STATE OF MICHIGAN

COURT OF APPEALS

SCARSELLA TILE & MARBLE, INC.,

Plaintiff-Appellant,

v

DEL SANDERS and HITCHCOCK INSURANCE AGENCY, INC.,

Defendants-Appellees.

UNPUBLISHED
December 19, 2000

No. 213122
Oakland Circuit Court
LC No. 97-549772-NO

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the trial court granting summary disposition to defendants Franklin Delano Sanders ("Sanders") and Hitchcock Insurance Agency, Inc. ("Hitchcock") in this negligence action.[1] We affirm.

In 1990, plaintiff was a small business with only one employee when it was referred to Hitchcock for the purpose of obtaining worker's compensation insurance. Sanders, an agent employed by Hitchcock, was unable to procure insurance for plaintiff in the "standard" or "voluntary" market and instead placed coverage for plaintiff through the Michigan Worker's Compensation Placement Facility ("the Facility"), a statutorily created entity comprised of all insurers authorized to write worker's compensation insurance in Michigan. MCL 500.2301; MSA 24.12301; see *Michigan Ass'n of Ins Agents v Michigan Worker's Compensation Placement Facility*, 220 Mich App 128, 129; 559 NW2d 52 (1996). The purpose of the Facility is to (1) provide worker's compensation insurance to any person who is unable to procure insurance through ordinary methods, and (2) to preserve to the public the benefits of price competition by encouraging maximum use of the normal private insurance system. MCL 500.2301; MSA 24.12301. An insurance agency that is unable to find a private source of worker's compensation insurance for a client may assist the client in applying to the Facility for insurance; the Facility will then assign the client a carrier, and the agent will receive a commission from the Facility. *Michigan Ass'n of Ins Agents, supra* at 130; see also MCR 500.2322; MSA 24.12322.

Plaintiff continued to annually renew its worker's compensation policy through the Facility until 1996 when it acquired another business, Midwest Tile. In 1997, plaintiff filed the

instant lawsuit, alleging that from December 18, 1993, to March 13, 1996, defendants charged plaintiff $28,662.75 for worker's compensation insurance, and that "the rate which the Plaintiff was charged was grossly in excess of what the contractual and legal obligation was, such that the Plaintiff was over charged approximately $10,959.35." The trial court granted defendants' motion for summary disposition, holding that defendants had no duty to seek lower-priced insurance for plaintiff.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Graham v Ford*, 237 Mich App 670, 672; 604 NW2d 713 (1999). When reviewing a motion for summary disposition based on MCR 2.116(C)(10),[2] this Court considers the pleadings, affidavits, depositions, admissions and other documents. *Spiek*, *supra* at 337. The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999); *Graham*, *supra* at 672. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Smith*, *supra* at 455; *Graham*, *supra* at 672. Summary disposition is appropriate where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith*, *supra* at 455; *Graham*, *supra* at 673.

The elements of an action for negligence include the existence of a duty, a breach of the standard of care, causation in fact, legal or proximate causation, and damages. *Theisen v Knake*, 236 Mich App 249, 257; 599 NW2d 777 (1999). "A duty, in negligence cases, may be defined as 'an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 155; 555 NW2d 738 (1996), aff'd 457 Mich 871; 586 NW2d 85 (1998), quoting *Antcliff v State Employees Credit Union*, 414 Mich 624, 630-631; 327 NW2d 814 (1982), quoting Prosser, Torts (4th ed), § 53, p 324. The standard of conduct to which an actor must conform to avoid being negligent is that of a reasonable person under like circumstances. *Howe*, *supra* at 155. If an actor's standard of care does not include certain conduct, then the actor is under no duty with respect to that conduct. *Id*. Whether a duty exists in the first instance is a question of law that is solely for the court to decide. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999); *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

After reviewing the record, we conclude that summary disposition was properly granted because plaintiff has failed to establish that defendants owed it any legal duty. Plaintiff points to no legal authority supporting its contention that Sanders, as Hitchcock's agent, owed it a duty to obtain insurance at the lowest possible rate, or to continually reassess plaintiff's status for the purpose of determining whether coverage could be obtained outside the Facility. To the contrary, an insurance agent has a limited role which does not include advising the insured:

> . . . [U]nder the common law, an insurance agent . . . *owes no duty to advise a potential insured about any coverage.* Such an agent's job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered. [*Harts*, *supra* at 8 (footnote omitted).]

As our Supreme Court explained in *Harts*, the Michigan Legislature has "long distinguished between insurance agents and insurance counselors, with agents being essentially order takers while it is insurance counselors who function primarily as advisors." *Harts*, *supra* at 8-9 (footnotes omitted). Further, MCL 500.1232; MSA 24.11232 provides in pertinent part:

> A person shall not . . . provide advice, counsel, or opinion with respect to benefits promised, coverage afforded, terms, value, effect, advantages, or disadvantages of a policy of insurance . . . unless he or she is licensed as an insurance counselor. . . . This section does not prohibit the customary advice offered by a licensed insurance agent . . . .

Under these principles, "an insurance agent may, but is not required or under any duty to, give 'customary advice.'" *Harts, supra* at 9 n 10.

In support of its position that defendants owed it a duty to procure insurance at a more competitive rate, plaintiff relies on a page from a manual issued as a guide to insurance agents by the Facility. The manual instructs the insurance agent to first attempt to place coverage through a voluntary carrier and, failing that, to continue trying to place coverage in the voluntary market even after placing coverage through the Facility. Plaintiff does not explain how this document, created by a third party for use by insurance agents, imposes a duty on defendants owed to plaintiff; rather, any duty imposed as a consequence of this document would appear to be owed to the Facility, not to individual insureds.

Plaintiff additionally contends, for the first time on appeal, that a "special relationship" existed between it and defendants, giving rise to a duty on behalf of defendants to seek insurance for plaintiff at a lower rate than that offered through the Facility. Because the issue whether a special relationship existed between the parties was not raised before and addressed by the trial court, it is not properly before this Court. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 632 n 3; 601 NW2d 160 (1999); *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996). Moreover, plaintiff has not cited any factual support for its contention that a special relationship existed between the parties. A party may not leave it to this Court to search for a factual basis to sustain or reject its position. *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Accordingly, we decline to address this issue.

Therefore, because plaintiff has failed to establish the duty element of its negligence claim against defendants, summary disposition was properly granted. See *Harts*, *supra* at 12.[3]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

[1] The insurer, defendant Citizens Insurance Company of America was dismissed by stipulation of the parties and is not a party to this appeal.

[2] Defendant's motion for summary disposition does not identify under which subsection the motion was brought. At the hearing on defendants' motion, the trial court stated that "it's a (C)(8) motion, not necessarily a (C)(10)." However, when deciding a motion brought under MCR 2.116(C)(8), a court may consider only the pleadings. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Here, defendant submitted documentary evidence to the trial court in its reply to plaintiff's answer to the motion for summary disposition, and the trial court indicated that it reviewed all the documents filed in connection with the motion. Therefore, the trial court could not have properly granted summary disposition under MCR 2.116(C)(8). See *Royce v Citizens Ins Co*, 219 Mich App 537, 540-541; 557 NW2d 144 (1996). Accordingly, we will consider the motion as brought pursuant to MCR 2.116(C)(10).

[3] Because plaintiff cannot establish liability against Sanders, the agent, it cannot establish vicarious liability against Hitchcock, the principal. See *Harts*, *supra* at 12.