IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

BROOKE HENRY, SURVIVING SPOUSE OF JASON HENRY, ON HER OWN BEHALF AND AS CONSERVATOR ON BEHALF OF ISAIAH AND NATHANAEL HENRY; BARBARA HARRISON, SURVIVING BIOLOGICAL MOTHER OF JASON HENRY; AND ROBERT HENRY, SURVIVING BIOLOGICAL FATHER OF JASON HENRY,
Plaintiffs/Appellants,

v.

AMERICAN CHURCH GROUP OF ARIZONA, LLC, AN ARIZONA LIMITED LIABILITY COMPANY; KEVIN NORTON, AN INDIVIDUAL; DESERT VIEW INSURANCE OF ARIZONA, LLC,
Defendants/Appellees.

No. 2 CA-CV 2019-0042
Filed April 2, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20180329
The Honorable Janet C. Bostwick, Judge

AFFIRMED

COUNSEL

The Leader Law Firm, Tucson
By John P. Leader
Counsel for Plaintiffs/Appellants Brooke Henry and Barbara Harrison

Zachar Law Firm PC, Phoenix
By Christopher J. Zachar
Counsel for Plaintiff/Appellant Robert Henry

The Hassett Law Firm P.L.C., Phoenix
By Myles P. Hassett, Jamie A. Glasser, and David R. Seidman
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Brooke Henry, Barbara Harrison, and Robert Henry (collectively "the Henrys") appeal the trial court's dismissal of their claims against American Church Group of Arizona, LLC, Kevin Norton, and Desert View Insurance of Arizona, LLC (collectively "ACG"). We affirm.

Factual and Procedural Background

¶2 We review the dismissal of a complaint under Rule 12(b)(6), Ariz. R. Civ. P., de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 7 (2012). Ordinarily, we look only to the pleading itself and "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins.*, 218 Ariz. 417, ¶ 7 (2008). "We will affirm the dismissal if, as a matter of law, the plaintiff is not 'entitled to relief under any interpretation of the facts susceptible of proof.'" *Brittner v. Lanzilotta*, 246 Ariz. 294, ¶ 4 (App. 2019) (quoting *Fid. Sec. Life Ins. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, ¶ 4 (1998)).

¶3 In January 2016, Jason Henry, while driving a bus for his employer Casas Church ("the Church"), was fatally injured in an accident with another vehicle. The other motorist involved in the accident was insured under a $100,000 liability policy. The Henrys' damages far exceed that amount.

¶4 Before the accident, ACG [1] had procured two insurance policies for the Church from Brotherhood Mutual Insurance Company ("BMIC"): a business automobile policy that provided $1,000,000 in underinsured motorist (UIM) coverage and an excess liability policy with a limit of $5,000,000. The Church was the named insured on both policies.

¶5 In June 2016, BMIC informed the Henrys that a total of $6,000,000 in coverage was available under the UIM and excess liability policies. Two months later, BMIC told the Henrys that the only coverage available was the $1,000,000 UIM policy and that excess coverage was not available. The Henrys filed suit against BMIC, alleging claims for breach of contract and insurance bad faith, and seeking a declaration of $6,000,000 in coverage. The Henrys' claims in that suit were subject to arbitration, and a panel of arbitrators subsequently decided that only $1,000,000 in coverage was available to the Henrys.

¶6 As a result, the Henrys filed the present suit against ACG, alleging professional negligence and negligent misrepresentation for failure to recommend and ensure that the Church obtain uninsured motorist and UIM policies with limits in amounts matching its excess liability limit. ACG moved to dismiss the Henrys' complaint pursuant to Rule 12(b)(6), arguing that ACG "had no duty to offer additional UIM coverage" and that it owed no duty of care to the Henrys.

¶7 The trial court granted ACG's motion to dismiss after concluding that, although Jason was an "insured" under the Church's policies, he was not a "named insured" and was not a client. The court explained that under *Napier v. Bertram*, 191 Ariz. 238 (1998), and *Ferguson v. Cash, Sullivan & Cross Ins. Agency*, 171 Ariz. 381 (App. 1991), ACG owed no duty to Jason or the Henrys. The court also noted that Arizona law imposes no duty on insurance producers for an alleged failure to recommend or procure optional additional UIM coverage.

¶8 This appeal followed. We have jurisdiction over the trial court's order dismissing the Henrys' complaint pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

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[1]ACG is an insurance producer as defined by A.R.S. § 20-281(5). In 2001, the Arizona Legislature replaced the previous statutory distinction between insurance "agents" and "brokers" with a single definition of "insurance producer." 2001 Ariz. Sess. Laws, ch. 205, § 12. For readability purposes, we use both "producer" and "agent" interchangeably in this decision.

Discussion

ACG Owed No Duty to the Henrys

¶9 "Whether the defendant owes the plaintiff a duty of care is a threshold issue; absent some duty, an action for negligence cannot be maintained." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 11 (2007); *accord KB Home Tucson, Inc. v. Charter Oak Fire Ins.*, 236 Ariz. 326, ¶ 27 (App. 2014). "Duty is found in the relationship between individuals that 'imposes upon one a legal obligation for the benefit of the other . . . .'" *Sw. Auto Painting & Body Repair, Inc. v. Binsfeld*, 183 Ariz. 444, 446-47 (App. 1995) (quoting *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 355 (1985)).

¶10 On appeal, the Henrys argue the trial court "incorrectly concluded that [ACG] only owed a duty to the Casas Church to advise and procure insurance." Specifically, the Henrys assert, and ACG concedes, that they are "insureds" with coverage rights under the Church's policies. The Henrys further argue, however, that the court "erred primarily because it failed to recognize an insurance [producer]'s duty to those insured under the policy procured" because, according to the Henrys, the insurance producer owes all insureds "due care in procuring insurance." The Henrys further contend ACG owed them a duty because of the following sentence from *Darner Motor Sales, Inc. v. Universal Underwriters Ins.*, 140 Ariz. 383, 397 (1984) (quoting *Quality Furniture, Inc. v. Hay*, 61 Haw. 89, 93 (1979)): "An insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance." The Henrys also assert *Webb v. Gittlen*, 217 Ariz. 363 (2008), and *Binsfeld*, 183 Ariz. 444, have approved or affirmed "*Darner*'s mandate that the duty is owed to those who are insured."

¶11 The Henrys, however, overlook the context of the sentence upon which they rely. *Darner* involved a question of the insurance agent's duty to his client—not any "insured" under the policy. 140 Ariz. at 397. In context, the sentence above appears as follows:

> What duty does a licensed insurance agent owe to a client or customer?
>
> The duty is concisely stated by the Supreme Court of Hawaii: "An insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance."

Id. *Darner*, therefore, does not establish that insurance producers owe a duty to insureds generally, but rather provides that they owe a duty to their insured *clients*. Moreover, *Hay*, 61 Haw. at 90-92, which the *Darner* court cited, concerned the duty an insurance agent owed to its client, who was the insured that made a claim. Both *Darner* and *Hay* are distinguishable on this basis; both involved insured clients filing claims against their insurance agents, as opposed to a non-client insured filing a claim, as here.

¶12 Further, in *Binsfeld*, this court explained, "Arizona case law defines the duty a licensed insurance agent owes to a client or customer," and quoted the sentence in question from *Darner*. 183 Ariz. at 447. And, although *Binsfeld* does not define "customer," the Henrys do not argue they are ACG's customers or clients. Similarly, *Webb* clarifies that "insurance agents generally are not fiduciaries, but instead owe only a duty of 'reasonable care, skill, and diligence' *in dealing with clients*." 217 Ariz. 363, ¶ 20 (emphasis added) (quoting *Darner*, 140 Ariz. at 397). This duty owed by the producer to its clients was recently affirmed in *BNCCORP, Inc. v. HUB Int'l Ltd.*, where our supreme court explained, "[T]he default rule in Arizona is that a broker who agrees to obtain insurance for a client *owes a duty to the client* 'to exercise reasonable care, skill and diligence' in so doing." 243 Ariz. 1, ¶ 36 (App. 2017) (emphasis added) (quoting *Darner*, 140 Ariz. at 397). Therefore, under *Darner* and its progeny, ACG only owed a duty of reasonable care, skill, and diligence to the Church.

¶13 Additionally, "[t]he general rule is that a professional owes no duty to a non-client unless special circumstances require otherwise. Under special circumstances our courts have imposed liability on a professional to the extent that a foreseeable and specific third party is injured by the professional's actions." *Napier*, 191 Ariz. 238, ¶ 15. Thus, because the Henrys are not ACG's clients, there can be no duty absent a special relationship between them.

No Special Relationship Between ACG and the Henrys

¶14 The Henrys also argue that under *Darner* and *Webb*, a special relationship exists between an insurance producer and any insured. ACG counters that merely being "insureds" does not establish a special relationship between the Henrys and ACG. Specifically, ACG contends, "the Henrys attempt to spin *Darner* and its progeny by claiming that all those who are 'insured' under a policy have a special relationship with the policyholder's insurance producer." ACG also argues the Henrys take *Darner*'s use of the word "insured" out of context because *Darner* "considered only the client's claim against the producer, so no special

relationship was involved or required." ACG further asserts that *Webb* does not, as the Henrys claim, expand an insurance producer's duty to insureds based on a special relationship. We agree with ACG.

¶15 First, *Darner* does not establish a special relationship between an insurance agent and every insured under the policy. *Darner* did not involve the question of whether a special relationship existed because the lawsuit was between the agent and its client. 140 Ariz. at 385-86, 397. Second, as noted, *Webb* clarified that insurance agents owe a duty to their clients—it did not expand this duty to all potential insureds. 217 Ariz. 363, ¶ 20. Indeed, neither *Darner* nor *Webb* so much as mentioned "special relationship."

¶16 The Henrys are correct that, unlike the injured party in *Napier*, Jason was not merely a "random passenger," but rather was employed by the Church as a bus driver and therefore was "an intended beneficiary" of the Church's policies. In *Napier*, a passenger who was injured in a taxicab filed suit against the taxicab's insurance agent, and the court explained that a duty between a "professional" and a non-client exists only when a special relationship between the professional and non-client "exceed[s] mere general foreseeability." 191 Ariz. 238, ¶ 16. There, the court found no special relationship between the insurance agent and passenger, and declined to recognize an agent's duty to a non-client. *Id.* ¶¶ 20-21. Although *Napier* appears to suggest that an agent may owe a duty to a non-client if a special relationship exists and exceeds "mere general foreseeability," the Henrys have not shown a special relationship exists here, nor have they demonstrated that the foreseeability of injury to Jason was more than general.

¶17 Similarly, although the Henrys contend *Ferguson*, 171 Ariz. 381, is factually distinguishable, they do not explain how the distinction suggests there is a special relationship in this instance. In *Ferguson*, a student who qualified as an insured under his boarding school's policy filed suit against the school's insurance agent. *Id.* at 383. There, the court explained: "While recognizing that potential claimants are entities that may be considered in negotiations between an agent and the insured, we believe the mere existence of those entities does not generate a special relationship with the agent." *Id.* at 385. The court further recognized that a professional may have a duty to a third party where the professional "because of their special relationship or status [is] in a position to foresee harm and to control it." *Id.* Here, even if ACG had been aware of Jason, it would not have been in a position to foresee and control the harm that befell

him.[2] *See id.* We thus conclude there was no special relationship between ACG and Jason, and, therefore, ACG owes no duty to the Henrys.[3]

¶18 Additionally, the Henrys assert a special relationship existed between them and ACG because "[b]oth parties to the contract in this case obviously intended to benefit" the Church's employees and, more specifically, individuals like Jason who operate the Church's vehicles. The Henrys also appear to rely on principles of vicarious liability to argue Jason "[wa]s the Church when he [wa]s acting in the course and scope of his employment" and therefore was ACG's client. They, however, do not cite authority supporting these arguments; therefore, we do not address them. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (requiring appellant's brief to contain supporting legal authority for each contention); *see also Cruz v. City of Tucson*, 243 Ariz. 69, ¶ 23 (App. 2017) (argument waived where no citation to supporting legal authority).

¶19 Because the Henrys have not shown a special relationship exists, ACG owes no duty to them. *See Napier*, 191 Ariz. 238, ¶ 15.

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[2] The Henrys assert *Gipson* overruled both *Napier* and *Ferguson*. 214 Ariz. 141, ¶ 15 (foreseeability not a factor to be considered by courts when making determinations of duty). The *Gipson* court held that foreseeability "is more properly applied to the factual determinations of breach and causation than to the legal determination of duty." *Id.* ¶ 17. But we need not determine the effect of *Gipson*, which was a wrongful death action arising from illegally providing narcotics to an acquaintance who in turn gave them to the decedent, *id.* ¶¶ 3-7, on the case at hand. ACG's negligence, if any, was not a proximate cause of Jason's injuries. *See Ferguson*, 171 Ariz. at 386 ("Ferguson's physical injuries would have occurred regardless of the amount of insurance coverage Wick obtained from CSC."); *cf. Gipson*, 214 Ariz. 141, n.1 (summary judgment appropriate where no reasonable juror could find defendant caused damages).

[3] The *Ferguson* court also concluded "that an agent owes no duty to a third party to recommend insurance to the insured in a particular amount where no insurance is required by law." 171 Ariz. at 386. Therefore, even if Jason and ACG had a special relationship, under *Ferguson*, the Henrys' claim that ACG was negligent in failing to recommend and ensure the Church obtain UIM coverage that, at a minimum, matched its excess liability coverage fails as a matter of law because UIM coverage is not required by law. *See* A.R.S. § 20-259.01(B). Further, because the Henrys did not allege the law requires UIM coverage to match excess coverage, dismissal was appropriate under Rule 12(b)(6).

Therefore, the Henrys' action for negligence cannot be maintained, *see Gipson*, 214 Ariz. 141, ¶ 11, and we must affirm, *see Brittner*, 246 Ariz. 294, ¶ 4.

Attorney Fees

¶20 Neither party requests attorney fees on appeal. Therefore, we award none. *See* Ariz. R. Civ. App. P. 21(a) ("A party that intends to claim attorneys' fees incurred on appeal . . . must give notice of such intention at the time and in the manner set forth in this Rule."). ACG is entitled to recover their costs upon compliance with Rule 21. *See* A.R.S. § 12-341 (successful party to civil action shall recover costs).

Disposition

¶21 For the foregoing reasons, we affirm.