STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS CITY BANK, as personal representative of the Estate of WILLIAM R. GETTY, deceased; and GETTY REAL ESTATE, INC,

Plaintiffs-Appellants/Cross Appellees,

v

JACKSON NATIONAL LIFE INS CO,

Defendant-Appellee/Cross Appellant,

and

CHARLES FINKBEINER & ASSOC, INC and CHARLES FINKBEINER, individually,

Defendants-Appellees.

UNPUBLISHED
March 15, 2005

No. 251865
Barry Circuit Court
LC No. 01-000517-CK

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants. We affirm.

Plaintiffs, Hastings City Bank, as the personal representative of the estate of William R. Getty, and Getty Real Estate, Inc., as owner of the insurance policy in question, filed a complaint against defendant Jackson National Life Insurance Company (defendant company) and defendants Charles Finkbeiner and Charles Finkbeiner & Associates, Inc (collectively defendant agent) after defendant company denied plaintiff bank's claim on a life insurance policy issued to Getty by defendant agent because defendant company did not receive the initial premium due on the policy before Getty's death.

Plaintiffs first argue that the trial court erred in granting summary disposition in favor of defendants based on provisions in the insurance application limiting defendant agent's ability to

waive or alter the requirements of the application and requiring all such waivers to be in writing and signed by either defendant company's vice president or president. We disagree.

A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Mahnick v Bell Co*, 256 Mich App 154, 157; 662 NW2d 830 (2003). In reviewing a decision by the trial court on a motion for summary disposition under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Id*. Additionally, the determination of whether contract language is clear and unambiguous is a question of law, which this Court reviews de novo. *Id*. at 157, 159. When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent. *Id*. at 159. When contractual language is clear, its construction is a question of law for the courts. *Id*.

According to the clear language of the insurance application, a waiver of any of defendant company's requirements would not be binding on defendant company unless the waiver was in writing and signed by the president or vice president. In *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003), our Supreme Court considered the requirements for modifying an agreement protected by written modification or anti-waiver clauses. Our Supreme Court recognized that the freedom to contract allows parties to modify contracts notwithstanding restrictive clauses; however, such modification requires mutual assent to the new or changed contract as well as mutual assent to forgo the restrictive clause in the original contract. *Id*. at 372-373. This requirement of mutual assent "is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id*. at 373. Delivery of the insurance policy where it is undisputed that plaintiff owner had not paid the premium did not waive defendant company's right to have all conditions of the application met. *G.P. Enterprises, Inc v Jackson Nat'l Life Ins Co*, 202 Mich App 557, 565-566; 509 NW2d 780 (1993). Further, plaintiffs provide no evidence that defendant company intended to waive the specific provisions limiting the agent's ability to alter the conditions listed in the application or the requirement that such waiver be in writing and signed by the appropriate official; therefore, the trial court properly granted summary disposition in favor of defendants.

Plaintiffs also argue that defendant company is estopped from asserting the above provisions as defenses. We disagree. "An estoppel arises where: (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 828; 346 NW2d 881 (1984). Plaintiffs fail to show that Getty believed that payment of the premium was not required before the policy would become effective, where this condition was specifically stated on the application, which Getty signed, and where an insured is held to the knowledge of the terms and conditions of an insurance contract, even though the insured may not have read the contract. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 324; 575 NW2d 324 (1998).

Plaintiffs also argue that Nancy Styles, defendant agent's employee, left Getty's daughter, Katherine Beyer, with the impression that prepayment of the insurance premium was not required during conversations immediately before and after Getty's death. However, Styles stated that prepayment was needed, and Beyer does not contradict that. Further, defendant company cites *House v Billman*, 340 Mich 621, 626; 66 NW2d 213 (1954), for the premise that it cannot be estopped from asserting the provisions if it did nothing to hold out the agent as possessing the authority to change, modify, or waive provisions of the contract. In this case, the application for coverage specifically stated that defendant agent or his employee had no authority to do so; therefore, any reliance on Beyer's part would not have been justifiable given the clear language of the application. Plaintiffs have failed to show the required elements for estoppel; therefore, the trial court properly granted summary disposition in favor of defendants.

Plaintiffs also argue that the trial court erred in granting summary disposition of their negligence claim against defendant agent and, vicariously, defendant company by finding no duty. We disagree. "Whether a duty exists is a question of law that is solely for the court to decide." *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999). In *Harts*, *supra* at 8, our Supreme Court held that, absent a special relationship, an insurance agent owes no duty to advise a potential insured about any coverage. Rather, an agent's job is to merely present the insurance company's product and take orders from those who want to purchase the coverage offered. *Id*. A "special relationship" would exist "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. Plaintiffs argue that a special relationship existed between Getty and defendant agent because of the length of their relationship and defendant agent's "shepherding" of the application to completion. However, our Supreme Court declined to hold that the length of a relationship between the agent and insured alone could create such a special relationship. *Id*. at 10. Further, plaintiffs have failed to provide evidence demonstrating any of the factors identified in *Harts*, *supra*; therefore, they have failed to show the existence of any special relationship between defendant agent and Getty which would have created a duty above the limited duty of an agent to present the product and take Getty's order/application for the insurance. Because plaintiffs cannot establish defendant agent's negligence, they cannot establish vicarious liability against defendant company. *Id*. at 12. Therefore, the trial court properly granted summary disposition in favor of defendants.

Plaintiffs next argue that the trial court erred in finding that plaintiff owner had no insurable interest in Getty. We disagree based on the specific circumstances of this case. It is true that a business has an insurable interest in an employee's life where the business's continued success is dependent on that employee. *Sun Life Assurance Co v Allen*, 270 Mich 272, 278; 259 NW 281 (1935). Such life insurance policies are known as "keyman" policies in the insurance industry. *Secor v Pioneer Foundry Co, Inc*, 20 Mich App 30, 35; 173 NW2d 780 (1969). However, that was not the insurable interest relied on by Getty and, in turn, plaintiff owner, in obtaining the insurance policy in this case. According to the insurance application, Getty specifically declined to obtain a key man policy, and instead indicated that the policy was being pursued as collateral for a loan. While plaintiff owner had an insurable interest in Getty as its key man in general, by the terms of the application, the insurable interest would have been the loan against which the policy was to be assigned. However, it is undisputed that this loan never

closed. Therefore, the insurable interest identified in the application never existed and the trial court properly granted summary disposition in favor of defendants.

Plaintiffs argue that the trial court erred by basing the summary disposition order on evidence that should have been excluded under the dead man's statute, MCL 600.2166. We disagree. Even assuming that the dead man's statute is still applicable in Michigan, notwithstanding MRE 601, it had no impact on the trial court's proper grant of summary disposition in favor of defendants. The trial court's determination was based on documents that corroborated defendants' claims that no viable cause of action existed—specifically, the insurance policy language stating that the initial premium must be paid during the lifetime of the prospective insured for the policy to become effective, the language limiting defendant agent's ability to alter the conditions listed in the application, and the requirement that any such waiver must be in writing and signed by the appropriate official. Thus, evidence offered by defendants regarding the import of those documents was admissible. MCL 600.2166(1).

Given the resolution of these dispositive issues, we decline to address other issues raised on appeal.

We affirm.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra