STATE OF MICHIGAN

COURT OF APPEALS

STANLEY NOKIELSKI and BETHANY NOKIELSKI, Plaintiffs, v JOHN COLTON and ESTHER POLLY HOY-COLTON, Defendants/Third Party Plaintiffs-Appellants, v A.S. ARBURY & SONS, INC., RONALD MILLER, and CINCINNATI INSURANCE COMPANY, Third Party Defendants-Appellees.	UNPUBLISHED January 4, 2011 No. 294143 Midland Circuit Court LC No. 08-3177-NI-L

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

In this insurance coverage case, defendants/third-party plaintiffs John and Esther Colton (the Coltons) appeal as of right from a grant of third-party defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

This case arises from an automobile/pedestrian accident. Defendant John Colton was driving through a parking lot when he struck and severely injured Stanley Nokielski with his car. Nokielski filed suit against the Coltons. The Coltons maintained automobile insurance through USAA[1] Insurance Company[2] with a $100,000 per person, $200,000 per accident coverage limit.

[1] United Services Automobile Association

[2] USAA is not a party to this appeal.

The Coltons also maintained an umbrella insurance policy underwritten by third-party defendant Cincinnati Insurance,[3] which was purchased through third-party defendant/appellee A.S. Arbury and Sons, Inc. (Arbury). This umbrella policy had a $1,000,000 limit, but according to its terms, the Coltons were required to maintain $500,000 in underlying coverage. As a result, there was a $400,000 gap in coverage between the USAA policy and the Cincinnati umbrella policy.

In her deposition, Mrs. Colton testified that after her first husband died in 1996, she assumed responsibility for insurance matters that her husband had previously handled. After his death, she simply paid the bills and never read the policies or called the Arbury office. Mrs. Colton stated that she had no recollection of discussing her umbrella policy with anyone at Arbury, nor did she even know she had an umbrella policy until after the accident.

In 1999, Mrs. Colton married Mr. Colton and added him to her policy. In November 2002, she called to cancel all of her automobile coverage. The Coltons then purchased automobile coverage from USAA, which is where Mr. Colton had previously held his insurance policies. Arbury's records indicate that someone at the agency sent Mrs. Colton a letter on August 31, 2004 requesting information concerning the level of coverage provided by her new automobile policy with USAA. In June of 2005 Arbury sent her another letter asking for her insurance information with USAA and a reminder was sent on June 22, 2005 to furnish that information. Neither Mr. nor Mrs. Colton responded to these letters nor could they recall ever having received those letters.

Tracy Willey, a customer service representative at Arbury, testified that she spoke with Mr. Colton by phone on August 31, 2004 and explained to him that Cincinnati Insurance Company, as the umbrella carrier, needed to know the liability coverage of the USAA policy. Mr. Colton refused to give her the information, stating "if Cincinnati wants that, they can call me direct." He also told Willey, "I got a better price over there [USAA], that's the only thing you need to know." Willey then advised Cincinnati Insurance Company of Mr. Colton's refusal to tell her this information.

Mr. Colton testified that he too first became aware of the umbrella policy after the accident. He stated that he had no recollection of anyone from Arbury ever contacting him about his USAA policy.

The Coltons filed a third-party suit against Arbury alleging negligence arising out of their representation of the Coltons in securing the umbrella policy. Arbury filed a motion for summary disposition, which was granted by the trial court.

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;

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[3] Cincinnati is not a party to this appeal.

582 NW2d 776 (1998); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 472; 776 NW2d 398 (2009).

The trial court did not err by granting Arbury's motion for summary disposition.

> Summary disposition of all or part of a claim or defense may be granted when
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> [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). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *Shepherd Montessori Center Milan v Ann Arbor Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003), lv den 471 Mich 877 (2004).

The moving party must specifically identify the matters that have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, MCR 2.116(G)(4).

In a negligence action, a plaintiff must show that the defendant owed the plaintiff a duty, that the defendant breached that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Whether a duty exists is a question of law that is solely for the court to decide." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). *Pressey Enterprises, Inc v Barnett-France Ins Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006).

Here, the trial court applied the standard in *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999), and ruled that plaintiffs had failed to produce evidence demonstrating the applicability of any exception to the general rule that insurance agents do not owe an affirmative duty to advise or counsel an insured about the adequacy or availability of coverage.

The Coltons argue that *Harts*, 461 Mich 1, is inapplicable because it only applies to cases involving captive insurance agents, and this case involves independent agents.[4] In *Harts*, the

[4] Insurance agents who work exclusively for one insurance company are known as "captive agents." (www.bls.gov/oco/ocos118.htm, United States Department of Labor, Bureau of Labor

plaintiffs owned an automobile that was covered by a no-fault insurance policy purchased from the defendant insurer through one of its agents. *Id.* 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.]

Although the defendant in *Harts* was a captive insurance agency, in our opinion, there is no reason that would preclude the *Harts* test from applying to both types of agents. In fact, the *Harts* Court stated:

> We granted leave in this case to determine whether a licensed insurance agent owes an affirmative duty to advise or counsel an insured about the adequacy or availability of coverage. We hold that, except under very limited circumstances not present in this case, an insurance agent owes no such duty to the insured. [*Harts,* 461 Mich at 2].

The *Harts* Court did not specifically indicate that it only intended to address captive agents and not independent agents. The Court made the following public policy argument, which we conclude extends to both captive and independent insurance agents:

> . . . [P]laintiffs encourage this Court to eliminate the general no-duty-to-advise rule and replace it with a rule that would impose a duty to advise in cases such as the one at bar, which, to be perfectly clear, would apparently be all cases concerning the purchase of insurance. However, we decline this invitation in light of the public policy established by the Legislature's active role in this area and the previously noted compelling reasons that militate against the imposition of such a duty. Rather, we agree with the Wisconsin Supreme Court in *Nelson*, *supra* at 683, 456 NW2d 343, which, when faced with such an issue, stated that "if such a duty is to be imposed on the [insurance agent], it should be imposed as a statutory one and not an implied judicial one." See also, generally, *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). [*Harts*, 461 Mich at 11-12].

Statistics website, accessed December 1, 2010). Arbury purchased its clients' insurance from multiple insurance companies, so would be considered an independent agency.

The Coltons argue that it does not make sense to apply the limited duty analysis from *Harts*, to a situation such as this, where the agent is operating as "more than an order taker." The *Harts* Court noted that the Legislature has "distinguished between insurance agents and insurance counselors, with agents being essentially order takers while it is insurance counselors who function primarily as advisors" (footnotes omitted) *Harts*, 461 Mich at 9. Just because an agent is independent, does not make him an insurance counselor, with a duty to advise. Therefore, the *Harts* framework should be applied to the issue of whether Arbury had a duty, or not.

When that framework is applied, we find that the trial court properly concluded that the Coltons failed to establish that Arbury had a duty to inform them that there was a $400,000 gap in their coverage. Regarding an insurance agent's role, 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)." Here, both of the Coltons testified that they never read their policy or even knew of its existence until after the accident.

A duty is created only when, "an event occurs that alters the nature of the relationship between the agent and the insured." *Harts*, 461 Mich at 11. A duty may arise when a special relationship exists between an insurance company or its agent and the policy holder. *Bruner v League General Ins*, 164 Mich App 28, 32; 416 NW2d 318 (1987). There also needs to be some type of interaction on "a question or coverage" with the insured relying on the expertise of the insurance agent to the insured's detriment. *Harts*, 461 Mich at 10-11.

The Coltons' testimony indicates that Arbury made no misrepresentation, there were no ambiguous requests of Arbury from the Coltons, Arbury did not give the Coltons any inaccurate advice; and, Arbury did not make any express agreement or promise to the Coltons. There could not have been any detrimental reliance on the part of the Coltons, because they claim that they did not even know about the umbrella policy until after the accident. Without this requisite "special relationship" as established by *Harts*, the Coltons have failed to demonstrate that Arbury owed them a duty, and, without a duty, there can be no negligence. Therefore, summary disposition was proper.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens