STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

KIM & WELCH, LLC,
d/b/a NEW YORK MINUTE,
Plaintiff/Counter-Defendant,

v. **Case No. 2022-192455-CB**
Hon. Victoria Valentine

THE BURLINGTON INSURANCE
COMPANY,
Defendant/Counter-Plaintiff,

and

BURNS & WILCOX, LTD, and
VOLLRATH INSURANCE SERVICES, INC.,
Defendants.

____/

<u>OPINION AND ORDER REGARDING VOLLRATH INSURANCE SERVICES, INC.'S MOTION FOR PARTIAL SUMMARY DISPOSITION</u>

At a session of said Court held on the
27th day of November 2023 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

<u>OPINION</u>

This matter is before the Court on Defendant Vollrath Insurance Services, Inc.'s Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10). On October 24, 2023, Plaintiff filed a Response, to which Defendant Vollrath Insurance Services, Inc. ("Vollrath")

subsequently filed its Reply on October 26, 2023. The Court heard oral argument on November 1, 2023.

The Court has reviewed the pleadings as well as the Motion, Response, and Reply, and has heard oral argument on the above-entitled Motion. The Court now finds as follows:

I. Factual Background

The present cause of action arises out of a dispute concerning an insurance policy issued to Plaintiff by Defendant The Burlington Insurance Company ("BIC").

Plaintiff operated a small convenience store and carry-out Chinese food restaurant at 9770 Dixy Highway in Clarkston, Michigan. In or around September 2020, Januarius Welch ("Welch"), who identifies himself as a partner[1] in Plaintiff business, contacted Vollrath, an insurance agency and broker, to inquire about purchasing a commercial insurance policy for Plaintiff to insure both the property and the business. Vollrath secured an insurance quote for a policy based on actual cash value ("ACV") through Burns & Wilcox, Ltd. ("B&W"), a surplus lines broker, which was to be issued by BIC. In October 2020, Welch executed the Commercial Insurance Application[2] and Convenience Store Supplemental Application[3] and on or about November 11, 2020, Plaintiff obtained an insurance policy through BIC to insure Plaintiff's building for damages of up to a $572,000.00 ACV limit of liability, its business personal property

[1] See Exhibit 2, page 16, to Vollrath's Motion.
[2] See Exhibit 4 to Vollrath's Motion.
[3] See Exhibit B to Plaintiff's Response.

losses of up to a $30,000.00 ACV limit of liability, and its business income losses of up to a $50,000.00 limit of liability.[4]

On June 4, 2021, during the insurance policy period, a fire occurred at Plaintiff's business, causing extensive damage to the building, fixtures, and property. As a result of the fire damage, Plaintiff made an insurance claim to BIC for the building and the business. On June 28, 2021, however, BIC declined to indemnify Plaintiff for its fire losses on account of Plaintiff's alleged noncompliance with the Protective Safeguards Endorsement outlined in the insurance policy.[5]

Consequently, Plaintiff initiated this lawsuit against BIC on February 8, 2022. However, the matter was closed pursuant to an Order for Administrative Closing so that the parties could litigate the case in the United States District Court, Eastern District of Michigan. The matter was subsequently remanded back to the Oakland County Circuit Court and reopened on September 22, 2022. Plaintiff then filed its First Amended Complaint against BIC, B&W, and Vollrath on December 12, 2022. In the First Amended Complaint, Plaintiff raises the following counts against Defendants: Breach of Contract (BIC) (Count I); Declaratory Judgment (BIC) (Count II); Reformation (BIC) (Count III); Negligence (Vollrath) (Count IV); Breach of Contract (Vollrath) (Count V); and Negligence (B&W) (Count VI).

On October 5, 2023, Vollrath filed its Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10).

II. Standards of Review

[4] See Exhibit A to the First Amended Complaint.
[5] See Exhibit B to the First Amended Complaint.

A motion for summary disposition pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of a claim based on the factual allegations in the complaint." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-60; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *El-Khalil*, 504 Mich at 163.

"All well-pleaded factual allegations are accepted as true and construed in a light more favorable to the nonmovant." *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper "when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery." *Parkhurst Homes*, 187 Mich App at 360.

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties…in the light most favorable to the party opposing the motion. Where 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." *Maiden*, 461 Mich at 120; *Quinto v Cross & Peters Co.,* 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil,* 504 Mich at 160 (citation omitted).

III. Plaintiff's Requested Relief under its Motion for Partial Summary Disposition

In its Motion for Partial Summary Disposition, Vollrath is requesting the Court to:

a) Dismiss Count V of Plaintiff's First Amended Complaint;

b) Dismiss Plaintiff's claim that a special relationship existed between Plaintiff and Defendant Vollrath;

c) Dismiss all claims relating to a breach of duty for failing to advise Plaintiff as to the adequacy of its insurance coverage;

d) Dismiss all claims relating to replacement cost coverage;

e) Dismiss all claims for damages above and beyond the policy limits relating to property coverage, business personal property coverage and business income coverage;

f) Grant Defendant Vollrath whatever other relief the Court deems just and appropriate under the circumstances.[6]

Vollrath's request for the dismissal of Count V, as outlined in (a) above, shall be addressed in Section V of this Opinion. The remainder of Vollrath's requests, as outlined in (b) – (f) above, concern allegations or damages requests that have been raised in relation to Plaintiff's claim for Negligence (Vollrath) in Count IV of the First Amended Complaint. Vollrath clarifies in its Reply, however, that the only issue before the Court is whether or not a special relationship was established between Plaintiff and Vollrath. Specifically, Vollrath states:

> This Court is reminded that the present Motion is for 'partial summary disposition.' This Defendant has not raised any argument about the existence or propriety of the Protective Safeguards Endorsement in the Motion currently before this Court. That will likely be the subject of a subsequent motion once all depositions are completed. The only issue presently before the Court, is whether Plaintiff has properly pled the necessary exceptions to establish a special

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[6] See page 4 of Vollrath's Motion for Partial Summary Disposition. Pursuant to MCR 2.116(B)(1), "[a] party may move for dismissal of or a judgment on all or part of a claim in accordance with this rule."

relationship between the parties. Plaintiff's First Amended Complaint fails to do so.[7]

Notably, Vollrath argues further on page 4 of its Reply Brief that the Motion should also be granted in relation to the adequacy of the insurance coverages, consisting of ACV limits, under the BIC insurance policy[8] that were willingly accepted by Plaintiff.

Based upon Vollrath's representations in its Reply Brief, the Court shall address the following issues in Section IV below: (1) whether there was a special relationship between Vollrath and Plaintiff; and (2) whether the BIC insurance policy provided adequate insurance coverages that were willingly accepted by Plaintiff. These issues are set forth in Vollrath's initial requests for relief as (b) and (c) on page 4 of the Motion for Partial Summary Disposition.[9]

IV. Count IV - Negligence (Vollrath)

A. Arguments of the Parties

Vollrath first argues in its Motion that it did not have a special relationship with Plaintiff and as a result, Vollrath did not owe Plaintiff a duty to advise on the adequacy of the BIC insurance policy. Vollrath contends further that Welch testified in his deposition that the BIC insurance policy was adequate and that he voluntarily and willingly accepted the coverages. Further, Vollrath asserts that Welch signed the application for insurance and attested to the

[7] See pp. 3-4 of Vollrath's Reply Brief.

[8] The BIC insurance policy insured Plaintiff's building for damages of up to a $572,000.00 ACV limit of liability, its business personal property losses of up to a $30,000.00 ACV limit of liability, and its business income losses of up to a $50,000.00 limit of liability.

[9] Vollrath's requests are also set forth on page 4 of this Opinion.

accuracy of the information, including that he was accepting coverage offered by BIC on an ACV basis. In its Reply, Vollrath maintains that Plaintiff had the B&W quotation, the insurance application, and the insurance policy long before the loss ever occurred, and all three documents clearly identify the ACV limits.

In opposition, Plaintiff argues that Vollrath was in a special relationship with Plaintiff based upon their longstanding relationship that extended back at least a decade. Plaintiff contends that it relied upon the insurance application that was prepared and signed by Vollrath. Plaintiff asserts further that he discussed replacement cost insurance coverage with Scott Vollrath and that Vollrath knew Plaintiff had purchased insurance policies with replacement cost value ("RCV") coverage in the past. Plaintiff also notes that Vollrath prepared two replacement cost estimators in September and October of 2020, the latter of which had a replacement cost value of the business as $572,109.00. Based upon these earlier communications, Plaintiff maintains that the insurance policy application seeking ACV insurance coverage, as opposed to RCV coverage, was erroneous. Additionally, Plaintiff asserts that BIC added the Protective Safeguards Endorsement to the insurance policy based upon erroneous information that Vollrath included in the insurance application. According to Plaintiff, Vollrath was aware that the subject building did not have the requirements outlined in the Protective Safeguards Endorsement of the BIC insurance policy. For all of these reasons, Plaintiff argues that Vollrath had a duty to complete the insurance application accurately and not contribute false information to the application, whether purposefully or mistakenly.

B. Analysis

In Count IV of its First Amended Complaint, Plaintiff raises the following allegations relative to its claim for Negligence (Vollrath):

> 53. VOLLRATH had a duty to procure Kim & Welch's property insurance, business personal property insurance and business income insurance to protect Plaintiff's business risks and in accordance with its knowledge of Kim & Welch's business operations and Kim & Welch's requests for insurance coverage.
>
> 54. VOLLRATH was requested by Kim & Welch to obtain RCV insurance coverage in accordance with Kim & Welch's request and consistent with its prior insurance coverage.
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> 55. VOLLRATH breached its duties owed to Kim & Welch as it was provided information as to the correct protective safeguards in use at the Kim & Welch's business premises and instead negligently completed Kim & Welch's application for insurance.
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> 56. VOLLRATH breached its duties owed to Kim & Welch by obtaining ACV insurance coverage and indicating to B&W and prospective insurers, including BIC, that Kim & Welch was seeking ACV insurance coverages.
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> 57. VOLLRATH breached its duties owed to Kim & Welch by failing to review the Policy and identifying that Kim & Welch's insurance coverage was not in accord with its requests and with the protective safeguards in actual use at Kim & Welch's business.
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> 58. VOLLRATH was in a special relationship with Kim & Welch in that it had a lengthy prior relationship upon which it was known that Kim & Welch was relying upon VOLLRATH's insurance knowledge and expertise.
>
> 59. VOLLRATH was aware of the RCV of the Kim & Welch's building and negligently requested ACV insurance coverage inadequate to fully cover Kim & Welch's building loss.
>
> 60. The breach of the duties owed to Kim & Welch by VOLLRATH was a proximate cause of Kim & Welch's losses.

With respect to the issue of whether Vollrath had a special relationship with Plaintiff, and consequently owed a duty to Plaintiff, both parties rely on the case of *Harts v Farmers Ins Exch,*

461 Mich 1; 597 NW2d 47, 49–52 (1999) in support of their respective positions. In *Harts*, an insured individual sued his automobile insurer and the agent of the insurer relative to a no-fault automobile insurance policy. The Michigan Supreme Court in *Harts* determined that policy reasons "support the general rule that insurance agents have no duty to advise the insured regarding the adequacy of insurance coverage . . . Thus, under the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage. 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,* 461 Mich at 6-12. The *Harts* Court stated further that "as 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' that gives rise to a duty to advise on the part of the agent." *Id.*

The *Harts* Court agreed with the Court of Appeals' determination in *Bruner v League Gen Ins Co,* 164 Mich App 28, 29; 416 NW2d 318, 319 (1987) that there must be some type of interaction on a question of coverage, however, the *Harts* Court did not "subscribe to the possible reading of *Bruner* that holds reliance on the length of the relationship between the agent and the insured [as] the dispositive factor in transforming the relationship into one in which the traditional common-law 'no duty' principle is abrogated." *Id.* As a result, the *Harts* Court modified the "special relationship" test "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 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.*

Vollrath notes that Michigan courts have determined that the "duty to advise" rule from *Harts*, regarding the adequacy or availability of coverage, also applies to independent insurance agents. *Janovski v S J Ferrari Ins Agency, Inc,* unpublished per curiam opinion of the Court of Appeals, issued [May 24, 2016] (Docket No. 326457), p. 5; *Cloverleaf Car Co v Cascade Underwriters Inc.,* unpublished per curiam opinion of the Court of Appeals, issued [June 16, 2022] (Docket No. 3574350), p. 4.

However, this Court notes that the agent in *Harts* was a captive agent. This Court further notes that there are no published opinions that have applied *Harts* to independent agents. Recently, in *Taylor v Lake Michigan Ins Co*, Judge Shapiro dissented from the majority opinion which extended the *Harts* holding. Judge Shapiro explained that:

> The majority's error comes in its application of the Michigan Supreme Court's decision in *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999), to an independent agent despite the fact that the agent in *Harts* was a captive agent and a fiduciary of the insurer rather than the insured. The question in *Harts* was whether a captive agent can under certain circumstances nevertheless have a duty to the insured because they have developed a "special relationship," and *Harts* defined the circumstances in which that may be so. However, an independent agent already has a uniquely "special relationship" to the insured—that of agency. The "special relationship" test, if also applied to independent agents, collapses the distinction between independent and captive agents because what must be shown to establish a duty to the insured is the same, i.e., a "special relationship," regardless of whether they are an agent of the insurer or an agent of the insured.

There have been few published cases discussing the *Harts* rule, but they are inapplicable to this case, because, like *Harts,* they concerned only captive agents. See, e.g., *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16; 761 NW2d 151 (2008); *Holman v Farm Bureau Gen Ins Co of Mich*, ––– Mich App –––*Holman v Farm Bureau Gen Ins Co of Mich*, ––– Mich App –––; ––– NW2d ––– (2022)––– NW2d ––– (2022) (Docket No. 357473), rev'd in part ––– Mich –––––– Mich –––; 990 NW2d 364 (2023).

The balance of this Court's decisions addressing whether to apply the *Harts* rule to an independent agent have been unpublished, and are therefore not binding. *Lakeside Retreats LLC v Camp No Counselors LLC*, 340 Mich App 79, 97 n 4; 985 NW2d 225 (2022). Furthermore, these unpublished cases have yielded mixed results. Some have opted to apply the *Harts* rule to all agents, regardless of whether they are captive or independent. See, e.g., *Janovski v S.J. Ferrari Ins Agency, Inc*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2016 (Docket No. 326457), p. 5; *Cloverleaf Car Co v Cascade Underwriters Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2022 (Docket No. 357435), p. 4. Conversely, others have distinguished *Harts* in situations involving independent agents. See, e.g., *Micheau v Hughes & Havinga Ins Agency*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2013 (Docket No. 307914), p. 4; *Deremo v TWC & Assoc, Inc*, unpublished per curiam opinion of the Court of Appeals, issued August 30, 2012 (Docket No. 305810), p. 4.

The majority's conclusion is not only contrary to the centuries-old common law of agency, it also is contrary to the controlling statute. MCL 500.1201 explicitly distinguishes insurance agents who act on behalf of the insurers and those who act on behalf of the insureds:

(b) "Agent of the insured" means an insurance producer who is not an appointed insurance producer of the insurer with which the insurance policy is placed. An agent of the insured is treated as representing the insured or the insured's beneficiary and not the insurer.

(c) "Agent of the insurer" means an insurance producer who sells, solicits, or negotiates an application for insurance as a representative of the insurer and not the insured or the insured's beneficiary. [MCL 500.1201(b) and (c).]

The majority's view begs the question: If an agent of the insured has the same duties as an agent of the insurer, and the *Harts* "special relationship" rule applies regardless of what type of agent is involved, what is the purpose of differentiating between independent and captive agents

> at all? If an insured cannot rely on their independent agent to represent their interests, then in what way are they agents of the insured?[4]
>
> *Taylor v Lake Michigan Ins Co*, No. 360974, 2023 WL 5494391, at *7 (Mich. Ct. App. Aug. 24, 2023)

Whether Vollrath had a special relationship with Plaintiff to alter the traditional "no duty" principle in a captive agency relationship is not relevant in this case. Therefore, while Plaintiff asserts in Paragraph 58 of the First Amended Complaint that "VOLLRATH was in a special relationship with Kim & Welch in that it had a lengthy prior relationship upon which it was known that Kim & Welch was relying upon VOLLRATH's insurance knowledge and expertise." The length of the relationship is not instructive under the current published case law and is only relevant in transforming a traditional common-law "no duty" relationship to that of a special relationship that gives rise to a duty on the part of an agent. See generally, *Harts*, 461 Mich at 6-12. Therefore, Plaintiff's special longstanding relationship with Vollrath is not instructive as Vollrath was an independent agent.

The Court is also unpersuaded with Vollrath's argument that Plaintiff's First Amended Complaint contains no allegations that Vollrath's conduct falls within any of the four exceptions under the *Harts* special relationship test as it is again not instructive.

Regarding the adequacy of the coverages under the BIC insurance policy, Welch admitted during his deposition that the coverages were adequate and that he accepted those coverages voluntarily and willingly. Specifically, Welch attested to the following:

> Q: Okay. But you accepted 572 [$572,000.00], so that was adequate for your purposes, correct?

