

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF MAUREEN RICHARDSON and
ROBERT RICHARDSON, Individually and as
Personal Representative,

UNPUBLISHED
January 21, 2014

Plaintiffs-Appellants/Cross-
Appellees,

v

DAVID GRIMES, JR. and QUALITY
INSURANCE SERVICES, INC.,

No. 312782
Oakland Circuit Court
LC No. 2011-121918-NM

Defendants-Appellee/Cross-
Appellants.

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff Robert Richardson, individually and as the personal representative of his deceased wife's estate, appeals of right the trial court's order dismissing his malpractice claim as untimely against defendants David Grimes, Jr. and Quality Insurance Services, Inc. On cross-appeal, Grimes and Quality Insurance appeal the same order to the extent that the trial court denied the motion under MCR 2.116(C)(8) and (C)(10). Because we conclude the trial court properly dismissed Richardson's malpractice claim, albeit on different grounds, we affirm.

I. BASIC FACTS

Beginning in the mid-1990's, Richardson used Quality Insurance to procure his automobile and homeowners' insurance policies. Grimes worked for Quality Insurance and was a licensed insurance agent. He began working with Richardson in the 2000's. Richardson had since 1994 purchased automobile insurance policies with maximum liability coverage of \$100,000 per person, \$300,000 per occurrence, for bodily injury resulting from an automobile accident. The so-called "100/300" coverage limitation is common for policies in this state. Richardson read and reviewed the policies when purchased or renewed and knew that, in the event of bodily injury or death to one person resulting from an accident, the maximum amount his insurer would pay is \$100,000. Generally, his policies automatically renewed without contact with Quality Insurance and Richardson could not recall ever discussing the limits with

Quality Insurance or discussing whether the 100/300 limitation was adequate to meet his personal insurance needs.

In May or June 2009, Richardson either contacted Grimes at Quality Insurance to “look over” his insurance rates or Grimes contacted him about “saving money” on his insurance policies by switching his automobile coverage from Citizens Insurance to Pioneer Insurance.¹ Richardson, who by this time had accumulated significant assets including investments valued at approximately \$2.7 million, stated that he told Grimes that he did not want to put himself at risk of being underinsured and Grimes assured him that he had adequate coverage. Grimes did not recall any discussion with Richardson regarding a concern that he might be underinsured and denied ever offering him an opinion regarding whether his existing coverage was sufficient. Richardson admitted that he never expressed his belief that his existing coverage might be inadequate; he did not request an increase in his policy limits, he did not discuss his assets or financial condition with Grimes, and he did not suggest that he had “a lot of assets” or that he might not have adequate coverage given his assets. Finally, he conceded that Grimes would not have known that he had brokerage accounts worth around \$2.7 million.

In June 2009, Grimes provided Richardson with a quote for an automobile insurance policy issued by Pioneer with the 100/300 coverage limitation. Grimes also provided a quote for a policy that included a \$500,000 per person/\$1,000,000 per occurrence limitation. Richardson reviewed the quotes and decided to purchase the Pioneer policy with the 100/300 coverage. Richardson claimed that he purchased the policy in reliance on Grimes’ assurance that the policy would provide adequate coverage.² Grimes did not believe that he owed any duty to evaluate Richardson’s assets or offer an opinion on the adequacy of his insurance coverage because he was not a financial advisor or an insurance counselor.

In November 2009, Maureen Richardson ran a red light, struck another vehicle, and killed its driver.³ Richardson contacted Quality Insurance to report the accident and asked it to remove the car involved in the accident from his policy because it was destroyed. The decedent’s estate eventually sued Richardson and his wife and they settled with the estate for \$675,000. Pioneer paid the \$100,000 required under its policy with Richardson and Richardson had to pay the remainder from his assets.

¹ The parties’ evidence differed as to the specifics.

² Shortly after purchasing this policy, Richardson requested a quote for a homeowners’ policy for his cottage. Grimes provided a quote using Richardson’s existing coverage of \$300,000 for liability protection and provided optional quotes with up to \$1,000,000 in coverage. Richardson again did not indicate that he wanted additional coverage and he ultimately purchased a one-year homeowners’ policy with \$300,000 in liability protection.

³ Maureen Richardson died from causes unrelated to the accident before Richardson sued Quality Insurance and Grimes.

Richardson continued to use Quality Insurance for his insurance needs until February 2012. On December 9, 2009, Richardson's automobile policy automatically renewed through Quality Insurance with the same 100/300 coverage limitation for a six-month period ending June 8, 2010. In June and July 2010, respectively, Richardson's homeowners' policies automatically renewed through Quality Insurance for one year with the existing coverage levels. In July 2010, Richardson contacted Grimes and requested a quote for a \$2 million umbrella insurance policy, which was issued on July 28, 2011, for a one-year period ending July 28, 2012.

In September 2011, Richardson sued Quality Insurance and Grimes for professional malpractice. He alleged that Grimes negligently advised him that his coverage was adequate without investigating his assets, which left him "grossly" underinsured. Quality Insurance and Grimes eventually moved for summary disposition. They maintained that Richardson failed to state a claim under MCR 2.116(C)(8) because, as a matter of law, they did not owe any duty to inquire about or investigate Richardson's assets or affirmatively recommend higher coverage or an umbrella policy. They also sought dismissal under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that Richardson did not reasonably rely on any alleged assurances regarding the adequacy of his coverage. Finally, they argued that Richardson's claim was untimely and should be dismissed under MCR 2.116(C)(7).

The trial court denied the motion as to MCR 2.116(C)(8) and (C)(10), but agreed that Richardson's claim was untimely under the two-year period of limitations applicable to malpractice claims. See MCL 600.5805(6). For that reason, it dismissed Richardson's suit.

The parties now appeal to this Court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Richardson argues that the trial court erred when it dismissed his claim under MCR 2.116(C)(7) on the basis that it was untimely. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

B. MALPRACTICE PERIOD OF LIMITATIONS

Generally, a claim of professional malpractice must be commenced within two years of the date of the accrual of the claim. MCL 600.5805(6); *Levy v Martin*, 463 Mich 478, 482; 620 NW2d 292 (2001). It is clear that insurance agents generally practice a profession, must be licensed, and have certain common law duties to their clients. See *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999) (noting that insurance agents have been regulated for more approximately 120 years and recognizing that an insurance agent can be liable for common law negligence in the performance of his or her duties). What is not clear, however, is whether the term malpractice applies to a cause of action against an insurance agent for breaching his or her duty to an insured.

Our Supreme Court has held that the term “malpractice”, as used in MCL 600.5805(6), does not apply to all persons acting in a professional capacity; rather, by using the common law term “malpractice”, the Legislature “intended that malpractice would be defined according to the common-law definition of the term and thus only those groups traditionally liable for malpractice would be benefited by the two-year statute of limitations.” *Sam v Balardo*, 411 Mich 405, 419; 308 NW2d 142 (1981). Indeed, although recognizing that funeral directors practiced a profession, had to be licensed, and could be liable for the negligent performance of their duties, our Supreme Court nevertheless held that negligence by funeral directors was not subject to the two-year period for actions alleging malpractice; the Court explained that the “Legislature did not intend . . . that every member of a state licensed profession is necessarily subject to malpractice and thereby covered by the two-year malpractice statute of limitations.” *Dennis v Robbins Funeral Home*, 428 Mich 698, 704; 411 NW2d 156 (1987). Because the common law did not recognize a claim for malpractice against funeral homes and funeral directors, the Court concluded that the Legislature did not intend to include claims against funeral homes or directors under the period of limitations applicable to malpractice claims. *Id.* at 702; compare *Local 1064 v Ernst & Young*, 449 Mich 322; 535 NW2d 187 (1995) (surveying foreign authorities and concluding that accountants were subject to claims of malpractice under the common law). Instead, the three-year period applicable to ordinary negligence claims applied to acts and omissions by funeral directors. *Robbins Funeral Home*, 428 Mich at 705.

Although they do not cite any authority specifically addressing whether an agent’s duty to an insured was traditionally a claim of malpractice under the common law, the parties do not appear to dispute whether the two-year period applicable to malpractice claims applies here. Instead, they contest the point at which Richardson’s claim accrued for purposes of malpractice. See MCL 600.5838(1) (governing the accrual of actions against state-licensed professionals); but see *Dennis*, 428 Mich at 704-705 (rejecting the contention that, by referring to a state licensed professional in MCL 600.5838, the Legislature intended to extend the term malpractice to include all state licensed professions). However, we do not need to address whether the trial court erred when it determined that Richardson’s claims were untimely under the period of limitations applicable to malpractice. Even if the trial court erred when it dismissed Richardson’s claim as untimely under MCL 600.5805(6), we conclude that the trial court came to the correct result because Richardson failed to establish his claim as a matter of law under both MCR 2.116(C)(8) and (C)(10). Accordingly, Quality Insurance and Grimes were entitled to summary disposition on those bases.

C. MCR 2.116(C)(8)

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). This Court accepts all factual allegations as true and construes them in the light most favorable to the nonmoving party. *Id.* “A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* (quotation marks and citation omitted).

As a threshold matter, Richardson had to allege and be able to prove that Grimes owed him a duty before he could establish his claim for negligence (whether characterized as malpractice or ordinary negligence). *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). “Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.” *Id.*, quoting *Moning v Alfonso*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). The existence of a legal duty is a question of law for the court to decide. *Harts v Farmers Ins Exch*, 461 Mich 1, 6; 597 NW2d 47 (1999).

Grimes and Quality Insurance argue that they did not owe Richardson an affirmative duty to advise him regarding the adequacy of his insurance coverage or to investigate his financial condition and recommend an appropriate coverage level or advise him to purchase an umbrella policy. As independent insurance agents,⁴ Grimes and Quality Insurance were Richardson’s agents rather than agents for the insurer; as such, they assumed the duties ordinarily present in an agency relationship, such as a duty of loyalty. *Genesee Foods Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654-656; 760 NW2d 259 (2008); *Burton v Burton*, 332 Mich 326, 337; 51 NW2d 297 (1952). Grimes accordingly had a duty “both in terms of finding an insurer that could provide [Richardson] with the most comprehensive coverage and in ensuring that the insurance contract properly addressed [Richardson’s] needs.” *Genesee Foods*, 279 Mich App at 656. “Generally, an insurance agent does not have an affirmative duty to advise a client regarding the adequacy of a policy’s coverage.” *Bruner v League General Ins Co*, 164 Mich App 28, 31; 416 NW2d 318 (1987). Generally, the scope of an insurance agent’s job is limited to “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.” *Harts*, 461 Mich at 8. This is in contrast to insurance counsellors who “primarily function as advisors on insurance coverage.” *Id.* at 8-9. The agent’s general no-duty-to-advise rule is “consistent with an insured’s obligations to read the policy and raise questions concerning coverage within a reasonable time after the policy has been issued.” *Id.* at 8 n 4; *Bruner*, 164 Mich App at 31.

This Court, in *Bruner*, recognized an affirmative duty to advise an insured regarding the adequacy or availability of coverage that may arise when a “special relationship” exists between the insurance agent and the insured, i.e., if there is a “longstanding relationship, some type of interaction on a question of coverage, with the insured relying on the expertise of the insurance agent to the insured’s detriment.” *Bruner*, 164 Mich App at 32, 34. Our Supreme Court in *Harts* modified the rule previously set forth in *Bruner*:

[A]s with most general rules, the general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured. This alteration of the ordinary relationship between an agent and an insured has been described by our Court of Appeals as a “special relationship”

⁴ There is no dispute that Quality Insurance and Grimes are not captive agents. See *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20-21; 592 NW2d 379 (1988).

that gives rise to a duty to advise on the part of the agent. While we agree with *Bruner*, that there must be “some type of interaction on a question of coverage,” we do not subscribe to the possible reading of *Bruner* that holds reliance on the length of the relationship between the agent and the insured is the dispositive factor in transforming the relationship into one in which the traditional common-law “no duty” principle is abrogated. We thus modify the “special relationship” test discussed in *Bruner*[.] [*Harts*, 461 Mich at 9-10 (citations omitted).]

The *Harts* Court then identified four limited exceptions to the general no-duty-to-advise rule where a special relationship arises obligating the insurance agent to affirmatively advise an insured about the adequacy or availability of coverage:

(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.]

Although *Harts* involved a captive agent rather than an independent agent, we conclude that the limited exceptions provided by our Supreme Court regarding the duty to advise concerning coverage apply equally to captive and independent agents for the reasons stated in *Nokielski v Colton*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2011 (Docket No. 294143), which we find persuasive and adopt as our own. See *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). Applying the *Harts* test, we conclude that Richardson failed to allege sufficient facts to establish a special relationship that would give rise to a duty to affirmatively advise on the adequacy or availability of insurance coverage. *Harts*, 461 Mich at 9-11.

Richardson did not allege that Grimes misrepresented the nature and extent of coverage provided. *Id.* at 10-11. Grimes’ alleged assurance that Richardson would be adequately insured in the event of an accident is more akin to an expression of an opinion than a misrepresentation of fact. See *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998) (“A promise regarding the future cannot form the basis of a misrepresentation claim.”) Richardson also did not allege that he made an “ambiguous request” regarding coverage. *Harts*, 461 Mich at 10-11. Although he did not want to be underinsured, he did not allege that he made an inquiry that suggested the need to assess the adequacy of his coverage. Instead, he alleged that Grimes contacted him regarding his insurance coverage to “save money,” to which Richardson allegedly indicated that he was not interested if it left him exposed or underinsured—presumably compared to his existing coverage. We cannot conclude that this allegation constituted a “request” for coverage requiring clarification and obligating Richardson to advise him regarding the adequacy or availability of insurance coverage. Likewise, Richardson’s allegations do not rise to the level of an “inquiry” that may require advice, warranting the imposition of a duty to advise him regarding the adequacy or availability of insurance coverage. *Id.* Again, Richardson did not allege that he ever made a specific inquiry about acquiring additional insurance coverage or the adequacy of his existing coverage. Finally, Richardson did not allege that Grimes assumed additional duties by agreement or promise. *Id.*

Richardson failed to allege sufficient facts that, if accepted as true, “support that a special relationship was formed” warranting the imposition of a heightened duty under *Harts* to advise him regarding the adequacy of his insurance coverage. Thus, the trial court erred in denying Grimes and Quality Insurance’s motion for summary disposition under MCR 2.116(C)(8).

D. MCR 2.116(C)(10)

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. In evaluating a motion for summary disposition brought under (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto*, 451 Mich at 362. If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 362-363.

Given the undisputed facts, a reasonable jury could not find that Richardson reasonably relied on Grimes’ assurances. Richardson, a sophisticated party, admitted that he read and reviewed the policy and knew that the policy’s automobile coverage limits for bodily injury were \$100,000 per person and \$300,000 per occurrence. He also testified that he knew and understood that, under the policy, the maximum amount the insurer would pay in the event of injury or death of one person under the policy was \$100,000. Accordingly, he specifically agreed that he understood that he was purchasing \$100,000 in coverage and that he would be obligated to pay any amount of liability over that amount. He agreed to purchase this level of coverage despite knowing that he had substantial assets and without informing Grimes about his wealth. Moreover, there is undisputed evidence that Grimes offered Richardson quotes on policies that included substantially more coverage—indeed sufficient coverage to insure against the loss that ultimately occurred here—which Richardson elected not to purchase. Instead, Richardson elected to continue with the 100/300 coverage level that the evidence showed he maintained for many years. On these facts, Richardson cannot claim to have reasonably relied on Grimes’ assurance that his insurance coverage despite his own knowledge that the 100/300 level covered only a small fraction of his overall wealth.

Richardson argued before the trial court, which agreed with him, that his averment that he did not fully understand residual liability established a factual dispute regarding whether he reasonably relied on Grimes’ assurances. However, this Court has held that “[p]arties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition.” *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). Instead, “deposition testimony, given in a clear, intelligent, and unequivocal manner, is binding in the absence of proper explanation[.]” *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 670; 440 NW2d 629 (1989). His averment purports to establish that he did not understand that he could be liable for any amounts in excess of his coverage. Yet, in his deposition he clearly indicated that he knew that the policy would only cover \$100,000 in liability to a single person and, at most, \$300,000 per accident. He also clearly stated that he

knew he had far more than \$300,000 in assets. It follows from this testimony that he must have understood that he would be personally liable for liability in excess of the limits and he could not create a question of fact by disavowing or contradicting his testimony in an affidavit.

The trial court erred in concluding that a genuine issue of material fact exists regarding whether Richardson reasonably relied on Grimes' alleged assertions of adequate insurance coverage and, accordingly, erred when it denied Grimes and Quality Insurance's motion for summary disposition under MCR 2.116(C)(10).

III. CONCLUSION

Even if the trial court erred in granting summary disposition under MCR 2.116(C)(7), Grimes and Quality Insurance were nevertheless entitled to summary disposition under MCR 2.116(C)(8) and (C)(10). This Court will not reverse a trial court's order when the right result was reached even if for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

There were no errors warranting relief.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Michael J. Kelly

/s/ Michael J. Riordan