S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HOLLY DEREMO, DIANE DEREMO, and MARK DEREMO, Plaintiff-Appellant/Cross-Appellees,	UNPUBLISHED August 30, 2012
v	No. 305810 Montcalm Circuit Court
TWC & ASSOCIATES, INC., d/b/a WINTER INSURANCE AGENCY, Defendant-Appellee/Cross-Appellants.	LC No. 2010-013454-NO

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In this negligence suit, plaintiffs Holly Deremo and her parents, Diane and Mark Deremo (collectively, the Deremos), appeal as of right the trial court's order granting summary disposition in favor of defendant TWC & Associates, Inc. (TWC). We affirm.

I. FACTS

This lawsuit arose out of a June 21, 2009, boating accident that seriously injured Holly Deremo. Holly Deremo was tubing behind a friend's boat in Bass Lake. She fell off the tube, and Duane Croad ran her over with his boat.

The Deremos sued Croad. And the parties entered into a Consent Judgment after Croad's homeowner's insurance company, Auto Owners, denied coverage. Under the agreement, Croad assigned his interest in a claim against his insurance agent to the Deremos. The Deremos, as Croad's assignees, then sued TWC for failing to secure proper insurance for Croad.

TWC, formerly known as Winter Insurance, is a small insurance agency. When the events underlying this litigation began in 2004, TWC had two licensed insurance agents and sold insurance policies on behalf of multiple insurers, including Auto Owners.

In April 2004, Croad applied for homeowner's insurance coverage through TWC. When he initially applied for his homeowner's policy, he owned a 21-foot Four Winns boat—the same boat that caused Holly Deremo's injuries. TWC's homeowner's insurance application included a

section regarding "watercraft liability," which required specific information about any boat to be added to the policy. This section of Croad's application was left blank. Croad testified that he did not see this section, but he admitted that if he read the application carefully, then he would have seen it.

He further testified that if TWC had explicitly asked if he owned a boat, then he "probably" would have added his boat to his homeowner's insurance policy. However, Croad admitted that he neither wanted to insure the boat, nor had he considered insuring the boat at that time. Indeed, there is no dispute that he did not disclose the boat to TWC before the 2009 accident, and he has never insured the boat through any other policy.

On April 20, 2004, Auto Owners issued a homeowner's policy to Croad on the basis of the application that he signed and submitted. Later, in July 2004, Croad moved. At that time, TWC secured a new insurance policy for his new address. One of the TWC agents testified that, when she asked Croad whether he owned a boat at that time, Croad specifically said, "No." The other TWC agent testified that symbols on Croad's quote sheet, an information gathering tool, supported testimony that Croad denied owning a boat. However, according to Croad, he could not recall whether TWC asked about the boat:

> *Q.* At the time you changed over to Auto-Owners your homeowner's insurance policy, did you tell the person at TWC reviewing it with you that you had a boat?
>
> *A.* Not that I can recall.
>
> *Q.* So you don't know if the discussion came up one way or another about insuring your boat?
>
> *A.* I don't remember. I'm sure they didn't ask me. I don't remember telling them.

Despite never asking about coverage for his boat, Croad assumed that his boat was covered under his homeowner's policy before the boating accident in June 2009. However, he admits that he never read the policy or had discussions with TWC about what the policy covered—he merely signed the policy and paid the premiums.

After the accident, the Deremos filed this lawsuit against TWC. TWC moved for summary disposition, asserting that, as a matter of law, the Deremos were not entitled to relief because (1) TWC did not owe Croad a duty to ensure that he obtained a policy that he never requested; (2) the Deremos could not establish causation because there was no evidence that Croad would have purchased a policy for his boat even if one had been offered; and (3) the statute of limitations barred the Deremos' claim. The trial court granted TWC's motion and summarily dismissed the Deremos' claim. The Deremos now appeal.

III. INSURANCE AGENT'S DUTY

A. STANDARD OF REVIEW

The Deremos argue that the trial court erred by granting TWC's motion for summary disposition because TWC's agents negligently failed to obtain proper insurance coverage for Croad, and thus, breached their fiduciary duties. Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. This Court reviews de novo a trial court's grant of a motion for summary disposition.[1] Likewise, this Court reviews de novo the question of law regarding whether a duty exists.[2]

B. ANALYSIS

Michigan law recognizes a distinction between insurance counselors and insurance agents.[3] Insurance agents have a limited role. They are essentially "order takers": soliciting insurance, taking applications, writing policies, and collecting premiums.[4] Only licensed insurance counselors may advise or counsel clients about benefits, terms, value, and effect of different insurance policies.[5] Here, it is undisputed that the two TWC agents that worked with Croad were licensed insurance agents, not insurance counselors.

Michigan law further subcategorizes insurance agents as either exclusive or independent.[6] Exclusive, or captive, insurance agents work exclusively for only one insurer and are agents of the insurer.[7] On the other hand, independent insurance agents represent more than one insurer and are deemed agents of the insured.[8] Here, there is no dispute that TWC's agents are

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[1] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[2] *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999).

[3] MCL 500.1201 (a), (e); MCL 500.1232; *Harts*, 461 Mich at 9, n 8.

[4] MCL 500.1201 (a), (e); *Harts*, 461 Mich at 9, n 8.

[5] MCL 500.1232 (qualifications), .1234 (licensing), .1236 (client agreements).

[6] *Genesee Foods Services*, *Inc v Meadowbrook*, *Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008); *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998).

[7] See United States Department of Labor, Bureau of Labor Statistics website, "What Insurance Sales Agents Do," accessed July 3, 2012, (http://www.bls.gov/ooh/Sales/Insurance-sales-agents.htm#tab-2) ("*Captive agents* are insurance sales agents who work exclusively for one insurance company. They can only sell policies provided by the company that employs them.").

[8] *Genesee Foods Services*, 279 Mich App at 654; *West American Ins Co*, 230 Mich App at 310. See also United States Department of Labor, Bureau of Labor Statistics website, "What Insurance Sales Agents Do," accessed July 3, 2012, (http://www.bls.gov/ooh/Sales/Insurance-sales-agents.htm#tab-2) ("*Independent insurance agents* work for insurance brokerages, selling

independent agents because they represent multiple insurers. Thus, TWC's agents were Croad's agents. This distinction is significant because "[t]he fiduciary duty that the insurance agent owes each party varies in relation to the agent's status as an independent or exclusive agent."[9]

Relying on *Harts v Farmers Ins Exchange*, TWC argues that it owed no duty to Croad. *Harts* promulgated the "no-duty rule" that, absent a special relationship, an insurance agent has no duty to advise the insured regarding the adequacy of the insured's coverage.[10] TWC contends that the Court intended this rule to apply all insurance agents—exclusive and independent alike—because it did not explicitly distinguish between independent and exclusive agents in rendering that rule. However, in *Harts*, it was clear from the facts that the defendant insurance agency was an exclusive insurance agency because it only represented one insurer. Indeed, the Court specifically used language describing an exclusive agent when stating the no-duty rule: "an insurance agent *whose principal is the insurance company* owes no duty to advise a potential insured about any coverage."[11] Thus, we read the *Harts* no-duty rule as only applying to exclusive insurance agents.

Therefore, we instead look to *Genesee Foods Services*, *Inc v Meadowbrook*, *Inc*, in which this Court specifically addressed the duty of an independent insurance agent apart from that of an exclusive agent.[12] This Court delineated the duty owed when an independent insurance agent assists a customer with procuring an insurance policy:

> [B]ecause [the agents] were independent insurance agents when they assisted [the] plaintiffs, their primary fiduciary duty of loyalty rested with [the] plaintiffs, who could depend on this duty of loyalty to ensure that [the agent] [was] acting in their best interests, *both in terms of finding an insurer that could provide them with the most comprehensive coverage and in ensuring that the insurance contract properly addressed their needs*. The primacy of this relationship between an insured and an independent insurance agent is reflected in Michigan caselaw, which, as stated earlier, holds that "the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer."[13]

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the policies of several companies. They match insurance policies for their clients with the company that offers the best rate and coverage.").

[9] *Genesee Foods Services*, 279 Mich App at 654.

[10] *Harts*, 461 Mich at 8.

[11] *Id.* at 8.

[12] *Genesee Foods Services*, 279 Mich App at 654.

[13] *Id.* at 656, quoting *West American Ins Co*, 230 Mich App at 310 (emphasis added). See also *Genesee Foods Services*, *Inc v Meadowbrook*, *Inc*, 483 Mich 907, 908; 762 NW2d 165 (2009) (KELLY, C.J., *concurring*) (confirming that the duty of loyalty "included finding an insurer that could provide [the] plaintiff with comprehensive coverage and ensuring that the insurance contract properly addressed [the] plaintiff's needs.").

Thus, because TWC's agents are independent agents, *Genessee* governs, and they owed Croad a duty to provide him with the most comprehensive coverage and ensure that the insurance contract properly addressed his needs. However, the record is absent evidence that TWC actually breached this duty fiduciary duty to Croad.

While it is true that Croad's policy did not actually address his needs because it did not cover his boat, we conclude that the TWC agents satisfied their duty by inquiring into the coverage that Croad required. Here, when Croad initially sought homeowner's coverage through TWC, its application requested specific information about any boat to be added to the policy. And, more significantly, the TWC agents testified that when they issued the second policy later in 2004, they explicitly asked Croad whether he had a boat. On the basis of these inquiries, it then became Croad's obligation to provide the necessary information to allow TWC to ensure that the insurance contract properly addressed his needs. However, Croad never requested a policy covering his boat. Indeed, he admitted that he neither wanted to insure the boat, nor had he ever considered insuring the boat. His desire not to insure the boat is consistent with the fact that he left the watercraft liability section blank on the original application. Moreover, even when the TWC agents explicitly asked, Croad denied owning a boat.

Thus, the TWC agents satisfied their duty to ensure that the insurance contract properly addressed Croad's needs, on the basis of the information that he provided. And although Croad nevertheless assumed that the policy covered his boat, he had a duty to raise any questions within a reasonable time after the policy was issued.[14] Therefore, we conclude that the trial court did not err in granting TWC summary disposition on the Deremos' claims.[15]

Because our resolution of this issue is dispositive, we decline to address the parties' remaining arguments.

We affirm.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck

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[14] *Casey v Auto Owners Ins Co*, 273 Mich App 388, 394-395, 729 NW2d 277 (2006).

[15] As Croad's assignees, the Deremos "stand[] in the shoes of the assignor and acquire[d] the same rights as the assignor possessed." *Prof Rehabilitation Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998).

STATE OF MICHIGAN

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SHAPIRO, P.J. (*concurring*).

I concur in the result only.

/s/ Douglas B. Shapiro