STATE OF MICHIGAN

COURT OF APPEALS

TAMMY MAYNARD, Individually and as Personal Representative of the ESTATE OF DERVIN L. MAYNARD,

Plaintiff-Appellant,

v

SCOTT MURRAY,

Defendant,

and

TRANSAMERICA LIFE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 21, 2021

No. 353850
Saginaw Circuit Court
LC No. 18-036029-NZ

Before: STEPHENS, P.J., and GLEICHER and BORRELLO, JJ.

BORRELLO, J. (*dissenting*).

The majority in this case characterizes defendant's lack of advice, which he had no duty to provide, as "advice" sufficient to create a special relationship between Murray and Dervin. Because plaintiff has not demonstrated that there is any evidence—even viewing the evidence in a light most favorable to her—that Murray took any actions to create a special relationship, I would affirm the trial court. I therefore respectfully dissent.

I. ADDITIONAL FACTUAL BACKGROUND

The issue in this case focuses on whether Dervin's lack of a personal life insurance policy at the time of his death may be attributed to wrongful conduct by defendants.

In 2017, Dervin applied for a life insurance policy with Transamerica through Murray[1] as the agent. Dervin signed as the proposed insured a conditional receipt for his March 22, 2017 life insurance application with Transamerica. The conditional receipt provided in relevant part as follows:

> **This Receipt does not provide any conditional insurance until after all of the conditions and requirements speci ed [sic] are met, and is strictly limited in scope and amount as set forth below.**
>
> **CONDITIONAL COVERAGE:** Conditional insurance, under the terms of the contract applied for, may become effective as of the date of completing Part 1 of the application, the date of completing Part 2 of the application, or the date requested in the application, whichever is latest (the Effective Date), but only after all the conditions to conditional coverage have been met.
>
> **CONDITIONS TO CONDITIONAL COVERAGE UNDER THIS RECEIPT:** Such conditional insurance will take effect as of the Effective Date, but only so long as all of the following conditions are met:
>
> 1. The payment made with the application must be received at our Administrative Office within the lifetime of the Proposed Insured and honored on first presentation for payment;
>
> 2. Part 1 and Part 2 of the application, and all medical examinations, tests, screenings and questionnaires required by the Company are completed and received at our Administrative Office;
>
> 3. As of the Effective Date, all statements and answers given in the application (both Parts) must be true and complete; and
>
> 4. The Company is satisfied that, at the time of completing Part 1 and Part 2 of the application, each person to be covered was insurable at any rating under the Company s [sic] rules for insurance on the plan applied for and in the amount and at the Nicotine Classification applied for.
>
> * * *
>
> **IF CONDITIONS ARE NOT MET OR DEATH OCCURS FROM SUICIDE, THERE IS NO COVERAGE UNDER THIS RECEIPT.** If one or more of this Receipt s [sic] conditions have not been met exactly, or if a Proposed Insured dies by suicide or intentional self-inflicted injury, while sane or insane, the Company will not be liable under this Receipt except to return any payment made with the application. If the Proposed Insured should die before completing all medical examinations, tests, screenings, and questionnaires required by the Company or

[1] Murray is not a party to this appeal.

> would not be insurable under the Company s [sic] rules, then the Company will not be liable under this Receipt except to return any payment made with the application.
>
> ***Except as provided in this Conditional Receipt,*** no coverage under the contract you are applying for will become effective unless and until after a contract is delivered to you and all other conditions of coverage set forth in Part 1 of the application have been met.

Additionally, the following statements were included immediately above Dervin's signature on the conditional receipt as the proposed owner:

> I have read the foregoing Conditional Receipt issued by Transamerica Life Insurance Company. The insurance producer has fully explained to me all the terms, conditions, and limitations of the Conditional Receipt, and I understand them.
>
> I also understand neither the insurance producer, any person who has signed this Receipt, nor the medical/paramedical examiner is authorized to accept risks or determine insurability, to make or modify contracts, or to waive any of the Company s [sic] rights or requirements.

The record also contains a series of text messages that plaintiff testified occurred between Dervin and Murray in 2017 related to the Transamerica policy application, which have been quoted in the majority opinion.

In a letter dated July 27, 2017, Transamerica denied Dervin's application for life insurance based on "copd with smoking." The letter indicated that as a result of the denial, Dervin had "no coverage under this application with Transamerica Life Insurance Company." Plaintiff testified that Dervin had COPD and emphysema from smoking.

Eric Lippert, assistant vice president of sales support and information management for Transamerica, testified that it appeared that the application signed by Dervin and Murray provided inaccurate information regarding "prior insurance" because it indicated that Dervin did not have any other life insurance policy.

Dervin passed away in November 2017. Approximately 15 days before his death, Dervin applied for a life insurance policy with Mutual of Omaha and he successfully obtained a $25,000 policy. However, plaintiff testified that the benefit for the Mutual of Omaha policy was not paid upon Dervin's death because he had not held the policy for the required 18 months. Instead, plaintiff received a $250,000 death benefit from Dervin's life insurance policy through the company he co-owned.[2]

[2] This was a different policy than the Transamerica policy for which Dervin was denied and which is at issue in this appeal.

The trial court granted Transamerica's motion for summary disposition and denied plaintiff's subsequent motion for reconsideration.[3] As relevant to the arguments raised on appeal, the trial court concluded that Murray was an exclusive agent of Transamerica[4] and that there was no evidence that a special relationship existed between Murray and Dervin that would have served as an exception to the general rule that an exclusive agent's duty is to the insurance company as the principal, rather than the proposed insured. The trial court was correct.

II. STANDARD OF REVIEW

In the context of a negligence claim, "[w]hether 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). A trial court's ruling on a motion for summary disposition is also reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019).

III. ANALYSIS

On appeal, plaintiff challenges the trial court's dismissal of her negligence claim. "To establish a prima facie case of negligence, a plaintiff must prove the following elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539, 552; 942 NW2d 696 (2019) (quotation marks and citation omitted).

Turning first to the question of duty, plaintiff expressly concedes on appeal that Murray "was an exclusive agent of Transamerica." Our Supreme Court has explained that in that situation, an insurance agent has "a duty to comply with the various fiduciary obligations he owed to [the insurance company] and to act for its benefit." *Harts*, 461 Mich at 7. Accordingly, "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." *Id*. at 8. Therefore, Murray generally had no duty to advise Dervin in the context of the transaction at issue because Murray was Transamerica's exclusive agent.

However, plaintiff argues that Murray had a duty arising out of a special relationship with Dervin to advise him not to let his Western & Southern policy lapse during the pendency of the Transamerica application. According to plaintiff, a special relationship existed because the text messages demonstrate that Dervin made inquires that required Murray's advice when Dervin informed Murray that the prior policy was going to lapse or had lapsed, and the text messages further show that Murray gave the requested advice by responding to Dervin's concerns about the lapsing policy with assurances that the new policy would soon be in effect, omitting any indication

[3] Plaintiff's claims against Murray were dismissed without prejudice because both parties failed to appear for the date and time scheduled for trial.

[4] Plaintiff conceded this fact in her motion for reconsideration, and she concedes this point on appeal as well.

that Dervin should prevent the old policy from lapsing by paying his premium. The majority agrees with this view of the text messages.

"[T]he 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" such that there is "a 'special relationship' that gives rise to a duty to advise on the part of the agent." *Id*. at 9-10 (citations omitted). "When a special relationship exists, an agent assumes a duty to advise the insured regarding the adequacy of insurance coverage." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 28; 761 NW2d 151 (2008). In *Harts*, the Michigan Supreme Court set forth the test for determining whether a "special relationship" was created:

> [T]he 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. [*Harts*, 461 Mich at 10-11 (citations omitted).]

In this case, plaintiff's appellate argument is directly focused only on the third circumstance described in *Harts*. However, the text messages on which plaintiff relies do not support her claim. There is no evidence that Dervin ever made an inquiry about whether or not he should allow his Western & Southern policy to lapse and there is no evidence that Murray ever advised Dervin to allow his Western & Southern policy to lapse. It is apparent from the text messages that Dervin knew that his policy would lapse on a specific date and that he knew it had lapsed after the lapse occurred. It is also apparent from the text messages that Dervin understood that he had no coverage with Transamerica until he was actually approved by the company.

Contrary to the assertions made by plaintiff and endorsed by my colleagues in the majority, the text messages contain no evidence that Murray assured Dervin he would certainly be approved for the policy but merely indicated Murray's assurances regarding the status of collecting necessary information and the timing of a final decision. There is no evidence that Murray affirmatively provided *any advice* to Dervin, much less advice that was "inaccurate," regarding how to navigate the fact that Dervin's existing policy with Western & Southern would lapse before any final decision on his pending Transamerica policy had been made. *Id*. Plaintiff, as well as the majority, merely attempts to show a special relationship based on Murray's failure to advise Dervin not to let his prior existing policy lapse, which Murray had no duty to do. Hence, the lack of a duty to do this does not establish that a special relationship was formed but instead constitutes conduct by Murray strictly in accordance with his general common law duty as an exclusive agent of Transamerica that he "owe[d] no duty to advise a potential insured about any coverage." *Id*. at 8. Under this general rule, liability may not be predicated on a "failure to advise a client of every possible insurance option, or even an arguably better package of insurance offered by a competitor." *Id*. at 7-8 (quotation marks and citation omitted). Contrary to the view taken by the majority in this case, Murray's failure to advise Dervin not to let the Western & Southern policy lapse, when Murray had no duty to provide such advice, did not establish a special relationship between Murray and Dervin. *Id*. at 8, 10-11.

To the extent plaintiff asserts in conclusory fashion that a special relationship was formed under the first and fourth circumstances of the test, she did not provide any further argument in this regard and has thus abandoned these arguments. "An appellant 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." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted).

Moreover, as previously discussed, the crux of the position advanced by plaintiff and promoted by the majority, is that Murry *failed to provide advice that Dervin should not have let his Western & Southern policy lapse until the Transamerica policy was finalized*. However, as Transamerica's exclusive agent, Murray had no duty to provide such advice. *Harts*, 461 Mich at 8. Plaintiff's theory does not establish that a special relationship was formed under the circumstances described in *Hart*. There is no evidence that Murray misrepresented the nature or extent of coverage. The text messages do not indicate that Murray ever claimed that the Transamerica policy was in effect, and the text messages further reflect that Dervin clearly understood that he never had life insurance coverage with Transamerica in effect and that he was losing his life insurance coverage with Western & Southern by allowing that policy to lapse. There is no evidence that Murray gave *inaccurate* advice; he merely failed to give advice that he had no duty to provide and that the majority believes he should have given anyway. There also is no evidence that Murray assumed any additional duty with respect to Dervin by agreement or making a promise; Murray made no promises in the text message exchanges. Thus, plaintiff has not presented any evidence that would create a genuine issue of fact regarding any of the situations that would have created a special relationship giving rise to a duty for Murray to provide such advice to Dervin. *Id*. at 10-11.

Because there was no evidence that Murray had any duty to advise Dervin in this context, plaintiff has also failed to establish that Transamerica had such a duty on the basis of Murray's conduct. *Id*. at 12 ("Because plaintiffs cannot establish liability against Mr. Pietrzak, the agent, they likewise cannot establish vicarious liability against Farmers, the principal."). Because there was no duty, plaintiff's negligence claim cannot be established as a matter of law and the trial court did not err by granting summary disposition in Transamerica's favor on the negligence claim. *Id*.; *Nyman*, 329 Mich App at 552.

For these reasons I respectfully dissent from the majority opinion. I would affirm the trial court's rulings in this matter.

/s/ Stephen L. Borrello