

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GEORGE MUGANIS,<sup>1</sup>

Plaintiff-Appellant,

v

CITIZENS INSURANCE CO., and  
ZERVOS AGENCY, INC.,

Defendants-Appellees.

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UNPUBLISHED

December 28, 2001

No. 223822

Oakland Circuit Court

LC No. 98-008687-CZ

Before: Owens, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff had claimed that defendant Zervos Agency, Inc. ("Zervos"), an independent insurance agent, erroneously represented the terms of an automobile insurance policy, causing him to receive less underinsured motorist coverage than he expected. Plaintiff sought declaratory judgment that the insurance company, defendant Citizens Insurance Co. ("Citizens"), was liable for the amount that he would have received according to defendant Zervos' purported representations. Plaintiff further sought damages from defendant Zervos under negligence and misrepresentation theories. He appeals as of right. We affirm in part and reverse in part.

**I. Basic Facts and Procedural History**

Plaintiff purchased an automobile insurance policy from defendant Citizens, through defendant Zervos, which included \$300,000 in underinsured motorist coverage. Plaintiff contends that defendant Zervos' employees represented that the \$300,000 coverage would be in addition to any insurance benefits received from the underinsured motorist. However, defendant Citizens' policy required that any benefits received from the underinsured motorist be deducted from the \$300,000. In other words, the \$300,000 was a maximum benefit under the policy.

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<sup>1</sup> We note that plaintiff spelled his name Mugianis throughout the lower court proceedings, but spelled it Muganis in his claim of appeal.

Plaintiff was involved in an automobile accident, and received \$120,000 from the parties at fault, the maximum under their respective insurance policies. Presumably, plaintiff's damages were in excess of \$420,000 because he expected to receive the full \$300,000 under his underinsured motorist policy. However, defendant Citizens informed plaintiff that he was only entitled to \$180,000: \$300,000 less the \$120,000 actually received. Plaintiff sought declaratory relief that defendant Citizens was indeed liable for the full \$300,000 under the policy because, according to plaintiff's testimony, the "gist" of defendant Zervos representations was that the underinsured coverage did not have a setoff provision. Plaintiff also sought to equitably estop defendant Citizens from denying plaintiff \$300,000 in coverage based on defendant Zervos' representations. Essential to plaintiff's claims was a finding that defendant Zervos' representations should be imputed to defendant Citizens. As noted above, plaintiff also sought to recover damages from defendant Zervos under negligence and misrepresentation theories.

Both defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant Citizens contended that plaintiff was not entitled to declaratory relief because the policy unambiguously provided for a setoff. Defendant Citizens also contended that, even if defendant Zervos misrepresented that there was no setoff provision, the statements of an independent insurance agent could not be imputed to the insurance company. Moreover, defendant Citizens noted that it sent copies of the policy to plaintiff; therefore, plaintiff could not reasonably rely on defendant Zervos' statements to the contrary.

Defendant Zervos denied that any misrepresentations were made. Defendant Zervos further claimed that it did not owe plaintiff a legal duty to advise him of the specifics of the policy coverage. Defendant Zervos noted that, even if it had misrepresented the terms of the policy, plaintiff's receipt of the policy containing the setoff provision language, and acquiescence in its terms, prevented him from reasonably relying on the representations.

Plaintiff's deposition testimony suggested that defendant Zervos' employees explained the underinsured policy in a manner that indicated that there was no setoff provision. Plaintiff further denied ever receiving copies of the policy from defendant Citizens.

The trial court found that the policy contained an unambiguous setoff provision. As such, the trial court denied plaintiff's request for declaratory relief against defendant Citizens. The trial court opined that defendant Zervos did not owe plaintiff a duty to advise him of the adequacy of the coverage. Thus, the trial court ruled that plaintiff's negligence claim failed as a matter of law. Although the trial court did not rule on plaintiff's misrepresentation and equitable estoppel claims, it dismissed plaintiff's entire lawsuit.

## II. Standard of Review

Generally, we review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10). *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The *Smith* Court opined:

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and

documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). [*Id.* at 454-455.]

The credibility of the witnesses is not to be considered when resolving a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

### III. Issues Raised on Appeal

On appeal, plaintiff contends that the trial court erred by granting summary disposition because there were material questions of fact and defendants were not entitled to judgment as a matter of law. For organizational purposes, we will consider each of plaintiff's legal theories separately.

#### A. Negligence

Plaintiff claimed that defendant Zervos erroneously represented that the underinsured motorist coverage provided \$300,000 coverage without any setoff. Plaintiff claimed that this representation negligently caused \$120,000 in damages. Defendant Zervos' motion for summary disposition contended, however, that it did not owe plaintiff a duty to explain the coverage. As noted above, the trial court agreed, granting defendant Zervos' motion for summary disposition.

On appeal, plaintiff claims that the trial court erred by concluding that defendant Zervos did not owe plaintiff a duty. Whether a duty exists is a question of law reviewed de novo. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999). Although an insurance agent does not ordinarily owe the insured a duty, our Supreme Court opined:

[T]he general rule of no duty changes when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id.* at 10-11.]

Plaintiff contends that his deposition testimony indicating that defendant Zervos erroneously represented the underinsured motorist policy coverage was sufficient to satisfy each of these four factors.

We recognize that the testimony of defendant Zervos' employees refutes plaintiff's assertion that there was a misrepresentation. However, at the very least, plaintiff's testimony creates a question of fact as to whether there was an erroneous representation by defendant

Zervos. If the trier of fact concludes that there was an erroneous representation by defendant Zervos, we believe that the *Harts* decision imposes a legal duty on defendant Zervos to the plaintiff. On the other hand, if the trier of fact concludes otherwise, then plaintiff's negligence claim would fail for lack of a legal duty on defendant Zervos' part. Thus, this factual question is certainly material to plaintiff's negligence claim. Therefore, the trial court erred by dismissing plaintiff's negligence claim.

### B. Misrepresentation

Plaintiff also claimed that he was entitled to damages from defendant Zervos under a misrepresentation theory. In *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999), we ruled that the elements of fraudulent misrepresentation are:

- (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result.

Although there is an outstanding factual question regarding the representation, plaintiff's complaint did not allege any facts suggesting that the purported representation was made with the intention of inducing plaintiff's purchase of the policy. In fact, plaintiff noted Angelo Zervos' testimony that he did not even know about the setoff provision. However, while this fact may support plaintiff's negligence claim, it does not help his misrepresentation claim. In the absence of any pleaded facts or evidence in the record to supporting element (4) above, we conclude that plaintiff's misrepresentation claim fails as a matter of law.<sup>2</sup> Although the trial court failed to make an express ruling on plaintiff's misrepresentation claim, no error resulted with respect to the trial court's dismissal of this claim. *People v Jory*, 443 Mich App 403, 425; 505 NW2d 228 (1993). Consequently, no error resulted from the dismissal of plaintiff's misrepresentation claim.

### C. Declaratory Relief & Equitable Estoppel

Plaintiff contends that the trial court erred by ruling that defendant Zervos was not defendant Citizens' agent. The trial court concluded that representations by defendant Zervos could not be imputed to defendant Citizens, and that the policy language unambiguously contained a setoff provision. Thus, the trial court denied plaintiff's request for declaratory relief in his favor.

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<sup>2</sup> In regard to the misrepresentation claim only, plaintiff's inability to establish a requisite element prevents the factual question regarding the representation from being "material." Thus, summary disposition would have been properly granted pursuant to MCR 2.116(C)(10).

In *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998), we opined:

An insurance policy constitutes a contractual agreement between the insurer and the insured. *Zurich-American Ins Co v Amerisure Ins Co*, 215 Mich App 526, 530; 547 NW2d 52 (1996)[, lv den 454 Mich 866 (1997)]. When such an agreement is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer. *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 215; 565 NW2d 907 (1997)[, lv den 457 Mich 855 (1998)].

Similarly, evidence that an insurance agency has the “power to place insurance with various insurance companies . . . is usually sufficient to establish that an independent insurance agent is the agent of the insured, not the insurer.” In *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 21; 592 NW2d 379 (1998). Here, the record established that defendant Zervos had the power to place insurance with several insurance companies. Thus, defendant Zervos was an independent insurance agent, and, more importantly, plaintiff’s agent. Therefore, defendant Zervos’ erroneous representations, if any, may not be imputed to defendant Citizens. Further, the trial court correctly concluded that defendant Citizens’ policy unambiguously provided for a setoff against any underinsured motorist coverage benefits payable. Consequently, the trial court did not err by denying plaintiff’s request for declaratory relief.

Plaintiff also claimed that defendant Citizens was equitably estopped from applying the setoff provision because of defendant Zervos’ representations. Equitable estoppel “is not an independent cause of action, but instead a doctrine that may assist a party by precluding the opposing party from asserting or denying the existence of a particular fact.” *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). It may apply “where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.” *Id.* at 141. Here, there were no allegations that defendant Citizens made any representations whatsoever, or in any way induced plaintiff to purchase the policy. As noted above, defendant Zervos’ purported representations may not be imputed to defendant Citizens. In addition, we do not believe that equity would permit defendant Citizens to incur a \$120,000 liability based on erroneous statements made by plaintiff’s agent, defendant Zervos. Therefore, although the trial court did not specifically rule on plaintiff’s equitable estoppel claim, no error resulted with respect to the trial court’s dismissal of this claim. See *Jory, supra* at 425.

#### IV. Receipt of the Policy

Finally, plaintiff contends that there was an outstanding factual question regarding whether plaintiff received a copy of the insurance policy from defendant Citizens. We agree. Although defendant Citizens presented circumstantial evidence suggesting that plaintiff should have received as many as three copies of his policy, plaintiff testified that he never received a copy. The trial court found that defendant Citizens sent three copies, but stopped short of expressly finding that plaintiff received the copies. Thus, to the extent that the trial court’s

finding could be construed as implicitly resolving this factual question, we vacate the finding and reserve it for the trier of fact. However, a finding that plaintiff did not receive a copy of the policy would not alter our conclusion that a necessary element was lacking from plaintiff's misrepresentation claim, nor would it allow defendant Zervos' purported representations to be imputed to defendant Citizens. Consequently, this factual question does not change our conclusions that the declaratory relief, misrepresentation, and equitable estoppel counts were properly dismissed.

## V. Conclusion

We believe that there was a material question of fact regarding whether defendant Zervos erroneously represented the policy terms.<sup>3</sup> If the trier of fact concludes that defendant Zervos erroneously represented the terms of the policy, this would give rise to a duty under one of the *Harts* decision's exceptions to the "no duty" rule. Thus, the trial court's dismissal of plaintiff's negligence claim pursuant to MCR 2.116(C)(10) for lack of duty was premature. Therefore, we reverse the trial court's dismissal of plaintiff's negligence claim. As noted above, to the extent that the trial court's finding that defendant Citizens sent plaintiff three copies of the policy could be construed as an implicit finding that plaintiff received a copy of his policy, we vacate the finding as an improper resolution of a factual question. However, we affirm the trial court's dismissal of plaintiff's declaratory relief, misrepresentation, and equitable estoppel claims.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Donald S. Owens  
/s/ Donald E. Holbrook, Jr.  
/s/ Hilda R. Gage

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<sup>3</sup> Our ruling should not be construed as suggesting how we might resolve this factual question. Any resolution of the question will require the trier of fact to, among other things, weigh the credibility of the witnesses—a task that courts may not do when ruling on a motion for summary disposition pursuant MCR 2.116(C)(10). *Skinner v Square D Co*, *supra* at 161.