# STATE OF MICHIGAN

# COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff/Counter-Defendant,

v

BRIAN LEPP,

Defendant/Cross-Defendant,

and

ESTATE OF KATHLEEN O'NEILL,

Intervening Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

v

VALENTI TROBEC CHANDLER INC, and JAIME FAZIO,

Third-Party Defendants-Appellees.

UNPUBLISHED
July19, 2011

No. 297534
Oakland Circuit Court
LC No. 09-101116-CK

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Intervening defendant and third-party plaintiff the Estate of Kathleen O'Neill (appellant) appeals as of right from the trial court's February 3, 2010, opinion and order granting summary disposition to third-party defendants Velenti Trobec Chandler, Inc (the insurance agency) and Jamie Fazio. We affirm.

## I. FACTS

This case arises from a May 24, 2008, boating accident that resulted in the death of Kathleen O'Neill. Plaintiff Auto-Owners Insurance Company filed suit seeking a declaratory judgment that there was no coverage under an umbrella policy it issued to the boat's owner, defendant Brian Lepp. Appellant intervened in that dispute as a defendant, then filed a third-party claim against the insurance agency and the agent through which Lepp had endeavored to

acquire insurance for the boat. Appellant alleged negligence and breach of contract, claiming that Fazio, the agent, promised to obtain additional insurance coverage on the boat and was negligent for failing to do so.

As of December 2006, Lepp maintained a $1 million umbrella insurance policy underwritten by Auto-Owners. Lepp purchased the policy through Fazio, who was an employee of the insurance agency. The policy excluded watercraft over 25 feet long, but provided that "we do cover such watercraft if . . . you give us notice within 30 days of acquiring it and pay an additional premium." It is undisputed that the boat at issue was over 25 feet long, and that Lepp did not give Auto-Owners notice or pay any additional premium in connection with the boat.

In the summer of 2008, Huntington National Bank lent Lepp money to purchase the boat, with the condition that he insure it. Lepp testified at his deposition that he contacted Fazio "and said I was purchasing a boat and I needed a policy that would be appropriate." He added that he relied on Fazio to decide what was appropriate and that he did not ask for a specific policy or limits. Lepp acknowledged that his priority was obtaining sufficient insurance to close the loan and get the boat in the water before the boating season expired. Lepp purchased a $500,000 primary policy from Progressive Mutual Insurance Company, which, according to Fazio, was the maximum amount Progressive permitted.

Lepp admitted that he only asked for a primary policy, never asked Fazio to make sure the boat was insured under the umbrella policy, and did not discuss that umbrella policy until after the accident. Lepp acknowledged that appellees did not promise to obtain any coverage in addition to the primary policy, and that he had never paid appellees to procure such coverage. However, according to Lepp, although he and Fazio were silent on the umbrella policy, he had expected Fazio to add the boat to it because she had done so in connection with his other personal insurance needs.

Fazio testified that, a week or two after Lepp purchased the boat, she advised him that the umbrella policy did not cover the boat because of the underwriting requirements. She added that she and Lepp explored additional insurance at additional cost, but that Lepp declined to purchase the coverage because there was not much time left in the boating season. Fazio unequivocally stated that she presented this information to Lepp, but that he declined to purchase additional coverage. Fazio further testified that she did not advise Lepp concerning how much liability coverage he should have on the boat.

Lepp testified that he called Fazio after the accident, and that she regretfully informed him that the umbrella policy did not cover the boat. According to Lepp, "she said that she was really sorry to have to tell me but she basically said that she failed to kind of cross-compliment policies and that there was essentially a gap in coverage and that the umbrella policy didn't cover the boat and she basically apologized and said that, that she had let me down." In contrast, Fazio testified that Lepp brought up the umbrella coverage issue in the hospital after the accident, that she reminded him of their previous conversation about the umbrella policy's not covering such an aggressive boat, and that "he had nodded at that point remembering, to my understanding and belief, that he recalled that conversation where there was no coverage at that [time]."

On December 16, 2009, appellees moved for summary disposition pursuant to MCR 2.116(10), arguing that the insurance agency and Fazio neither had nor breached a duty to procure insurance coverage for Lepp's boat, having never entered into any agreement for that purpose. Appellant responded that summary disposition was inappropriate because a genuine issue of material of fact existed "as to the duty owed by [appellees]." After conducting a hearing, the trial court ruled in favor of appellees. On appeal, appellant argues that the trial court erred in granting summary disposition on its breach of contract and negligence claims. We disagree.

## II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). 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 moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4), and must support the motion with affidavits, depositions, admissions, or other documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The opposing party must then show, by submission of admissible evidence, that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

## III. BREACH OF CONTRACT

There are two types of implied contracts that could be relevant in this matter, those implied in law, and those implied in fact.[1]

A contract implied in law does not require a meeting of the minds, but is imposed by operation of law in order to prevent inequity, even if no contract was intended. *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949).

> A contract implied in law is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. A contract may be implied in law where there is a receipt of a benefit by a defendant from a plaintiff and retention of the benefit is inequitable, absent reasonable compensation. [*In re Lewis Estate*, 168 Mich App 70, 74-75; 423 NW2d 600 (citations omitted).]

Appellant's allegations do not fit this theory. Lepp never paid Fazio or anyone else at the insurance agency to extend insurance coverage to the boat, and he never furnished anything of

[1] Although appellant claims that there was an "implicit" contract, it fails to articulate what manner of implied contract that might be.

value to appellees with a reasonable expectation of being compensated. There is no evidence that appellees accepted some benefit from Lepp, much less one that may be deemed unjust or inequitable to retain. In short, the facts of this case are wholly insufficient to give rise to a contract implied in law.

A contract implied in fact arises where the ordinary course of dealing and common understanding of two or more parties shows a mutual intention to form a contract. *Erickson v Goodell Oil Co*, 384 Mich 207, 211-212; 180 NW2d 798 (1970).

> A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. The existence of an implied contract, of necessity turning on inferences drawn from given circumstances, usually involves a question of fact, unless no essential facts are in dispute. [*Id.* at 212 (citations omitted).]

The key requirement is that a meeting of the minds, or mutual assent, is required, even though it is not manifested by direct or explicit words. *Detroit*, 326 Mich at 100.

Here, no reasonable mind could find a contract implied in fact because there was no evidence of a mutual intention to contract for additional insurance coverage for the boat. Lepp's testimony that he relied on Fazio for his personal insurance does not itself suggest that Lepp and appellees had a mutual intention to contract. Lepp's unilateral expectation that the boat would be covered under his umbrella policy is likewise insufficient evidence of an actual and mutual intention to contract.

Further, Lepp's testimony that Fazio admitted to making a mistake does not show a mutual intention to contract. According to Lepp, Fazio "essentially indicated that, that she had made a mistake and didn't I guess properly overlap the policies to insure that there was no gap in the coverage and that she had basically made a mistake, that she should have, you know, looked out and protected me better as a whole, you know, in merging, I guess merging the policies so they complemented each other . . . ." Given that Lepp himself admitted that he never discussed with Fazio adding the boat to the umbrella policy, it would strain credulity to interpret Lepp's account of Fazio's statements as an admission of failing to follow through on a specific obligation to see that the boat was insured, as opposed to admitting more generally to making such mistakes as allowing gaps in coverage and failing to ensure that Lepp was covered comprehensively. The courts' obligation to view the evidence in the light most favorable to the nonmoving party does not mean resorting to strained, artful interpretations of testimony.

Finally, although appellant is correct that Fazio admitting knowing that Lepp wanted the boat covered under his umbrella policy, she nonetheless stated that the boat would be ineligible under that policy because of the underwriting guidelines concerning boat speed and size. Fazio elaborated:

> At the time he took out the Progressive policy, you know, we put in the max, maximum liability you could get with them. I did advise him at that time

> the boat was not covered, due to underwriting guidelines Auto-Owners would not accept it, said we could go through an excess market but that would be an additional cost to him, and he chose at that time, it was late in the season when he got the boat, the umbrella was already in force, so he chose not [to] take that at the time because it was a very small amount of time that he was going to have the boat in the water for that year.

Viewed in context, the bare fact that Fazio knew Lepp wanted the boat covered under his umbrella policy does not support the conclusion that Fazio and Lepp had a mutual intention to contract to obtain coverage for the boat. Given Lepp's testimony that he and Fazio had no discussion regarding the umbrella policy, and Fazio's testimony that she told Lepp that Auto-Owners would not insure the boat under the umbrella policy, no reasonable mind could find mutual intention to contract to obtain umbrella coverage for the boat. There is simply no reasonable way to interpret the evidence as indicating that Fazio intended to contract to obtain insurance coverage for the boat. Accordingly, there could be no mutual intent, and thus no contract implied in fact. See *Erickson*, 384 Mich at 211-212.

For these reasons, we conclude that the trial court did not err in granting summary disposition on appellant's contract claim.

## IV. NEGLIGENCE

Michigan recognizes a cause of action in tort for an insurance agent's failure to procure requested insurance coverage. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87; 492 NW2d 460 (1992). The cause of action protects foreseeable third parties who are injured when a contracting party negligently performs his or her contractual duty. *Williams v Polgar*, 391 Mich 6, 22; 215 NW2d 149 (1974). Thus, the existence of a contractual duty is a prerequisite to recovery under this theory. See *id*. Further, "in an action based on a contract and brought by a plaintiff who is not a party to that contract," the plaintiff must show that "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." *Fultz v Union-Commerce Associates*, 470 Mich 460, 467; 683 NW2d 587 (2004).

Although characterized as negligence, the proof required for this claim is essentially identical to that required for the contract claim. Under the so-called negligence theory, appellant was required to show that Fazio had a contractual duty to obtain umbrella coverage for Lepp, that Fazio was negligent in performing that duty, that Fazio had some separate and distinct duty to appellant, and that appellant was injured because of Fazio's negligent performance.

Again, Lepp specifically disclaimed any agreement between himself and appellees regarding adding the boat to the umbrella policy. Lepp stated that he asked for only a primary policy, that he did not talk to Fazio about the umbrella policy or ask her to make sure the boat was insured under it, and that there were in fact no discussions regarding the umbrella policy until after the accident. Given that there was no such discussion, much less a contract, appellant cannot show that Fazio had a contractual duty to obtain insurance coverage for Lepp's boat.

Moreover, even if appellant could show that Fazio had a contractual duty to obtain umbrella coverage for Lepp, its claim would nonetheless fail because appellant failed to allege

that appellees had any duty to appellant that was separate and distinct from any contract with Lepp. For these reasons, the trial court did not err in granting summary disposition on appellant's negligence claim.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause