

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AUTO CRAFTERS, L.L.C.,

Plaintiff-Appellee,

v

AL BOURDEAU INSURANCE SERVICE, INC.,

Defendant-Appellant,

and

MERIDIAN INSURANCE GROUP,

Defendant.

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UNPUBLISHED  
February 21, 2006

No. 257890  
Oakland Circuit Court  
LC No. 2003-049255-CK

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this negligence action involving the sale of auto insurance, defendant, Al Bourdeau Insurance Service, Inc., appeals as of right from a judgment awarding plaintiff damages of \$9,000, together with interest, costs, and case evaluation sanctions issued following a bench trial. Although the trial court did not err in finding that defendant owed a duty of care to plaintiff, because the trial court erred when it found that defendant breached that duty, we reverse.

The basic issue in this case is whether defendant's agent acted negligently by failing to sell plaintiff the auto insurance coverage<sup>1</sup> it requested, and by failing to advise plaintiff concerning the insurance coverage options available to it, such that defendant should be held liable for the additional coverage plaintiff failed to obtain on the subject vehicle. The subject vehicle is an extended cab Ford-150 pickup truck with 2,997 miles on it that plaintiff's owner, Paul Falzon, purchased in 2000 for \$12,980 after it had been totaled in an accident. Plaintiff initially obtained a salvage title on the truck, but later obtained clear title on the truck after plaintiff repaired and customized the vehicle. After discussions between Falzon and Jim Bagley,

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<sup>1</sup> Throughout the record, when referring to types of insurance coverage, the parties interchange lay language with terms of art in the insurance industry.

defendant's agent, plaintiff added the truck to its insurance policy. Falzon testified that he wanted to insure the truck for replacement value, and that he and Bagley eventually agreed on \$36,000.<sup>2</sup> Falzon believed that he was purchasing insurance coverage that would pay plaintiff \$36,000, less a reasonable amount of depreciation, if the truck was totaled, but admitted that Bagley never directly told him that the policy would pay \$36,000 if the truck was totaled. Thereafter, Falzon was involved in a rollover accident with the truck. The insurance adjuster deemed the truck a total loss and offered plaintiff \$14,553.33.

Asserting that he was entitled to \$36,000, plaintiff filed suit against both defendant and Meridian for breach of contract. Plaintiff settled with Meridian, who is not participating in this appeal, for \$18,000. The matter proceeded to trial against defendant. Accepting Falzone's testimony, the trial court found that Bagley had a duty to "properly fill the order . . . and that he breached that duty by not doing so." The court also found that Bagley had the duty to advise plaintiff "as indicated in the *Harts*<sup>3</sup> case." The court stated:

I think in this case there was an ambiguous request [for insurance coverage] that probably needed clarification and the clarification would have been that we can't issue this policy through Meridian because it's a special type of policy. In order to get such a stated policy, someone has to come out and actually look at the truck, photograph it and then come up with a value that both the insurance company and the insured agree with.

The trial court found that Falzone's failure to read the policy did not matter because, "even if he did read it, he thought he—he thought the language in that policy covered what he was asking for." The trial court found that Bagley's breach of duty was the proximate cause of plaintiff's damages and ultimately found for plaintiff awarding it \$9,000.<sup>4</sup> This appeal followed.

Defendant argues on appeal that the trial court erred in finding that it owed plaintiff a duty, that it breached that duty, and that its breach proximately caused plaintiff's damages. Questions of law, such as whether a duty exists, are reviewed de novo. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000); *Harts, supra* at 6. We review a trial court's findings of fact for clear error. *Sands Appliance Services, supra* at 238. Regard is to be given to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410-411; 531 NW2d 168 (1995), overruled in part on

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<sup>2</sup> Plaintiff intended the \$36,000 figure to include the original cost of the vehicle (\$12,900), plus parts (\$15,000), and Falzon's labor.

<sup>3</sup> *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999).

<sup>4</sup> The court awarded plaintiff the original cost of the truck, plus parts but not labor, minus the amount of plaintiff's settlement with Meridian (\$27,000 - \$18,000 = \$9,000).

other grounds in *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116-117 n 8; 595 NW2d 832 (1999) (definition of accident).

“To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant’s breach was a proximate cause of the plaintiff’s injuries, and (4) the plaintiff suffered damages.” *Spikes v Banks*, 231 Mich App 341, 355; 586 NW2d 106 (1998). “Whether a defendant owes an actionable legal duty to a plaintiff is a question of law.” *Id.* “Whether [the defendant] breached [its] duty to [the] plaintiff is a question of fact[.]” *Id.*

The common law “imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.” *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); see also *Khalaf v Bankers & Shippers Ins Co*, 404 Mich 134, 142-143; 273 NW2d 811 (1978). This duty “may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.” *Clark, supra* at 261. This Court has held that a plaintiff states “a cause of action in tort by alleging loss resulting from [an] insurance agent’s failure to procure insurance coverage requested by [the] plaintiff.” *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 87; 492 NW2d 460 (1992); see also *Khalaf, supra* at 142-143 (an insurance agent may be subject to tort liability “for negligent failure to procure insurance which would have provided a source of recovery” for the loss). Thus, in the instant case, the trial court correctly found that an insurance agent such as defendant has a duty to procure the insurance coverage requested by its insured.

Regarding the duty to advise, our Supreme Court has stated that “an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage.” *Harts, supra* at 8 (emphasis added); see also *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 314; 575 NW2d 324 (1998), modified by *Harts, supra*. “Such an agent’s job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered.” *Harts, supra* at 8.

However, the existence of a “special relationship” between an agent and his insured will give rise to a duty to advise. *Harts, supra* at 9-10; see also *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003); *Marlo Beauty Supply, supra* at 314. A special relationship exists, “so that the general rule of no duty changes[,] when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires 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, supra* at 10-11. Where no special relationship exists, only licensed insurance counselors have a duty to advise. *Id.* at 8-9.

In the present case, the trial court, relying on *Harts, supra*, correctly stated that where a special relationship exists, an insurance agent has a duty to advise its insured concerning

coverage options.<sup>5</sup> A review of the record reveals that Bagley either knew that stated value or agreed value coverage was not available through Meridian and perhaps not at all for the two-year-old truck. There is no indication in the record that Bagley or anyone else informed Falzon that in the event of a loss, the insurance company would be conducting its own appraisal of value of the truck, and may not agree concerning the value of the customization work. In any event, we conclude that the trial court did not clearly err in finding that a special relationship existed between Bagley and Falzon, giving rise to a duty to advise.

However, our review of the record reveals that plaintiff cannot establish that defendant breached that duty. Falzon's testimony indicated that he had ambiguously requested "replacement value" coverage for the truck when he stated that he wanted coverage in the amount of \$36,000 for the customized truck. But, Falzon specifically testified that he expected to receive the actual cash value of the truck (\$36,000) less a reasonable amount of depreciation at the time of loss. Plaintiff's counsel similarly agreed with his client's expectation and so argued to the trial court. Ultimately, the trial court concluded plaintiff was only entitled to the value of the vehicle at the time of the loss, not a specified amount. The trial court fixed the amount at \$27,000, and then subtracted plaintiff's settlement with the insurer, Meridian. Therefore, in the absence of the existence of an agreed value policy—plaintiff never expected one and the trial court did not find one—the action reduces itself to one of valuation.<sup>6</sup> Since Falzon never actually expected defendant to procure stated value or agreed value coverage guaranteeing receipt of \$36,000 for the customized truck in the event of a total loss, but rather expected to receive *something less* than \$36,000 in the event of a total loss, plaintiff cannot establish that Bagley breached any duty to advise plaintiff regarding the purchased coverage.

In light of our disposition, we need not reach defendant's remaining issue on appeal.

Reversed.

/s/ Pat M. Donofrio  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly

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<sup>5</sup> Defendant has failed to cite any authority in support of its argument that the existence of a special relationship must be specifically alleged in the complaint.

<sup>6</sup> Clearly, had plaintiff litigated against Meridian to completion and the trial court valued the vehicle at the time of loss at \$27,000, Meridian would have been obligated to pay plaintiff that amount, the expected amount under the procured policy. Plaintiff's argument is properly with the insurer with whom he settled, not defendant.