the
12 facts. Are you complaining only about the inadequate
13 level of coverage?

14 MR. OUDEMOOL: No, sir.

15 JUDGE SMITH: You are complaining about
16 that?

17 MR. OUDEMOOL: We - - - we are complaining
18 about - - -

19 JUDGE SMITH: But only as to the third
20 loss, as I understand it. The first two losses you
21 got 75,000 each?

22 MR. OUDEMOOL: There's also a complaint
23 here of failure to provide - - -

24 JUDGE SMITH: Okay, but - - -

25 MR. OUDEMOOL: - - - coverage - - -

1 JUDGE SMITH: - - - you're not - - - you're
2 not - - - specifically, you're not complaining that
3 the coverage as to the first two losses was
4 inadequate in amount?

5 MR. OUDEMOOL: Oh, yes.

6 JUDGE SMITH: You are?

7 MR. OUDEMOOL: Oh, yes.

8 JUDGE SMITH: You hit the 75,000 cap on
9 each loss and wanted more?

10 MR. OUDEMOOL: Oh, yes, absolutely. They -
11 - -

12 JUDGE SMITH: I didn't see that in the
13 record.

14 MR. OUDEMOOL: - - - the proof in the loss
15 - - - in conjunction with the second loss, was
16 400,000 dollars, sir.

17 JUDGE SMITH: Okay, okay, okay.

18 JUDGE GRAFFEO: I know - - - I know your
19 red light's on, but I have just one final question
20 for you.

21 MR. OUDEMOOL: Right.

22 JUDGE GRAFFEO: If we agree with you, will
23 we be discouraging this industry - - - the brokerage
24 industry - - - from providing recommendations - - -

25 MR. OUDEMOOL: No.

1 JUDGE GRAFFEO: - - - to commercial
2 clients?

3 MR. OUDEMOOL: No, no, not at all. What -
4 - - what you're going to say, if you agree with us,
5 is that it's necessary that when a broker makes a
6 representation as to what he can do in selling
7 himself to get the business, that he lives up to his
8 obligation to do what he says he is capable of doing
9 and will do.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.
11 Thanks, counselor. You'll have your rebuttal.

12 MR. OUDEMOOL: Thank you.

13 CHIEF JUDGE LIPPMAN: Counselor?

14 MR. WITZ: Thank you. Good morning. My
15 name is Tom Witz, and I represent the respondent,
16 obviously, C.H. Insurance.

17 CHIEF JUDGE LIPPMAN: Counselor, why isn't
18 there at least a question of fact as to whether
19 there's a special relationship here? It's - - - it
20 is more than, let's say, the average relationship
21 between a broker and an insured, or do you allege
22 that it's not more, it's just a very typical, no real
23 great investment, by the broker? But why aren't
24 there at least questions whether there is or is not a
25 special relationship?

1 MR. WITZ: I think because Ms. Voss who's
2 the principal of these - - - these companies, is in
3 the best position to know what risk she's willing to
4 assume. She sat down with her broker; they discussed
5 a business at the time in 2004, and decided that
6 75,000 dollars was enough coverage. She - - -

7 CHIEF JUDGE LIPPMAN: You don't - - - you
8 don't think that she was relying on his expertise
9 rather than her own - - -

10 MR. WITZ: Not completely, no. I think it
11 was - - -

12 CHIEF JUDGE LIPPMAN: Do you think she had
13 a good idea as to what it should be?

14 MR. WITZ: I do, yes. And - - -

15 JUDGE READ: So you - - - so you don't
16 think she's pleaded facts that at least if believed,
17 and on their face, would be sufficient to find a
18 special relationship?

19 MR. WITZ: I don't, In light of the fact
20 that she received a copy of that policy. She
21 testified that she read it; she understood it; she
22 knew what she had. And she testified at the end of
23 the day - - -

24 JUDGE ABDUS-SALAAM: Counsel, doesn't that
25 beg the question about the expertise? If - - - do

1 you know whether this was her first trip at the rodeo
2 on businesses and she didn't know anything about what
3 business interruption loss she would need, and she
4 went to this broker to try to get some advice about
5 that, and get the right amount?

6 MR. WITZ: Oh, absolutely not. She
7 testified at her deposition consistently and ad
8 nauseam about how sophisticated she was in business.
9 She had worked her way up - - -

10 JUDGE SMITH: Are you saying there was - -
11 - there was no special relationship, even in 2004?

12 MR. WITZ: Yes.

13 JUDGE SMITH: So that he - - - so that if -
14 - - but her testimony is, she asked him what's the
15 right amount, and he asked her a lot of questions and
16 took notes and came back and said 75,000. If - - -
17 and if he was wrong, then you say there's no cause of
18 action?

19 MR. WITZ: Correct.

20 JUDGE SMITH: But - - - yeah, but you also
21 argue in the alternative that - - - that the
22 relationship - - - that there's no proof that he was
23 wrong, and anyway, that building was never damaged;
24 there was never a claim. So who knows whether 75,000
25 was the right amount? He never told her 75,000 was

1 the right amount in 2007. Isn't that your stronger
2 argument?

3 MR. WITZ: Well, yes, I agree. And it goes
4 back - - - you know, there was - - - Mr. Oudemool
5 says that, you know, well we had 444,000 dollars in
6 losses after that second loss. Well, who else - - -
7 who else is going to know that that's a potential
8 decisive - - -

9 JUDGE ABDUS-SALAAM: Counsel - - -

10 CHIEF JUDGE LIPPMAN: Counsel, what's the
11 dividing line? When does it become a special
12 relationship? What would have to happen differently,
13 in this particular case, that would make it a special
14 relationship?

15 MR. WITZ: She would have to rely entirely
16 upon the advice - - -

17 CHIEF JUDGE LIPPMAN: She says I don't know
18 anything about - - -

19 MR. WITZ: Exactly.

20 CHIEF JUDGE LIPPMAN: - - - this.

21 MR. WITZ: I don't know anything about
22 this.

23 CHIEF JUDGE LIPPMAN: Listen, you do it.
24 I'm totally dependent on you. That would not be, you
25 know, a normal situation. You'd almost never have a

1 special relationship - - -

2 MR. WITZ: Right.

3 CHIEF JUDGE LIPPMAN: - - - if that were
4 the case.

5 MR. WITZ: Absolutely. And - - -

6 CHIEF JUDGE LIPPMAN: Is that your - - -
7 that's your contention - - -

8 MR. WITZ: It is.

9 CHIEF JUDGE LIPPMAN: - - - that you almost
10 never have a special relationship?

11 MR. WITZ: Almost never.

12 CHIEF JUDGE LIPPMAN: Between a broker and
13 the insured?

14 MR. WITZ: Unless - - - unless you're
15 paying - - -

16 JUDGE GRAFFEO: Well, it would - - - it
17 would be different - - -

18 MR. WITZ: - - - unless - - - I'm sorry.
19 Unless you're - - - may I? I'm sorry.

20 JUDGE GRAFFEO: Go ahead, finish.

21 MR. WITZ: I mean, if I'm paying you a fee
22 for your advice, then that's going to enter into the
23 realm of special relationship. I'm paying you
24 something extra for your advice.

25 CHIEF JUDGE LIPPMAN: Oh, so unless you pay

1 - - -

2 MR. WITZ: That didn't happen here.

3 CHIEF JUDGE LIPPMAN: - - - unless you pay
4 extra, there's no special relationship? Not
5 necessarily. That's one of the circumstances that
6 this court pointed out in Murphy v. Kuhn.

7 CHIEF JUDGE LIPPMAN: Okay.

8 JUDGE PIGOTT: We had - - - we had three.

9 JUDGE GRAFFEO: So wouldn't it be - - -

10 MR. WITZ: Correct.

11 JUDGE PIGOTT: I'm sorry. Go ahead, Judge.

12 CHIEF JUDGE LIPPMAN: Judge Graffeo, then
13 Judge Pigott. Go ahead.

14 JUDGE GRAFFEO: Excuse me. Wouldn't it be
15 different if the record disclosed that perhaps she
16 was given three or four different options? Like if
17 you want 75,000 in coverage, the premium's going to
18 be X; if you want 100,000, it's going to be Y; if you
19 want 150,000 - - - and she somehow made a selection
20 as to the level of coverage that she wanted. That
21 would be different.

22 MR. WITZ: Well, that would certainly be an
23 easier case, sure.

24 JUDGE GRAFFEO: But here it seems like he
25 made the recommendation and she relied on the

1 expertise.

2 MR. WITZ: But she could have asked - - -
3 she could have said no, based upon her knowledge of
4 her own businesses. She could have said - - -

5 JUDGE SMITH: This - - -

6 MR. WITZ: - - - 75,000 is not enough.

7 JUDGE RIVERA: So is - - -

8 JUDGE SMITH: - - - does every insured know
9 his own business?

10 MR. WITZ: I think so. Yes, they should.

11 JUDGE SMITH: So when can there ever be a
12 special relationship?

13 JUDGE PIGOTT: Your point is, it's going to
14 be rare.

15 MR. WITZ: It's going to be very rare.

16 JUDGE PIGOTT: But you said the one - - -
17 you were going through the three in Murphy: the
18 agent receives compensation for consultation, which
19 didn't occur here. But the second one is, there is
20 some interaction regarding a question of coverage,
21 with the insured relying on the expertise of the
22 agent.

23 MR. WITZ: Right.

24 JUDGE PIGOTT: Now, do we have proof that
25 that's not true in this case?

1 MR. WITZ: I think that we do. Because of
2 her sophistication in business and because she knew
3 when she received that policy and read it, what the
4 coverage was.

5 JUDGE READ: What if she had some kind of -
6 - -

7 JUDGE RIVERA: So it sounds like you're - -
8 -

9 JUDGE READ: - - - business records, some
10 kinds of records that showed, you know, how much - -
11 - how much profit was generated by these various
12 businesses, and she turned those over to the broker?

13 MR. WITZ: Well, yeah. But the - - - one
14 of the issues in this case - - -

15 JUDGE READ: Would that have - - - would
16 that have shown she was relying on his expertise, or
17 would that factor into the existence of a special
18 relationship?

19 MR. WITZ: I think that would be part of
20 it, and not completely.

21 CHIEF JUDGE LIPPMAN: If it shows - - - I
22 think, what Judge Read is saying, if it shows
23 independent analysis of her business records, and
24 then he comes out with seventy-five or thirty or
25 whatever it is, does that matter? It's an analysis.

1 He's not just doing a mechanical let me see what
2 coverage I can get - - -

3 JUDGE READ: In other words, is that what
4 you have to have to show a special relationship, in
5 addition to you said being hired as a consultant?

6 MR. WITZ: Yeah, partly, I think. And I
7 think it depends upon the - - - the extent of the
8 entire communications between the two - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but do we know,
10 but in light of all this conversation back and forth
11 with the bench, can we say definitively that there's
12 no special relationship here?

13 MR. WITZ: I think you can, because - - -

14 CHIEF JUDGE LIPPMAN: It borders on some of
15 these things we've been talking about, at the very
16 least, right?

17 MR. WITZ: Yeah, and I think you can say
18 there's no special relationship. And, you know, I'm
19 going to argue that it's irrelevant anyways in the
20 context of this case, because of the proximate cause
21 issue. I don't think we need to reach the decision
22 of whether or not - - -

23 CHIEF JUDGE LIPPMAN: You better - - -

24 JUDGE GRAFFEO: But why - - -

25 JUDGE RIVERA: But it sounds like you're

1 really arguing - - -

2 JUDGE GRAFFEO: - - - why shouldn't - - -

3 JUDGE RIVERA: - - - that someone who is
4 unsophisticated can make out this special
5 relationship, but someone who is a savvy business
6 owner, someone who's perhaps had many, many years of
7 a particular type of insurance coverage, perhaps a
8 history with a particular broker, it sounds to me
9 like you're arguing, that person never gets the
10 benefit of establishing a special relationship.

11 MR. WITZ: It depends, I think, on the
12 circumstances.

13 JUDGE PIGOTT: That's - - - that's the
14 third prong, I guess you'd call it, of Murphy, which
15 there's a cause of - - - a course of dealing over an
16 extended period of time which would put objectively
17 reasonable insurance agents on notice that their
18 advice was being sought and specifically relied on.
19 That's - - - that's what you would be talking about
20 if it's an ongoing relationship, which you have here.

21 MR. WITZ: Right.

22 JUDGE PIGOTT: From '4 to '7 - - - 2004 to
23 2007.

24 MR. WITZ: Right. And I think all this is
25 - - - I mean, whether a special relationship exists,

1 in most cases, it's going to be fact specific. I
2 agree with that.

3 JUDGE GRAFFEO: Why should it be rare? Why
4 should be - - - why should we adopt a rule that makes
5 it difficult to establish a special relationship?
6 What is it about the brokerage industry that you feel
7 necessitates that kind of protection?

8 MR. WITZ: Well, because they're a broker.
9 They're not a fiduciary. They stand in a position in
10 between an insurance carrier and a client of theirs,
11 in attempting to obtain insurance coverage that best
12 suits needs for a price that the person is willing to
13 pay.

14 CHIEF JUDGE LIPPMAN: Is that a good - - -
15 is that a good policy argument for your position?

16 MR. WITZ: I think that it is. It is. I
17 mean, you know, the next step is to raise them to the
18 level of a fiduciary.

19 JUDGE PIGOTT: Before you leave. Your time
20 - - -

21 JUDGE RIVERA: I don't understand the - - -
22 I don't understand the rule you've set up. I mean, I
23 can call an insurance company and get insurance.
24 What - - - what is the broker doing for me?

25 MR. WITZ: The broker is - - - is doing

1 work you don't want to do. They're calling around to
2 several different insurance companies to attempt to
3 find you the coverage that you need.

4 CHIEF JUDGE LIPPMAN: Counselor - - -

5 JUDGE RIVERA: The coverage that you need.
6 Isn't that establishing that we have to have some
7 engagement and understanding on what - - - what I
8 need, and you're going to make recommendations on - -
9 - based on what you hear when you make those calls or
10 however you find out the information, what I need?

11 MR. WITZ: Sure. I mean, it's - - - it's
12 almost no different than walking into a store to buy
13 a product.

14 JUDGE SMITH: You're - - - you're trying to
15 avoid the situation where every time the insured
16 finds his policy doesn't cover or doesn't cover
17 enough, he just adds the broker to the lawsuit?

18 MR. WITZ: Right.

19 CHIEF JUDGE LIPPMAN: Counselor, quickly,
20 proximate cause. Go ahead.

21 MR. WITZ: Proximate cause is - - - is the
22 - - - is the crux in this case. In my view, under
23 the business - - - under the policy, in order to be
24 paid for business interruption loss, it had to be a
25 necessary suspension of the operations. As we say in

1 our - - - in our brief, courts in this state and
2 throughout the country have said, that means a total
3 cessation, a total interruption - - - albeit
4 temporary - - - of the insured's business.

5 In this case, Ms. Voss testified that had
6 she been paid 75,000 dollars each for the first two
7 losses, her businesses would have remained
8 operational. That testimony alone is sufficient to
9 affirm the Appellate Division's decision on the issue
10 of proximate cause and dismiss the complaint.

11 CHIEF JUDGE LIPPMAN: Well, she said a lot
12 of other things that maybe don't go in the same
13 direction. Right?

14 MR. WITZ: Well, she - - - well, she - - -
15 I mean, but that's really it. I mean, that's not all
16 she said. She also said that if I had been paid that
17 money, and I had been paid it timely for both
18 property damage and the BI loss, I would have been
19 back in business.

20 JUDGE SMITH: So you're - - - you're saying
21 that if - - - assume for these purposes it's the
22 broker's fault that she did not have the amount of
23 business interruption insurance she should have had;
24 and she did, in fact, suffer a business interruption;
25 and she did, in fact, lose 400,000 dollars; but

1 language of this particular policy, the necessary
2 suspension language, once she's resumed operations,
3 whether it's permanent, whether it's - - -

4 JUDGE PIGOTT: Where did I get the language
5 that the policy calls for payment of business losses
6 in the event of "operation - - - operations are not
7 resumed at all or are not resumed within a reasonable
8 time"?

9 MR. WITZ: That - - - that's in part of the
10 extra expense stuff, I believe.

11 JUDGE PIGOTT: Suppose she'd had half a
12 million in coverage, whatever he says she was
13 supposed to have, with this insurance company, and
14 this insure - - - yeah, and this insurance company
15 had been just as slow as it was in - - - in adjusting
16 the claim, and she suffered exactly the business
17 interruption she did suffer, she could get her
18 500,000 in damages, wouldn't she?

19 MR. WITZ: She should, yes.

20 JUDGE SMITH: So why - - - why was your
21 error not the proximate cause of her failing to get
22 that?

23 MR. WITZ: Because 75,000 policy limit was
24 enough according to her own testimony.

25 JUDGE SMITH: So well, it in fact, on those

1 facts, turned out not to be enough. If all - - -
2 maybe because the insurance company was slow in
3 paying. But is it really so totally unforeseeable
4 that an insurance company might be a little slow in
5 paying?

6 MR. WITZ: No. But it's also not - - - it
7 is also unforeseeable, I believe to suspect - - - to
8 expect a person repairing a roof to have to do it
9 three times.

10 CHIEF JUDGE LIPPMAN: Okay, counselor,
11 thanks.

12 MR. WITZ: Thank you.

13 CHIEF JUDGE LIPPMAN: We'll have rebuttal.
14 Counselor?

15 MR. OUDEMOOL: Just for a moment on the
16 issue I didn't discuss with you when I was first up.
17 The statement by Ms. Voss that she would have - - -
18 could have become operational if timely paid the
19 amounts before, is irrelevant. As Justice Carni
20 pointed out in his dissent in the Appellate Division,
21 he felt it had nothing to do it, because she was
22 entitled to be paid under the policy whether she - -
23 -

24 JUDGE SMITH: What I - - -

25 MR. OUDEMOOL: - - - resumed operations or

1 not.

2 JUDGE SMITH: - - - what I think - - - I
3 mean, what I think his argument is, if I understand
4 it, is there never would have been a business
5 interruption but for the unforeseeable delay by the
6 insurance company in paying the lousy 75,000 dollars.
7 And if there'd been no business interruption, she - -
8 - then she wouldn't - - - you know, she wouldn't
9 recov - - - she wouldn't have had these 400,000 in
10 losses.

11 MR. OUDEMOOL: Well, but that also ignores
12 the fact that her coverage was applicable whether she
13 was operating - - - not operating at all or she was
14 back at a low level of operation, where she was
15 entitled to recover diminution in profits.

16 JUDGE PIGOTT: But what were you talking
17 about there? I mean, the - - - 75,000 of business
18 interruption, was she paid that?

19 MR. OUDEMOOL: No, sir.

20 JUDGE PIGOTT: All right. She's never been
21 paid either one of those?

22 But the - - - the question I took is if - -
23 - if the property damage had been proper - - - in
24 other words, if that roof had gotten fixed properly
25 the first time, she would have been back in, and

1 75,000 would have more than covered what her income
2 was for the short period of time that it takes to fix
3 a roof?

4 MR. OUDEMOOL: Perhaps so.

5 CHIEF JUDGE LIPPMAN: Okay.

6 JUDGE SMITH: You - - - I'm sorry. You
7 said that the - - -

8 CHIEF JUDGE LIPPMAN: Judge Smith.

9 JUDGE SMITH: - - - the 75,000 - - - that
10 she didn't get even the 75,000 on those first two
11 claims?

12 MR. OUDEMOOL: No, sir.

13 JUDGE SMITH: So - - - and you - - - so to
14 win your case against the broker, you've first got to
15 prove that the insurance company was wrong and should
16 have at least - - - you at least hit the limit. If
17 you hit the - - - if you didn't hit the limit, you
18 can't complain it was too low?

19 MR. OUDEMOOL: Absolutely.

20 JUDGE SMITH: Different - - -

21 CHIEF JUDGE LIPPMAN: Counsel - - - I'm
22 sorry, go ahead.

23 JUDGE SMITH: So one more question. The -
24 - - there are two ways - - - at least two ways to win
25 against a broker. One is to say that you had a

1 special relationship. And the other is to say that
2 you gave him instructions that he didn't follow. Are
3 you making the latter argument?

4 MR. OUDEMOOL: No, sir.

5 JUDGE SMITH: Okay.

6 CHIEF JUDGE LIPPMAN: Can - - - one - - -
7 just one final question. So what did she get? What
8 did she get on the - - - on the first claim?

9 MR. OUDEMOOL: She - - - very little if
10 any. And it's in the record. I'm not conversant
11 with the numbers in my head in my preparation. So -
12 - -

13 CHIEF JUDGE LIPPMAN: But she didn't get
14 the 75-?

15 MR. OUDEMOOL: She did not.

16 CHIEF JUDGE LIPPMAN: Okay. All right.
17 Thank you both. Appreciate it.

18 MR. OUDEMOOL: Thank you.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Voss v. The Netherlands Insurance Company, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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