STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL ASSOCIATION OF INVESTORS CORPORATION, a Michigan non-profit corporation,

Plaintiff-Appellant,

v

DOBSON-MCOMBER AGENCY, INC., a Michigan Corporation and DAVID TIEDGEN, an individual,

Defendants-Appellees.

UNPUBLISHED
June 29, 2010

No. 286295
Oakland Circuit Court
LC No. 06-079104-CZ

NATIONAL ASSOCIATION OF INVESTORS CORPORATION, a Michigan non-profit corporation,

Plaintiff-Appellant,

v

DOBSON-MCOMBER AGENCY, INC., a Michigan Corporation, and DAVID TIEDGEN, an individual,

Defendants-Appellees.

No. 287701
Oakland Circuit Court
LC No. 06-079104-CZ

Before: STEPHENS, P.J. AND CAVANAGH AND OWENS, JJ.

PER CURIAM.

In this insurance case, plaintiff appeals as of right from the trial court's denial of plaintiff's motion for partial summary disposition and grant of defendants' motion for

directed verdict and taxation of costs in favor of defendants. We reverse and remand for proceedings consistent with this opinion.

I. FACTS

Plaintiff, National Association of Investors Corporation (NAIC) is a Michigan non-profit corporation established to provide members with investment education. It is owned by the National Association of Investment Clubs Trust (the Trust). Defendant Dobson-McOmber Agency, Inc. (DMA) was, until its acquisition by Hylant of Ann Arbor in 2005, one of the largest independent insurance agencies in southeastern Michigan. The agency sold property insurance, casualty insurance, life insurance, and employee benefit and retirement plans. DMA worked with many different insurers to obtain and arrange insurance to meet their clients' requests for coverage. DMA was paid a commission by insurance companies after they sold policies to their clients.

The insurance policy at issue in this case was one that covered plaintiff's board of trustees. It was a directors and officers (D&O) policy procured by DMA from Chubb Insurance (Chubb). The policy was originally purchased in the 1990's and plaintiff renewed the policy from year to year. The policy provided one million dollars in coverage, and contained an "insured vs. insured" exclusion each year since 1998, when the employment practices liability coverage was added by plaintiff.

Defendant David Tiedgen was employed by DMA as a commissioned insurance agent and was also an executive vice president at DMA. DMA was plaintiff's insurance agency for over 50 years, and Tiedgen was responsible for plaintiff's account for about 15 years. Another employee of DMA, Rob Jenner, handled plaintiff's account in the capacity of account manager. From 1994 through May 2004, plaintiff's board of trustees delegated the responsibility of handling insurance matters to its vice president of finance, James Sobol. Sobol typically communicated with Tiedgen about once each quarter. Plaintiff's board of trustees had an annual meeting during which they reviewed their insurance coverage. The board discussed the various types of insurance policies, compared costs of existing policies to those of previous years, whether there had been any changes to the policies and whether there needed to be any additions or deletions to the policies. Tiedgen typically prepared an insurance summary for Sobel to present to the board during this annual meeting.

On May 10, 2004, Sobol sent the account manager for DMA an email that stated in part:

> NAIC Trustees have requested some further data regarding their protections under the subject policies. They feel that in todays [sic] litigious society in which we now live, that $10 million or $25 million would not be out of line? Do you have the means to give us a comparison with other like non-profits?

> The Trustees have asked that at the very earliest opportunity to have a representative of Chubb give a full presentation on this subject addressing questions like:
>
> - who is specifically covered
>
> - how much coverage is enough
>
> - what are the circumstances under which organizations like ours would/could be sued
>
> - is there a common plan to follow if some individual or group decides to sue the board, individuals on the board, the organization overall, etc.
>
> Do you and David [Tiedgen] think we need a representative from Chubb or can this be handled by Dobson McOmber?

On May 25, 2004, Tiedgen replied to Sobol by email and agreed to make a presentation to the board of trustees himself, stating that it was not necessary to bring in a representative from Chubb. Also in his reply, Tiedgen set forth DMA's risk analysis of coverage for D&O liability but did not mention the insured vs. insured exclusion in the policy. In his deposition, Tiedgen stated that in his email he intended to "indicate the classic exposures that most businesses face . . . and then suggesting a brainstorming session to identify other exposures that they might be aware of that we weren't and pointing out that they don't—the D&O doesn't cover every exposure." Tiedgen acknowledged that he did not identify any exposures for which there was not coverage, including the insured vs. insured exclusion.