A: At that time, yes.

Q: Okay. So we've got that on the record, that $572,000 was adequate for your purposes and you voluntarily and willingly accepted that amount, correct?

A: To rebuild the business, yes.[10]

Q: Okay. Okay. So we've got that on the record. Now, I want to ask you – and as we've – as we've gone through, and I don't want to go through it again, the quotation, the application and the insurance policy all indicated that the valuation was ACV, correct?

A: I mean, that's outside of the scope of what we're talking about, but I will say that that's true.

Q: Okay. Now, as far as the business personal property that we haven't discussed, you did not ever object to that, did you, as far as the amount?

A: I have not, no.

Q: Okay. So you accepted that voluntarily and willingly, correct?

A: Yes.

Q: And the same is true for the business income amount on the policy, which was identified either as BI or business income of $50,000, you –

A: Correct.

Q: --voluntarily and willingly accepted that and did not object to that coverage limitation, correct?

A: I did not. The bulk of the coverage was to rebuild my building, that's all I cared about.[11]

Based upon the foregoing deposition testimony by Welch, the evidence establishes that Plaintiff voluntarily and willingly accepted the insurance coverages under the BIC policy and Plaintiff deemed those insurance coverages to be adequate.

While the Court has now addressed the two core issues for summary disposition that have been identified by Vollrath in its Reply Brief, the Court observes that Vollrath's Motion also

[10] See Exhibit 2, pp. 184-185, to Vollrath's Motion.
[11] See Exhibit 2, pp. 185-186, to Vollrath's Motion.

requests the dismissal of "all claims relating to replacement cost coverage."[12] However, Vollrath provides no specific argument or explanation in either its Motion or Reply Brief as to why Plaintiff's claims for replacement cost coverage fail. As such, Vollrath's request for dismissal of Plaintiff's claims relating to replacement cost coverage is deemed abandoned. *Houghton v Keller,* 256 Mich App 336, 339-340; 662 NW2d 854 (2003) ("failure to properly address the merits of [one's] assertion of error constitutes abandonment of the issue"; a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" (citations omitted)). Moreover, "[t]rial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

The Court observes further that both parties delve into the issue of whether Welch's execution of the Commercial Insurance Application and Convenience Store Supplemental Application binds Plaintiff to the coverages under the BIC insurance policy and bars Plaintiff's negligence claim.[13] Yet, Vollrath is not seeking summary dismissal of Plaintiff's Negligence claim

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[12] See request (d) on page 4 of Vollrath's Motion for Partial Summary Disposition and page 4 of this Opinion.

[13] Vollrath relies on the case of *Auto-Owners Ins Co v Motan*, unpublished per curiam opinion of the Court of Appeals, issued [September 8, 2015] (Docket No. 321059), in which the Michigan Court of Appeals held that once an insured party signs the application for an insurance policy, the insured party ratifies that "all of the information in the application was complete and accurate. It is of no import that [the insured party] failed to review the application for accuracy before signing it; his signature is valid just the same." *Id*. at 4. Regardless of whether the insured party or the insurance agent mischaracterized the information on the insurance application, those mischaracterizations are attributed to the insured party once he/she executes the insurance application. The *Auto-Owners* Court reiterated the long-standing principle that "a contracting party has a duty to examine a contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty.'" *Id*; *Montgomery v Fid & Guar Life Ins Co,* 269 Mich App 126, 130; 713 NW2d 801, 804 (2005).

In contrast, Plaintiff cites the case of *Holman v Farm Bureau Gen Ins Co of Michigan*, 342 Mich App 492 (2022), *rev'd in part,* 990 NW2d 364 (Mich 2023), in support of its argument that its negligence claim against Vollrath is not barred simply because Welch executed the insurance application. The *Holman* Court relies upon the case of *Zaremba*

at this time and so analysis of this particular issue is premature for purposes of this Opinion and Order. Summary disposition regarding damages[14] related to Plaintiff's Negligence claim is also premature for purposes of this Opinion and Order.

Accordingly, and for the reasons set forth in this Opinion, Vollrath's Motion for Partial Summary Disposition in relation to Plaintiff's Negligence claim is warranted in relation to the insurance coverages based on actual cash value under the BIC insurance policy. Plaintiff voluntarily and willingly accepted the coverage therefore, Plaintiff's claim relating to a breach of duty by Vollrath for failing to advise Plaintiff as to the adequacy of its insurance coverage must be dismissed.

V. Count V - Breach of Contract (Vollrath)

A. Arguments of the Parties

In its Motion, Vollrath argues that Plaintiff's Breach of Contract claim must be dismissed because an insurance agent's failure to procure the requested insurance sounds in tort and not in contract. In response, Plaintiff concedes that its claim is properly construed as a negligence claim and represents that it will voluntarily dismiss Count V against Defendant Vollrath.

Equip, Inc v Harco Nat'l Ins Co, 280 Mich App 16; 761 NW2d 151 (2008), in which the *Zaremba* Court determined that "an insured's duty to read insurance policy documents does not preclude a negligence action against the insurance agent." *Id.* The *Holden* Court observed further that "[w]hile *Zaremba* concerned an insurance agent's duty to advise on the adequacy of coverage, this case primarily concerns the scope of an agent's duty in preparing the application, which Michigan caselaw has not expressly addressed. However, given that captive insurance agents are 'order takers,' *Harts*, 461 Mich at 9; 597 NW2d 47, it follows that there is a duty to do so accurately and not contribute false information to the application, whether purposefully or mistakenly. Thus, it is not necessary for us to determine whether there was a special relationship between [the parties] because this case falls within the more general, limited duty to take orders described in *Harts. Id.* at 8; 597 NW2d 47. And under *Zaremba*, plaintiff's corresponding duty to review the entire application may be considered in determining comparative fault, but it does not bar a negligence action against [the insurance agent]." *Holman*, 342 Mich App 503-505.

[14] See request (e) on page 4 of Vollrath's Motion for Partial Summary Disposition and on page 4 of this Opinion.

B. Analysis

As referenced by Plaintiff, the Michigan Court of Appeals has "characterized an insurance agent's failure to procure requested insurance as a tort." *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220, 229; 859 NW2d 723, 729 (2014); *Holton v A+ Ins Assoc, Inc,* 255 Mich App 318, 324–325; 661 NW2d 248 (2003). See also *Zaremba Equip, Inc v Harco Nat'l Ins Co,* 280 Mich App 16, 37–38; 761 NW2d 151 (2008) (holding that an insurance agent who does not procure the insurance coverage requested breaches his or her duty, suggesting a negligence claim).

In consideration of the caselaw, the Court agrees that Plaintiff's Breach of Contract claim against Vollrath sounds in tort, and not in contract. Therefore, summary disposition of Plaintiff's Breach of Contract claim is warranted, however, the Court acknowledges Plaintiff's representation that it will voluntarily dismiss Count V against Vollrath. The Court will allow Plaintiff the opportunity to voluntarily dismiss Count V from its First Amended Complaint.

ORDER

For the reasons set forth in the Opinion above:

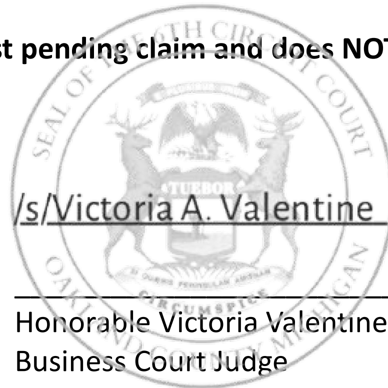
IT IS HEREBY ORDERED that Defendant Vollrath's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is **GRANTED IN PART** as to Vollrath's requested relief under (c)[15] as those requests concern Count IV Negligence (Vollrath). All other requests set forth in Vollrath's Motion for Partial Summary Disposition concerning Count IV of the First Amended Complaint are **DENIED** for the reasons stated in the Opinion.

[15] See request (c) on page 4 of Vollrath's Motion for Partial Summary Disposition and on page 4 of this Opinion.

IT IS FURTHER ORDERED that Plaintiff may file a voluntary dismissal of Count V Breach of Contract (Vollrath) by December 15, 2023.[16] If Plaintiff fails to do so, Count V shall be automatically dismissed under MCR 2.116(C)(10) and in accordance with the Court's analysis in Section V of this Opinion.

IT IS SO ORDERED.

This order does NOT resolve the last pending claim and does NOT close the case.



/s/Victoria A. Valentine

11/27/23 ____
Honorable Victoria Valentine
Business Court Judge

[16] Pursuant to MCR 2.504(A)(2)(b), "[u]nless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice."