

STATE OF MICHIGAN
COURT OF APPEALS

LOCAL 3126 of the NATIONAL ASSOCIATION
OF LETTER CARRIERS OF THE UNITED
STATES OF AMERICA and PAUL ROZNOWSKI,
Individually and as an agent/servant/employee of the
NATIONAL ASSOCIATION OF LETTER
CARRIERS OF THE UNITED STATES,

Plaintiffs-Appellants,

v

JUDGE-MCKEE INSURANCE AGENCY, INC.,

Defendant-Appellee.

UNPUBLISHED
April 3, 1998

No. 198934
Oakland Circuit Court
LC No. 95-507194-CK

Before: Gribbs, P.J. and Murphy and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting defendant's motions for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

This action arises out of the November 1991 shooting at the Royal Oak, Michigan Post Office. Two of the surviving victims sued plaintiffs for negligence in performance of their duties. Plaintiffs contacted defendant, who had sold them various policies of insurance issued by TIG Insurance Company. Although TIG hired legal counsel to represent plaintiffs, it also tendered a "reservation of rights" letter stating that it would not be obligated to pay any judgment and that plaintiffs may have to pay for the service of legal counsel and/or reimburse it for such payments. Plaintiffs then brought suit against defendant and TIG. Subsequently, defendant and TIG filed motions for summary disposition, which the trial court granted. TIG is no longer a party to this appeal.

We review the trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc.*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in

favor of the party opposing the motion. The court's task is to review the record evidence and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

Plaintiffs first argue that they have raised a genuine issue of material fact to show fraud or misrepresentation based upon their treasurer's deposition testimony. We agree.

To show fraud or misrepresentation, plaintiffs must prove: (1) defendant made a misrepresentation; (2) defendant knew that it was making a misrepresentation or made it in a reckless manner; (3) such misrepresentation was material; (4) defendant made the misrepresentation with the intent that plaintiff would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage. *Christensen v Michigan State Youth Soccer Ass'n, Inc*, 218 Mich App 37, 44; 553 NW2d 638 (1996). Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. The burden of proof rests with plaintiffs. Fraud will not be presumed, but must be proven by clear, satisfactory and convincing evidence. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976) (citations omitted).

Here, the trial court ruled that there was no evidence of misrepresentation. However, the record contains deposition testimony that defendant's agent told plaintiff's treasurer that the agent knew what plaintiffs needed and advised him that union employees would be covered "in transit. . . [i]f we were representing someone...if we had to go on an investigation, if [we] were at the office, if we were going to a meeting." The treasurer testified that the agent "said it was pretty well—pretty broad coverage. . . The only thing I remember him saying, that we had a million dollar umbrella policy would cover us for most everything." In addition, plaintiff's expert alleged that an April 1991 letter from plaintiff to defendant should have alerted defendant that plaintiff did not correctly understand the limitations of its coverage. The general rule relied upon by the trial court, that an insured is held to the knowledge of the terms and conditions contained within the insurance policy even though he has not read it, *Farm Bureau Mutual Ins Co of Michigan v Hoag*, 136 Mich App 326, 332; 356 NW2d 630 (1984), goes to the question of coverage rather than of misrepresentation. In this case plaintiff presented evidence which, if believed, is sufficient to support a finding that defendant misrepresented the scope of plaintiff's insurance coverage. Summary disposition was improperly granted.

We need not address plaintiff's remaining issues in light of our decision.

Reversed. We do not retain jurisdiction.

/s/ Roman S. Gribbs

I concur in result only.

/s/ William B. Murphy