Shortly after Tiedgen sent this email to Sobol, Sobol left NAIC and was replaced by Bonnie Reyes who became the Chief Financial Officer of NAIC. On June 8, 2004 Tiedgen emailed Reyes to inform her that he was preparing a chart for the board of trustees depicting, "NAIC entities, exposures as we understand them and coverage as currently constituted." Tiedgen prepared the color-coded chart and distributed it to the board of trustees at a June 17, 2004 meeting. The chart described the types of existing coverage and the individuals or entities that were insured. The chart did not include the insured vs. insured exclusion or identify any gap in coverage resulting from the exclusion and there was no discussion of the exclusion at the board meeting.

In March of 2004, the board of trustees voted to oust a long-time board member, Ralph Seger. Seger contacted an attorney because he believed that his ouster had been improper. He sent a letter to the board of trustees advising that if the issue of his termination were to go to court, he believed he could prove monetary damages. In February 2005, Seger did assert a claim against plaintiff based on his removal from the board of trustees. Tiedgen forwarded notice of the claim to Chubb and sent an email to NAIC in which he expressed the opinion that the claim would be covered.

In June, 2005, Chubb denied coverage of the claim because of the insured vs. insured exclusion. The litigation between Seger and plaintiff settled in early 2007. However, while the litigation was pending, another trustee, Warren Alexander filed pleadings in support of Seger's position that he'd been unlawfully removed. Plaintiff filed this lawsuit.

After five days of trial, plaintiff rested its case. Defendants moved for a directed verdict arguing that plaintiff had failed to establish the existence of a special relationship between the parties as required by *Harts v Farmers Insurance Exchange*, 461 Mich 1, 597 NW 2d 47 (1999). The trial court granted defendants' motion for a directed verdict.

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in denying its motion for partial summary disposition prior to trial. We disagree.

A. STANDARD OF REVIEW

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2006).

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004), and all reasonable inferences are to be drawn in favor of the nonmovant, *Scalise*, 265 Mich App at 10.

This Court is liberal in finding a genuine issue of material fact. *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The trial court concluded that issues of fact remained regarding each of defendants' alleged defenses.

B. ANALYSIS

Here, even if the jury were to determine that defendants and plaintiff shared a special relationship, it could still consider the comparative fault associated with or arising from plaintiff's duty to read its insurance documents. Defendants introduced evidence that neither the board of trustees, nor Sobol had read the insurance policies. Although Sobol contended he did review the policy summaries, he said never noticed the exclusions.

As this Court stated in *Zaremba v Harco Nat'l Ins Co, et al*, 280 Mich App 16; 761 NW2d 151 (2008):

> Under *Harts*, an insurance agent may create a special relationship by engaging in conduct inconsistent with merely taking a customer's order. But we view as simply illogical the suggestion that an agent's decision to undertake additional responsibilities on behalf of an insured immunizes the insured from the consequences of its own negligence. The negligence of one party does not eliminate the legal requirement that an opposing party use ordinary care. See Mi Civ J.I. 10.04. [*Id.* at 29.]

Pursuant to MCL 600.6304, a jury must consider comparative fault if any fault is attributable to the plaintiff. MCL 600.6304 provides:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.
>
> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

The doctrine of comparative fault requires that every actor exercise reasonable care. *Hierta v Gen Motors Corp (On Rehearing)*, 196 Mich App 20, 23; 492 NW2d 738 (1992). "The general standard of care for purposes of comparative negligence, while differing in perspective, is theoretically indistinguishable from the applicable standard for determining liability in common-law negligence: the standard of conduct to which one must conform for his own protection is that of 'a reasonable [person] under like

circumstances.'" *Lowe v Estate Motors Ltd,* 428 Mich 439, 455-456; 410 NW2d 706 (1987) (citation omitted). The question of a plaintiff's negligence for failure to use due care is a question for the jury unless no reasonable minds could differ or the determination involves some ascertainable public policy considerations. *Rodriguez v Solar of Michigan, Inc,* 191 Mich App 483, 488; 478 NW2d 914 (1991).

Given the facts introduced by defendants regarding plaintiff's admitted failure to read the policy, we conclude that the evidence submitted could establish plaintiff's comparative negligence. The trial court did not err in refusing to grant plaintiff's motion for partial summary disposition of defendants' defenses where defendants established genuine issues of material fact.

III. DIRECTED VERDICT

Plaintiff argues that the trial court erred in granting defendants' motion for a directed verdict. We agree.

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for a directed verdict. *Roberts v Saffell,* 280 Mich App 397, 401; 760 NW2d 715 (2008). We must the view the evidence in the light most favorable to the nonmoving party. *Moore v Detroit Entertainment, LLC,* 279 Mich App 195, 201-202; 755 NW2d 686 (2008). "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Roberts,* 280 Mich App at 401.

We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party to determine if the evidence fails to establish a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 131; 666 NW2d 186 (2003). In determining whether a question of fact existed that would preclude a directed verdict, this Court draws every reasonable inference in favor of the nonmoving party, while recognizing the trial court's superior opportunity to observe witnesses. *Coble v Green,* 271 Mich App 382, 386; 722 NW2d 898 (2006).

B. ANALYSIS

First, plaintiff argues that *Harts* should not even apply to this case because defendants are not "captive" insurance agents.[1] Defendants argue that DMA was not an insurance counselor, and did not have a special relationship with plaintiffs, and that *Harts* should apply. Whether or not DMA and plaintiff had a special relationship is an issue of

[1] Insurance agents who work exclusively for one insurance company are known as "captive agents." (www.bls.gov, United States Department of Labor, Bureau of Labor Statistics website, accessed October 27, 2009). DMA purchased their clients' insurance from multiple insurance companies.

fact that should be resolved by the factfinder. Because of the existence of this factual issue, the trial court erred in granting defendant's motion for a directed verdict.

Although it appears that the *Harts* case may not even apply to this case, even if it does, we conclude that factual questions exist upon which reasonable minds could differ regarding the application of the exceptions contained in *Harts*. In general, an insurance agent has no duty to advise an insured about the adequacy or availability of coverage. *Pressey Enterprises, Inc v Barnett-France Ins Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006). Based on a review of Michigan statutes regulating insurance products, the Michigan Supreme Court has characterized insurance agents as "order takers," in contrast to insurance counselors, "who function primarily as advisors." *Harts*, 461 Mich at 9. This limited role of the insurance agent "is consistent with an insured's obligation to read the insurance policy and raise questions concerning coverage within a reasonable time after the policy has been issued." *Id*. at 9, n 4.

In *Harts*, the plaintiffs owned an automobile that was covered by a no-fault insurance policy purchased from the defendant insurer through one of its agents. *Harts*, 461 Mich at 3. The plaintiff was involved in an accident with an uninsured motorist and subsequently filed suit against that insurer and one of its agents, claiming that the agent was negligent in selling them an inadequate insurance policy because it did not have uninsured motorist coverage. *Id*. Our Supreme Court stated, "[w]hether a duty exists is a question of law that is solely for the court to decide." *Id.* at 6, citing *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). The Court then held that the general rule that there is no affirmative duty for a licensed insurance agent to advise or counsel an insured about the adequacy or availability of coverage 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. [*Harts*, 461 Mich at 10-11.]

Therefore, for defendant to have owed plaintiff a duty, one of the four exceptions must have existed. In the *Harts* case, summary disposition in favor of the defendant insurer was proper because the plaintiff failed to present facts sufficient to show a special relationship. *Harts*,461 Mich at 12.

Our Supreme Court has stated, "[t]his limited role for the agent may seem unusually narrow, but it is well to recall that this is consistent with an insured's obligation to read the insurance policy and raise questions concerning coverage within a reasonable time after the policy has been issued. *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 144; 314 NW2d 453 (1981).]" *Harts*, 461 Mich at 9.

Plaintiff contends that a special relationship was established by *Harts* exception three: an inquiry was made that may have required advice, and the agent, though he need not, gave advice that was inaccurate. On May 10, 2004 plaintiff sent defendants an email

specifically asking for "a full presentation" on the subject of NAIC's insurance coverage, "addressing questions like . . . who is specifically covered . . .how much coverage is enough . . . what are the circumstances under which organizations like ours would/could be sued?" The email was initiated at the behest of lead outside director of the board of trustees, Ken Lightcap. Lightcap stated that he "was trying to find out if there were any gaps in the coverage which would be of concern to the board as an organization and to the individuals thereon."

Tiedgen responded to this email with a promise to make a presentation to the board of trustees. Tiedgen specifically told plaintiff that it was not necessary to bring in a representative from Chubb; rather, DMA was capable of, and would take responsibility for answering plaintiff's questions and rendering the requested advice. This was confirmed by the testimony of Reyes, who also confirmed that the inquiry made by the board of trustees was for a comprehensive review of the insurance coverage of NAIC and "any potential risks or exposure we had as an organization or the individuals who were directors or officers." Therefore, there was clearly testimony that could have established that plaintiff made an inquiry for advice from defendants and that defendants undertook to provide that advice.

Next, plaintiff needed to present evidence sufficient to establish a question of fact as to whether or not the information provided to plaintiff by defendant was inaccurate. Plaintiff presented evidence that Tiedgen's May 25, 2004 email response to plaintiff's inquiry set forth DMA's initial risk analysis of coverage for D&O liability, but did not identify the gap in coverage created by the insured vs. insured exclusion. Under the heading "[w]hat are the circumstances under which an organization like ours would/could be sued?" Tiedgen stated:

> Once you get past the EPL exposure you have to identify and analyze each "stakeholder" and their personal exposure for NAIC. Identification and Analysis of exposures are the first two (and most difficult) steps in the classic Risk Management process.

The document also identified a variety of different potential legal scenarios, but did not include the insured vs. insured exclusion.

In addition, that email contained another heading "[w]ho is specifically covered by NAIC's D&O insurance?" Tiedgen discussed who the insured organizations and insured persons were under the D&O policy, but did not discuss the insured vs. insured exclusion.

On June 17, 2004 Tiedgen distributed a "NAIC Group-Exposure/Coverage Chart" at the board of trustees meeting. This chart did not include the insured vs. insured exclusion, nor did Tiedgen mention this exclusion in his presentation to the board.

On August 3, 2005 Stephen Dobson (former president of DMA) sent an email to Jenner stating that NAIC "raised the issue of our not telling them of this exclusion" and stated that if he (Dobson) were NAIC, he would be wondering why DMA did not tell

them about the possibility of this exclusion being invoked "from the get go." We agree with plaintiff that a reasonable juror could find that defendants' failure to identify the insured vs. insured exclusion in response to plaintiff's request for a full presentation on its potential exposures constituted inaccurate advice.

Lending support and credibility to the characterization of the information provided by defendants as "inaccurate," was the testimony of defendants' employees and expert witness. Plaintiff presented testimony of Jenner, who stated that his job at DMA is to evaluate risks, make recommendations to the client about suitable coverage taking in to account the risks and exposures so that they do not have an uninsured loss. He also agreed that he would have an obligation to identify gaps in coverage for a client and discuss those gaps and their effect with the client.

Dobson testified that an insurance agent should have a conversation with a nonprofit client that goes beyond the insured vs. insured exclusion because it would impact a multitude of risks. Dobson noted that there are multiple claim situations for nonprofits that would "pit an insured against another insured" and that the insured vs. insured exclusion leaves nonprofits susceptible to serious losses. He also testified that, in his opinion, an ethical, licensed insurance agent has an obligation to advise the customer of liability risks. Finally, he stated that he would not want to do business with someone who did not identify gaps in coverage to their clients. And he testified:

> *Q*. All right. And how would you characterize the relationship between Dobson-McOmber and NAIC, as you understand it based on all this material?
>
> *A*. Well, to me they have a special relationship. There are several reasons behind that. One is in regards to the—the meeting that they were asking for information and they were asking what's covered, who's covered, and they were given information that did not refer to an exclusion. So in my opinion they were given advice that's not accurate advice. So that's one of the examples of where a special relationship can occur. Also, the length of time by the nature of the advice that they had given, the proposals and the questions that had been asked and answered from different people, to me it was a special relationship.

Plaintiff also presented the testimony of its standard of care expert, Kenneth Korotkin, who stated that in his opinion, the chart presented to the board of trustees in response to their request for a full presentation on its insurance coverage constituted "blatant neglect" because defendants did not refer to the exclusions. He stated "you always refer to policy exclusions." He also testified that Tiedgen's presentation to the board and his chart were inconsistent with his obligations as a licensed insurance agent.

Plaintiff further contends that a special relationship was established by *Harts* exception four; the agent assumes an additional duty by either express agreement with or

promise to the insured. *Harts*, 461 Mich at 10-11. In support of this contention, plaintiff presented Tiedgen's initial response to the May 10, 2004 email inquiry:

> We'll have something to you by week's end but it will probably be Thurs. or Fri.
>
> Good questions and reasonable concerns and we look forward to addressing them.
>
> We can handle a presentation for the trustees. I think a meeting where we answer the specific questions raised and have some time for Q&A would be valuable.
>
> We'll be in touch later this week.

We find that this email, coupled with the testimony of DMA employees that they believed that they had a professional obligation to disclose a situation to a client when there was a gap in coverage, could support the proposition that defendants assumed a special duty "by either express agreement with or promise to" plaintiff beyond the very limited duty of an insurance agent that is the general rule under *Harts*, 461 Mich at 9-11.

In addition, the trial court erred procedurally by making findings of fact at this stage of the proceedings. The trial court stated, "[t]here was advice given in reply to the initial request, but this Court does not find the advice given was inaccurate." Plaintiff presented evidence from which a reasonable jury could possibly have inferred that defendants gave plaintiff inaccurate advice in response to their inquiries regarding their exposures. The trial court did not find that the information about plaintiff's coverage provided by defendants was not inaccurate *as a matter of law*. Rather than allowing the factfinder to determine the issue of accuracy, the trial court improperly stepped in and resolved an issue of fact.

"If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The "appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Serv's, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

Defendants argue that plaintiff had an obligation to read its policy and that it was plaintiff's failure to read the policy that caused plaintiff's injury. While we agree that this argument may have merit, this argument is more appropriately resolved at trial in defendants' assertion of plaintiff's comparative negligence. Defendants further contend that even if there were a special relationship, plaintiff has failed to provide any evidence that defendants breached any duty to plaintiff. We conclude that plaintiff has indeed asserted that defendants breached their duty by providing inaccurate and incomplete information after being directly asked for a comprehensive explanation of NAIC's

insurance package. Plaintiff provided sufficient testimony on that topic to establish an issue of fact for the jury.

In short, the trial court erred in granting defendants' motion for a directed verdict where issues of fact upon should have precluded the grant of this motion.

IV. EXPERT WITNESS

Plaintiff argues that defendants' expert witness Dan Bailey was not qualified to testify regarding the responsibilities or duties of insurance agents and insurance brokers. We agree.

A. STANDARD OF REVIEW

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when a trial court's decision results in an outcome falling outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. ANALYSIS

On June 2, 2008 the trial commenced. Plaintiff filed a motion to preclude certain testimony of defendants' expert witness Dan Bailey. Plaintiff argued that Bailey testified that he had never been an insurance agent or broker and was not qualified to testify regarding the responsibilities or duties of insurance agents and insurance brokers. The trial court ruled that Bailey could testify that the Chubb policy afforded reasonable coverage.

In his deposition, Bailey clearly stated that he is not an expert with regard to the responsibilities or duties of insurance agents and insurance brokers. Bailey admitted that he is not aware of the facts of this case or NAIC's specific risks or exposures, such as its high number of volunteers. Given Bailey's admitted lack of expertise as to the duties of insurance agents and brokers, he was not qualified to testify that the Chubb policy afforded reasonable coverage for NAIC. MRE 702 allows a witness qualified as an expert by "knowledge, skill, experience, training, or background" to testify about "scientific, technical, or other specialized knowledge . . . in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case." Here, Bailey acknowledged that his opinion was not based on knowledge of the specific facts of this case. Therefore, we find that the trial court erred in allowing Bailey to testify that the Chubb policy afforded plaintiff reasonable coverage.

V. TAXATION OF COSTS

Given our conclusion that the trial court erred in granting defendants' motion for directed verdict, the issue of costs is now moot.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens