STATE OF MICHIGAN

COURT OF APPEALS

HI-TECH ENGINEERING, INC.,

Plaintiff-Appellant,

V

PAUL S. BUITEN, BUITEN-TAMBLIN-STEENSMA & ASSOCIATES and TRAVELERS INDEMNITY COMPANY,

Defendants-Appellees.

UNPUBLISHED
November 12, 2002

No. 228250
Kent Circuit Court
LC No. 98-001500-NZ

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Plaintiff Hi-Tech Engineering, Inc ("Hi-Tech") filed an action against defendant Paul S. Buiten ("Buiten") and his insurance agency alleging negligence and misrepresentation in selling a general liability policy issued by defendant Travelers Indemnity Company ("Travelers"). Hi-Tech also sought declaratory relief that the pollution exclusion in the policy did not preclude coverage for injuries caused to two employees of a Wisconsin corporation when a machine manufactured and sold by Hi-Tech failed, discharging a highly toxic chemical, toluene diisocyanate. Hi-Tech appeals from an order of summary disposition granted pursuant to MCR 2.116(C)(10) in favor of Travelers and Buiten. In this case, we hold that Travelers had no duty to defend Hi-Tech in the underlying product liability suit and affirm summary disposition granted to Travelers, Buiten and his agency.

A trial court's grant or denial of summary disposition is reviewed de novo on appeal. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion for summary disposition based on MCR 2.116(C)(10) (except as to damages, there is no genuine issue as to any material fact and the moving party is entitled to partial or full judgment as a matter of law) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Smith*, *supra* at 454. The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), and has the initial burden of supporting its position with documentary evidence, *Smith*, *supra* at 455. The trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. *Id*. at 454. If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with

evidentiary materials that a genuine material issue of disputed fact exists, and upon failure to do so, summary disposition is properly granted. *Id*. at 455.

Hi-Tech first argues that the pollution exclusion did not apply to the injured employees' claims. In a related garnishment action initiated by the injured employees against Travelers, this Court has already decided that the pollution exclusion in the Travelers policy excluded coverage. *McKusick v Travelers Indemnity Co*, 246 Mich App 329; 632 NW2d 525 (2001). In fact, all of Hi-Tech's arguments, except one, concerning Travelers have already been decided by this Court in *McKusick, supra*, which is controlling authority in the instant appeal pursuant to MCR 7.215(I)(1). Therefore, we will only address the issue which the *McKusick* Court did not decide.

In *McKusick*, the Court found that the one undecided issue, whether Travelers breached its duty to defend Hi-Tech, was not preserved for appeal, nor was its resolution necessary to the disposition of the garnishment action. *McKusick, supra* at 341. In this case, however, Hi-Tech raised this issue below. The trial court decided as follows:

> Plaintiff also asserts that even if coverage does not extend to these claims, the duty to defend does. We disagree.
>
> While the exclusion may not list, as plaintiff asserts, failure to warn, we believe we must look to the essential nature of the claims. *Illinois Employers Insurance [] v Dragovich*, 139 Mich App 502, 507; [362 NW2d 767] (1984). However, it is characterized in these complaints against plaintiff, Hi-Tech, the claims are personal injury actions for bodily injury caused by pollutants escaping or, as the policy says, arising from Hi-Tech's product. That is what is excluded from coverage.

The duty of an insurance company to defend its insured in a tort action depends upon the allegations in the complaint and arises where the allegations "even arguably come within the policy coverage." *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 493; 506 NW2d 527 (1993) (internal citation omitted). Further, the duty of an insurance company to defend its insured is not necessarily synonymous with the coverage provided, *Illinois Employers Ins, supra* at 506, nor is it conclusive of the duty to indemnify the insured, *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989).

In *Illinois Employers Ins, supra*, the insurance company filed suit seeking a declaration that its exclusion for any "assault and battery" perpetrated by the insured or its employees precluded both coverage and the duty to defend where the underlying plaintiff alleged he was "sprayed with a gas ejecting device" and was "struck, pushed or physically assaulted by the employees, agents or servants" of the insured. *Id*. at 505. The insured argued the exclusion did not apply because the injured plaintiff's complaint alleged negligence and gross negligence in "failing to maintain his premises in a safe manner and in failing to train and supervise his employees." *Id.* This Court disagreed and opined:

> [The injured person's] injuries were the result of the assault and, as such, are not included within the coverage afforded under the insurance policy at issue. Regardless of the label, be it negligence or intentional tort, plaintiff owed no duty

> to defend where the bodily injury arose out of an assault or battery. In the present case, it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists. Inasmuch as the insurer must look beyond the precise wording of the allegations in a third party's complaint against its insured to determine whether coverage is possible, so must the allegations be examined to determine the substance, as opposed to the mere form, of the complaint. [*Id.* at 507.]

Our Supreme Court later adopted this analysis. *Allstate Ins Co, supra* at 662-663.

In the present case, the trial court correctly examined the substance of the allegations in the underlying products liability lawsuits, rather than the form, to conclude that the injuries arose out of the discharge of pollutants. Each complaint alleged several different legal theories by which to impose product liability on Hi-Tech, including breach of duty to warn, strict liability, negligence and breach of warranty. The injured parties' complaints, however, alleged under all legal theories that the alleged injuries were the result of exposure to isocyanates discharged by the machine sold by Hi-Tech. Thus, the injuries arose out of a pollution discharge from Hi-Tech's product, and, therefore, no coverage existed because of the pollution exclusion. *McKusick, supra* at 338, 340. Accordingly, Travelers had no duty to defend Hi-Tech. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins* Co, 220 Mich App 347, 357; 559 NW2d 93 (1996).

Hi-Tech also argues that a "special relationship" existed between it and Buiten, creating a duty that Hi-Tech's expert asserts Buiten breached by failing to investigate and disclose differences in Hi-Tech's existing coverage and that provided by the Travelers' policy. We disagree.

Actionable negligence is conditioned upon a relationship between the parties that gives rise to a legal obligation to use reasonable care to protect the injured party from harm. *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). Generally, questions regarding duty are for the court to decide as a matter of law, *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999), and are subject to de novo review on appeal, *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001). Where a duty does not exist as a matter of law, summary disposition is proper. *Harts, supra* at 12.

Michigan follows the common law rule that an insurance agent does not have a duty to advise a potential insured concerning coverage offered or available. *Id.* at 8. Our Supreme Court found that the common law rule is consistent with Michigan's statutory regulatory scheme and is supported by sound policy reasons. *Id.* at 7-9. However, such a duty may be created when an event occurs that changes the relationship between the insurance agent and the insured. *Id*. at 10. Our Supreme Court held that a "special relationship" arises when (1) the agent misrepresents the nature or extent of the coverage, (2) an ambiguous request is made which requires a clarification, (3) an inquiry is made which might require advice and the agent gives inaccurate advice, or (4) the agent assumes the duty by express agreement with or promise to the insured. *Id.* at 10-11.

We conclude that none of these situations which give rise to a "special relationship" existed in the present case. First, an examination of the record reveals that no evidence was

presented that Buiten misrepresented the coverage provided by the Travelers' policy. The deposition of Douglas Nagel, the CEO of Hi-Tech, established that Buiten did not claim he would provide equal or better coverage at an equal or better price; rather, that was Nagel's criterion for Buiten to meet if he expected to win Hi-Tech's business. Further, Nagel admitted that it was Hi-Tech's responsibility to determine if Buiten's quote for insurance was adequate. Moreover, the pollution exclusion was disclosed in the quote Buiten provided to Hi-Tech's chief financial officer Carl Jasperse, who was responsible for the company's insurance.

Second, there was no evidence of an ambiguous request for coverage requiring clarification. In fact, Jasperse was aware that the Travelers' policy contained a pollution exclusion and made no request for such coverage. Likewise, the third circumstance which creates a "special relationship," as delineated in *Harts, supra*, fails because there simply was no evidence that anyone at Hi-Tech requested advice or that Buiten provided inaccurate information.

Last, no evidence was presented that Buiten assumed additional duties by express agreement. As discussed above, equal or better insurance for an equal or better price was Nagel's criterion for accepting an offer to purchase insurance, not an express agreement or promise by Buiten. Accordingly, because a "special relationship" did not arise between Hi-Tech and Buiten, Buiten owed no duty to advise Hi-Tech concerning insurance coverage, and, therefore, summary disposition in favor of Buiten regarding Hi-Tech's negligence count was appropriate. *Harts, supra* at 12.

Hi-Tech also argues that expert testimony established that Buiten breached a duty to Hi-Tech. However, the testimony of an expert cannot create a factual question concerning a duty where the law has not recognized one. "[T]he duty to interpret and apply the law has been allocated to the courts, not to the parties' expert witnesses." *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997).

Furthermore, Hi-Tech misplaces its reliance on *Southwest Auto Painting & Body Repair, Inc v Binsfield*, 183 Ariz 444; 904 P2d 1268 (Ariz App, 1995). A review of that case discloses that Arizona does not follow the common law rule as does Michigan, but rather, Arizona case authority recognizes that an insurance agent owes a duty to an insured to exercise reasonable care performing its duties in procuring insurance. *Id.* at 447. Therefore, *Southwest Auto Painting* is inapposite.

Additionally, Hi-Tech cites no authority or policy arguments to support its position below and on appeal that by virtue of Buiten being an "independent" agency, representing many different insurance companies, it became the insured's agent. A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims, nor may it give an argument cursory treatment with little or no citation of supporting authority. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). This argument has therefore been abandoned. *Id.*

Finally, Hi-Tech argues that Buiten misrepresented that his agency would procure the equivalent or better coverage for Hi-Tech through Travelers than Hi-Tech's existing coverage and that Buiten's failure to compare the existing policy to the Travelers policy constituted, at a

minimum, reckless disregard for the truth creating a material factual issue concerning fraud and misrepresentation. Again, we disagree.

The sine qua non of an action for fraud or misrepresentation is that the defendant made a false representation of material fact. *Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 446; 491 NW2d 545 (1992). Even "silent fraud," the suppression of material facts where there is a legal or equitable duty of disclosure, requires "some type of misrepresentation." *M & D, Inc v McConkey*, 231 Mich App 22, 36; 585 NW2d 33 (1998). In the present case, the record established that Buiten never claimed he would provide equal or better coverage at an equal or better price for Hi-Tech, but rather, that was the statement of Hi-Tech's CEO to Buiten, who also admitted that it was Hi-Tech's responsibility to determine if Buiten's quote for insurance was adequate. Moreover, it is undisputed that the quote and coverage summary Buiten provided to Hi-Tech's chief financial officer clearly disclosed the pollution exclusion in the Travelers' policy.

Even if Buiten made the statement that he would provide equal or better coverage at an equal or better price, the context of the meeting at which this alleged statement was made clearly indicates that such a comment related to future conduct, and at most would have been a promise of future performance, not actionable fraud. As our Supreme Court opined in *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact."[1] Our Supreme Court reaffirmed this requirement for a fraud action in *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998), holding that "[a] promise regarding the future cannot form the basis of a misrepresentation claim."

Thus, based on Hi-Tech's failure to produce any evidence that Buiten made a false representation of a past or existing material fact, the trial court properly granted Buiten and his agency summary disposition on Hi-Tech's claim of misrepresentation and fraud. *Smith, supra* at 455.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder

[1] For the same reason, Hi-Tech's reliance upon this Court's decision in *Baker v Arbor Drugs, Inc*, 215 Mich App 198; 544 NW2d 727 (1996), is misplaced. The *Baker* Court found, as to the plaintiff's fraud and misrepresentation claim, that there was evidence of a material representation, which was false when it was made. *Id*. at 209. That is not the case in the instant action.