STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN TOOLING ASSOCIATION WORKERS COMPENSATION FUND, as Subrogee of DISTEL TOOL & MACHINE COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v

FARMINGTON INSURANCE AGENCY, LLC,

Defendant/Third-Party Plaintiff-Appellant/Cross-Appellee,

and

MACHINERY MAINTENANCE SPECIALISTS, INC.,

Defendant,

and

EMPLOYERS INSURANCE OF WAUSAU and WAUSAU INSURANCE COMPANIES,

Third-Party Defendants-Appellees.

UNPUBLISHED
December 7, 2004

No. 249013
Oakland Circuit Court
LC No. 2001-030684-CK

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant Farmington Insurance Agency ("Farmington") appeals as of right from an order holding it liable for breaching a standard of care owed to a party who relied on an erroneous certificate of insurance. Plaintiff Michigan Tooling Association Workers Compensation Fund ("Michigan Tooling") cross-appeals from the trial court's decision to allow Farmington to amend its pleadings near the end of the trial. We affirm.

On March 6, 1998, Farmington issued a certificate of insurance certifying that Michigan Maintenance Specialists, Inc. (MMS) was covered by workers compensation insurance provided by Wausau.[1] However, Wausau had cancelled that coverage on February 20. Although the named "certificate holder" on the face of the certificate was David Friedman, Inc., Distel Tool & Machine Company ("Distel") obtained a copy of the certificate and, in reliance on its accuracy, allowed an MMS employee to perform work on Distel's premises. The employee was injured, and Michigan Tooling, on behalf of Distel, paid the employee's worker's compensation award.

I

Farmington argues on appeal that it owed no duty to Distel. We disagree. This Court reviews de novo questions of law and reviews for clear error a trial court's findings of fact. *Meredith Corp v Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003). Whether a duty exists is a question of law. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999). However, whether circumstances exist giving rise to that duty is a question of fact. *Howe v Detroit Free Press*, 219 Mich App 150, 156; 555 NW2d 738 (1996).

As the trial court correctly recognized, the duty issue hinges on foreseeability. Although the courts consider a number of factors to determine whether a legal duty exists, "the lowest threshold requirement [is] that the harm incurred was foreseeable." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86-87; 679 NW2d 689 (2004).

The trial court's written opinion found that:

> Here, the risk of foreseeability of harm to employers such as Distel would be one of reasonable certainty. The Court finds it would be foreseeable that a party such as Distel would in fact rely on the Certificate of Insurance issued to Arnold Primak, [the owner of MMS] even though they were not the Certificate holder. It is not unreasonable to assume that parties other than the Certificate holder Freedman would accept the Certificate of Insurance as evidence that insurance was, in fact, in effect for MMS; thus, allowing MSS's employees to enter their premises for work purposes. It is not unreasonable to then expect that thereafter an injury could occur on the premises of a company such as Distel.
>
> Moreover, the Court finds there was, in fact, a relationship between the parties, although not a direct one. Their relationship exists through the Michigan Worker's Compensation Act. Plaintiff was considered a statutory employer for purposes of the Act, and Defendant FIA [Farmington] was an agency providing insurance to employers through the Worker's Compensation Placement Facility. Plaintiffs were in a class of parties who could reasonably rely on Certificates of Insurance issued through agencies such as FIA. As a direct result of Defendant's

[1] We use the term "Wausau" to refer to Employees Insurance of Wausau and Wausau Insurance Companies, which, although named as separate parties, are apparently in essence a single party.

actions, Plaintiff suffered damages for which it would not have otherwise been responsible.

Farmington apparently did not deal with Distel and was not aware Distel existed until after the injury, so Farmington argues that Distel was unforeseeable. However, a party who renders a service to another "which he should recognize as necessary for the protection of a third person or his things" may be liable for harm that befalls the third person if the party failed to exercise reasonable care in the execution of "a duty owed by the other to the third person." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 464; 683 NW2d 587 (2004). Farmington contended throughout the trial that only a named certificate holder was entitled to rely on a certificate of insurance, but the evidence showed that the only benefit to being a certificate holder was a right to be provided notice of subsequent cancellations. Otherwise, the informational content of a certificate of insurance is generally to be relied on as accurate. Distal was clearly in a class of foreseeable parties who might rely on the certificate of insurance issued by Farmington and a party to whom Farmington therefore owed a duty of care. See *Williams v Polgar*, 391 Mich 6, 18; 215 NW2d 149 (1974). Distal was entitled to rely on the certificate as accurate.

Farmington argues that this Court rejected such a broad imposition of duty on professionals to third parties who might rely on their work in *Stockler v Rose*, 174 Mich App 14, 35-37; 436 NW2d 70 (1989). However, this Court actually found it unnecessary to determine whether a broad test should apply to accountants, and took a more restrictive approach on the basis of the specific facts of the case, where the work in question contained the *client's* representations, and the accountant in question had limited control over the contents. *Id*. Thus, *Stockler* does not affect the analysis in the present case.

However, Farmington argues that this Court should not impose a duty for policy reasons.[2] Farmington argues that even the named certificate holder should not be able to rely on the certificate as accurate on any date other than the date it was issued. The face of the certificate implies the possibility that the insured's policies might be cancelled at any time and that the certificate holder might not be informed. However, this Court in *Williams* noted that liability to third parties for negligent misrepresentation did not convert a title abstracter into a title insurer. *Williams*, *supra*. Liability is not imposed solely on the basis of the information being incorrect, but whether Farmington failed "to perform in a diligent and reasonably skillful workmanlike manner." *Id.* at 21. The only question on appeal is whether Farmington owed Distel a duty – but the existence of a duty is only one element of negligence. The existence of a duty will not necessarily result in the unlimited liability Farmington alleges.

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[2] The trial court took a different view, finding that, "Furthermore, the Court believes that it would serve public policy in preventing future harm if Defendant FIA bears liability in this matter since they are the party that disregarded the rules of the Worker's Compensation Placement Facility. Liability in this matter may prevent a future situation from occurring by encouraging FIA and other agencies to follow the placement rules by contacting the servicing insurance company in the future before issuing certificates of insurance."

In any event, the evidence establishes that Farmington is only obligated to exercise care to ensure that the information in a certificate of insurance is accurate when it is issued: therefore, logically, Farmington is *not* obligated to *guarantee* the accuracy of the information, nor is Farmington obligated to inform any non-named parties of subsequent cancellations. Because it was foreseeable that a class of plaintiffs including Distel might rely on the accuracy of the information in Farmington's certificate of insurance, Farmington owed Distel a duty to prepare the certificate of insurance in a "diligent and reasonably skillful workmanlike manner." *Williams, supra*. Because Farmington only argues that it did not owe Distel a duty, we have no occasion to consider whether, as the trial court found, Farmington actually breached that duty.[3]

II

Farmington also argues that the trial court should have apportioned comparative fault among the entities involved in this action. We disagree. Interpretation and application of the comparative fault statutes are questions of law. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 322; 661 NW2d 248 (2003). Notwithstanding "but-for" causation, proximate cause will bar a finding of comparative fault unless the defendant proves "that, in light of the foreseeability of the consequences of the [party's] at-fault conduct, the [party] should be held legally responsible for such consequences, i.e., it is socially and economically desirable to hold the [party] liable." *Lamp v Reynolds*, 249 Mich App 591, 599-600; 645 NW2d 311 (2002).

Farmington argues that Distel was at fault for relying on the certificate of insurance. However, the evidence showed that the contents of a certificate of insurance may generally be relied on to be accurate. If a party is entitled to rely on the accuracy of the certificate's contents, the party should not logically be expected to predict the fact that it was erroneous. Moreover, an insurance agent is in a better position to ensure the accuracy of the certificate's contents, and it would be absurd to require a party entitled to rely on those contents to verify them. Therefore, it is neither logical nor economical to hold liable a party who relies on the contents of the certificate, absent a showing of notification of subsequent cancellation. Because the policy was previously, not subsequently, cancelled, that is not an issue here.

Farmington also argues that MMS was at fault for failing to indemnify Distel and for incurring legal fees by arguing in the underlying workers compensation action that the employee was an independent contractor. There was evidence that, in one attorney's opinion, MMS's position could not have been made in good faith. However, there was also evidence that the owner of MMS believed the employee was, in fact, an independent contractor. In any event, MMS was apparently never sanctioned for pursuing a frivolous or otherwise inappropriate legal position under MCR 2.114. Holding MMS comparatively at fault for taking an ultimately unsuccessful position in another suit is not "socially and economically desirable." *Lamp, supra*.

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[3] The trial court's opinion found breach of Farmington's duty to Distal: "The Court finds that FIA breached its duty to Plaintiff by issuing a Certificate of Insurance when, in fact, there was no coverage in effect. Defendants were negligent in that they failed to follow the rules of the Worker's Compensation Placement Facility, which required FIA to receive authority from the insurer, Wausau, before issuing a Certificate of Deposit."

Farmington argues that it had implied authority from Wausau to issue certificates of insurance. Presuming that to be true, however, authority to issue a certificate is not synonymous with having no duty to exercise care in doing so. Farmington argues that Wausau is comparatively at fault for failing to notify Farmington of the policy cancellation. Wausau apparently sent Farmington notification of the cancellation pursuant to its internal policies, raising the presumption that it was received. *Good v Detroit Automobile Inter-Insurance Exchange*, 67 Mich App 270, 274-276; 241 NW2d 71 (1976). Farmington does not argue that Wausau was at fault for failing to take appropriate steps at that time. Instead, Farmington argues that Wausau should have informed Farmington of the cancellation after Farmington issued the certificate of insurance because Farmington sent a copy of the certificate to Wausau, also pursuant to its internal policies. *Id*. However, by that time, notification of Farmington would have been futile: Farmington could not have notified Distel, and the evidence shows that MMS was "confused" about insurance, so Distel would likely not have received notification from any of the parties. Therefore, Wausau did not contribute to the injury.

III

Finally, Michigan Tooling argues that the trial court should not have allowed Farmington to modify its pleadings, pursuant to MCR 2.118(C)(2). However, we need not reach this issue because any error with regard to the amendment is immaterial in light of our resolution of the issues raised by Farmington on appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff