STATE OF MICHIGAN

COURT OF APPEALS

TAMMY MAYNARD, Individually and as Personal Representative of the ESTATE OF DERVIN L. MAYNARD,

Plaintiff-Appellant,

v

SCOTT MURRAY,

Defendant,

and

TRANSAMERICA LIFE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 21, 2021

No. 353850
Saginaw Circuit Court
LC No. 18-036029-NZ

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

The issue presented is whether defendant Scott Murray, an insurance agent employed by defendant Transamerica Life Insurance Company, assumed a duty to advise Dervin Maynard regarding the impending lapse of Dervin's life insurance policy—a policy that Murray had sold. Viewed in the light most favorable to Dervin's estate, the evidence supports that Dervin repeatedly sought Murray's guidance regarding continued coverage and repeatedly received inaccurate advice. Murray counseled Dervin regarding Dervin's existing policy and promised that coverage under a new policy would be forthcoming. These interactions created a "special relationship," bringing this case squarely within the duty framework described in *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999). We vacate the summary dismissal of the estate's lawsuit and remand for continued proceedings consistent with this opinion.

I. BACKGROUND

Dervin Maynard (also known as "Jake") maintained a life insurance policy since at least 2003. In 2016, Dervin allowed his policy to lapse and purchased a new $250,000 policy through Western & Southern Life Insurance Company upon the advice of Scott Murray, then an independent insurance agent. Murray took a job with Transamerica shortly thereafter. In March 2017, Dervin applied for life insurance coverage with Transamerica, again upon Murray's advice. Dervin's Western & Southern policy was in effect when Dervin applied for a replacement policy with Transamerica, but was scheduled to lapse on June 15, 2017, unless another premium payment was made. Murray was aware of this fact as he had sold Dervin the Western & Southern policy, and Dervin reminded him in text messages that the policy was expiring.

Murray helped Dervin fill out his application for the Transamerica policy. Dervin passed away in November 2017 and cannot testify regarding his conversations with Murray. But it is clear from text messages sent in June and July 2017, several months after completing his Transamerica application and around the time his Western & Southern policy lapsed, that Dervin repeatedly shared with Murray his concerns that the Western & Southern policy would lapse before the new Transamerica policy would be issued.

On June 6, 2017, Dervin texted Murray at 11:32 a.m. to remind him that the Western & Southern policy was about to lapse, entreating: "Please help."

> *Dervin*. Dude it's Jake can you plz call me? My old policy lapses next Thursday . . . . any word on new policy labs yet? I've tried to check online & it just won't let me get through man Please help
>
> *Murray*. Give me a few minutes. The lady who handles that for me is out to lunch. I will call you this afternoon.
>
> *Dervin*. Thank you sir . . .
>
> *Murray*. Yes sir!

At 4:52 p.m. that same day, Dervin again texted Murray. This time, he received reassurance that the policy was on the way:

> *Dervin*. Any word sir?
>
> *Murray*. We *are good*. I just have to swing by and get a couple signatures.
>
> *Dervin*. Awesome!!! *If I can afford it I may just pay a whole year in advance Thanx man*[.]
>
> *Murray*. Perfect. I'll swing by with those forms one day this week.
>
> *Dervin*. Cool . . . any recollection what that premium will be? I'd like to be prepared for you[.]

Murray. *I'll check before I come up to visit*.

Dervin. Thanx bud[.] [Emphasis added.]

The day before the Western & Southern policy was set to lapse, June 14, 2017, Dervin again texted Murray:

Dervin. Hey stud wassup? It's Jake[.] I'd like to have new policy in place b4 old one lapses[.] Hala [a co-employee of Dervin's] was curious as well about hers too[.]

Dervin. Hello . . . .

Murray. I'll know more this afternoon.

Dervin. Thanx man[.]

Murray. You the man!!

And on the day the Western & Southern policy lapsed, Dervin and Murray communicated as follows:

Dervin. You get my fax man?

Murray. Got it!

Dervin. Cool[.]

Murray. Have a great weekend!

Dervin. Thanx man[,] my old policy lapses today . . . . [W]hen will I be insured under new one? How much per mo? Maybe I can pay a year[.]

Murray. *It looks like it will be final in a day or two. The annual premium should be about $1300.*

Dervin. Cool I can do that bud . . . . if I croak over the weekend my wife will be in touch

Murray. Let's hope that doesn't happen!!

Dervin. Right . . . have a good one[.]

Murray. You too!

Dervin received official notice that the Western & Southern policy lapsed on June 20 and he messaged Murray twice with no response:

Dervin. Hey stud I got my lapse papers today . . . are we ever gonna get the new policy in place?

Dervin. Pretty damn soon I hope[.]

The following day, Dervin pushed:

Dervin. Hello . . . .

Murray. I'm working on it.

Dervin held out hope that the Transamerica policy would come through. On June 27, he messaged Murray:

Dervin. Dude . . . . am I ever getting my life insurance back in place or what bud? Western Southern life keeps calling man[.] Is there an issue I'm not aware of sir?

Murray. We are just waiting on a statement from your physician. *Everything is good*. Doctors sometimes take longer than they should to reply to these things.

Dervin. Should I motivate him?

Murray. You can try. We have also tried.

Dervin notified Murray the following day that he had received further bad news:

Dervin. They're declining my app due to lack of documentation[.] Fuckin sucks man. I've got a call in to my Dr. . . . will it matter if he fills it out now? My other policy has lapsed now too[.]

Murray. *As soon as we get the statement from your doctor the [sic] will open it back up. No worries.*

Dervin. Okay I'll expedite it[.]

Murray. Thanks! [Emphasis added.]

Dervin continued to question Murray. On July 10, Dervin reminded Murray that his Western & Southern policy had lapsed and asked if there had been "[a]ny luck moving forward." Murray ignored this message. The next day, Murray responded that he would "have more information today," when Dervin queried, am I "just outta luck with y'all or what man?" Murray again ignored messages on July 19 and 20 asking whether things were "moving forward" with Dervin's "situation." Murray again ignored a message from Dervin on July 24 asking: "Is this ever gonna happen or have I gotta try somewhere else? This whole process has kinda sucked & now my other policy has lapsed & I'm without coverage[.] . . . C'mon man . . . ."

Transamerica formally denied Dervin's life insurance application on July 27, 2017, based on his history of smoking and diagnosis of chronic obstructive pulmonary disorder (COPD). Dervin's wife and the personal representative of his estate, Tammy Maynard, later confirmed that Dervin also suffered from emphysema from smoking.

Dervin's estate filed suit in April 2018. Relative to the current appeal, Tammy asserted that Murray and Transamerica owed Dervin a duty of care to provide accurate advice and to advise Dervin not to allow his Western & Southern policy to lapse until the Transamerica policy was in place. Transamerica, as Murray's employer, the estate argued, was vicariously liable for Murray's negligence.

The circuit court ultimately dismissed the estate's claims pursuant to MCR 2.116(C)(10). The court noted that Murray was an exclusive agent of Transamerica. Absent evidence of a special relationship between Murray and Dervin, the court concluded, Murray's duty was to the insurance company alone, and not to the client.

The estate now appeals.

II. ANALYSIS

We review de novo a circuit court's resolution of a summary disposition motion. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

> A motion under MCR 2.116(C)(10) . . . tests the *factual sufficiency* of a claim. When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*El-Khalil*, 504 Mich at 160 (quotation marks and citations omitted).]

The central issue is whether Murray, and through him Transamerica, owed Dervin a duty arising from the existence of a special relationship. "Whether [such] a duty exists is a question of law that is solely for the court to decide." *Harts*, 461 Mich at 6. *Harts* controls the estate's ability to prosecute its negligence claims. *Harts* establishes relatively clear guideposts for determining when an insurance agent is potentially liable under a negligence theory for actions or inactions that go beyond merely "taking orders" for insurance.

A. *HARTS*

In *Harts*, our Supreme Court considered whether an insurance agent owes a duty to advise an insured regarding the adequacy of coverage. "[U]nder the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage" because the agent's job consists merely of "present[ing] the product of his principal and tak[ing] such orders as can be secured from those who want to purchase the coverage offered." *Id.* at 8. Notwithstanding the general no-duty-to-advise rule, the Supreme Court concluded in *Harts* that "when an event occurs that alters the nature of the relationship between the agent and the

insured," a "special relationship" may form, creating a duty on the part of the agent. *Id*. *at* 9-10. The change in the agent-insured relationship becomes manifest 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. [*Id*. at 10-11.]

The common thread running through all four examples is that an agent who assumes a duty to advise the insured regarding the need for or the adequacy of insurance coverage creates a special relationship with his customer.

The "special relationship" evidence in this case centers on Murray's advice to Dervin regarding the impending lapse of his Western & Southern life insurance policy—a policy that Murray had sold to Dervin before Murray became employed at Transamerica. Dervin owned a small business and had various insurance needs. According to Tammy, Murray had served as Dervin's insurance advisor for many years. And the evidence supports that he continued to provide guidance and counsel during his employment with Transamerica, maintaining their preexisting relationship.

Harts supplies four factual scenarios in which an agent's role as a mere "order-taker" for an insurance company becomes a "special relationship" in which the agent owes the customer a duty of care. Two scenarios are relevant here. If a customer asks for advice and the agent gives incorrect guidance, the agent has stepped outside the "order-taker" function and thereby assumed a duty of care. Alternatively, if the agent makes a promise to an insured, the agent may bear liability because in making the promise the agent has also undertaken a duty of care. The evidence supports that in the days before and after Dervin's existing life insurance policy lapsed, Murray did both.

B. THE EVIDENCE RELEVANT TO DUTY

Viewed in the light most favorable to Dervin, the text messages exchanged before and after his existing policy lapsed demonstrate that Dervin repeatedly asked Murray for advice about how to proceed. Murray not only failed to counsel Dervin to pay the premium for his Western & Southern policy until the Transamerica policy was formally offered; he undertook to reassure Dervin that the Transamerica policy *would* be issued in time to avoid a lapse. According to an expert's affidavit filed in the trial court, when asked for guidance Murray violated the standard of care by failing to advise Dervin to continue the existing coverage until the new policy issued. The messages also support that Murray instead repeatedly assured Dervin that the Transamerica coverage was, in effect, a done deal. Unfortunately, Transamerica ultimately declined coverage due to Dervin's history of smoking and his COPD—facts certainly known to Murray at the time Dervin was begging for advice.

It is worth repeating that we must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the same spirit—favorably to the nonmoving party. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836

(1982). This means that if the estate's interpretation of the text messages is objectively reasonable and plausible, summary disposition is inappropriate.

Drawing inferences is part and parcel of a summary disposition analysis. A reasonable inference is simply a logical deduction flowing from the facts presented. See *Yoost v Caspari*, 295 Mich App 209, 228; 813 NW2d 783 (2012). When considering summary disposition, inference drawing is often necessary because actors rarely announce their motives or intentions, or the extent of their knowledge. Direct evidence makes decision-making easy, but is often unavailable. For example, under certain circumstances we may reasonably infer that a defendant knew of a defective condition on the land despite a defendant's outright denial, or the absence of an admission to that effect. And direct evidence is not the sine qua non of summary disposition analysis. Rather, circumstantial evidence must also be factored into a summary disposition analysis. *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004). "[Q]uestions concerning the state of one's mind, including intent, motivation, or knowledge can be proven by circumstantial evidence." *Id.*

Not only do the conversations documented in the text messages support a reasonable inference that Murray undertook to counsel Dervin regarding whether Dervin should have allowed the existing policy to lapse; read in the light most favorable to the estate, the messages supply *direct* evidence, too.

The June 6 communications stated that Dervin sought Murray's "help." Logically, that means either that Dervin wanted reassurance that the Transamerica policy was about to be issued or Murray's advice about what to do to protect himself in the event the Transamerica policy was not issued, or he wanted Murray to go beyond the "order-taker" role and use his influence to get the policy issued. Murray's responses provided advice, reassurance, and a promise to do what he could to cement the coverage. He reassured Dervin, "We are good. I just have to swing by and get a couple of signatures." Murray encouraged Dervin's plan to pay his entire year's premium in advance by replying, "Perfect," and promising to check on the premium amount before coming to visit that week. Evaluated reasonably and in the light most favorable to the estate, this exchange of text messages substantiates that Murray represented that the policy was about to be issued. "We are good" cannot mean anything else. Murray's reply of "perfect" to Dervin's offer to pay "a whole year in advance" cements that meaning. A reasonable inference flowing from Murray's words is that Murray encouraged Dervin to pay the Transamerica policy premium a year in advance without concern for the lapsing Western and Southern policy.

In this exchange, Murray also inaccurately advised, or indeed promised, Dervin that the policy was about to be issued and vowed to "check" the yearly premium before "com[ing] up to visit." Again, Murray was not responding to Dervin as a simple "order taker" of coverage. Rather, he affirmatively misrepresented that the Transamerica policy was going to be issued "this week." His words are entirely consistent with the undertaking of a duty of care. See *Harts*, 461 Mich at 10 ("[T]he general rule of no duty changes when . . . an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or . . . assumes an additional duty be either express agreement with or promise to the insured.").

On the day before and the day when the Western & Southern policy lapsed, Murray once again represented that the Transamerica policy was about to be issued: "It looks like it will be final in a day or two." This was inaccurate information and, in the context of the previous text message discussions, evidence that Murray advised Dervin that he need not worry about the lapse in coverage. Indeed, the next sentence ("The annual premium should be about $1300") was a follow-up to the discussion about paying for a year of coverage. The information Murray relayed in this text exchange was light years beyond the role of taking an order for coverage. Rather, Murray misrepresented that coverage was about to be provided, thereby establishing a special relationship under *Harts.*

If there are any lingering doubts about the role that Murray assumed, the exchanges that occurred after the Western & Southern policy lapsed, but apparently could still be resurrected, should assuage them. Murray assured Dervin that once statements from Dervin's doctors were collected, the situation would be rectified—Transamerica "will open it back up." He told Dervin, "[n]o worries," a shortcut for saying, "don't worry." Telling someone not to worry about an impending problem is the same thing as giving advice. And Murray gave direct advice that the application was not permanently closed.

Our respectful disagreement with the dissent flows from our differing applications of the twin principles that at the summary disposition stage, we must accord the non-moving party the benefit of the inferences generated by the evidence and must consider the evidence through a lens focused on the claim's *merits*. While the dissent views the evidence as supporting a "lack of advice" and a "failure to advise," we perceive the communications as direct requests for advice ("Please help," "I'd like to have a new policy in place b4 old one lapses," "[W]hen will I be insured under a new one?," "Dude . . . am I ever getting my life insurance back in place or what bud?"), met with advice from an insurance expert coupled with representations that coverage was forthcoming ("We are good. I just have to swing by a get a couple signatures," "Everything is good," "As soon as we get the statement from your doctor the [sic] will open it back up. No worries."). The questions and answers exchanged in the text messages, viewed as a whole, decidedly contradict the dissent's claim that "there is no evidence that Dervin ever made an inquiry about whether or not he should allow his Western & Southern policy to lapse and there is no evidence that Murray ever advised Dervin to allow his Western & Southern policy to lapse." Had Murray been a mere "order taker" he either would have refused to respond to Dervin's appeals for "help" or would have informed Dervin that he had no power or ability to assist. Instead, Murray encouraged Dervin to expect the new policy would be issued and failed to suggest that just in case it wasn't, another payment on the existing policy was warranted.

The circuit court was bound to read the text messages in the light most favorable to Dervin. Read in that light, it is readily apparent that Murray gave Dervin advice above and beyond that of a mere order taker for his employer, Transamerica, and assumed a special duty to do more for this particular client. It is an entirely logical interpretation that Murray repeatedly reassured Dervin that Transamerica would issue the policy, and that Dervin need not worry about the lapsing Western & Southern policy. The rules governing summary disposition require us to credit the estate's interpretation of the text messages if it is reasonable and plausible, a burden easily met here.

Accordingly, summary disposition was improperly granted. We vacate that order and remand for continued proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher