STATE OF MICHIGAN

COURT OF APPEALS

AARON THERIAULT, assignee of TERRI'S LOUNGE, INC., d/b/a TERRI'S LOUNGE,

Plaintiff-Appellee,

and

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervening Plaintiff-Appellee,

v

AL BOURDEAU INSURANCE SERVICE, INC.,

Defendant-Appellant,

and

MICHIGAN ASSOCIATION OF INSURANCE AGENTS, and INSURANCE INSTITUTE OF MICHIGAN,

Amici-Curiae.

UNPUBLISHED
October 14, 2008

No. 278643
Genesee Circuit Court
LC No. 05-081385-NZ

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the order of the trial court granting judgment for plaintiff, Aaron Theriault, assignee of Terri's Lounge, Inc., d/b/a Terri's Lounge. Defendant also challenges the trial court's denial of its numerous post-trial motions. We reverse.

On appeal, defendant argues that the trial court: (i) misapplied the case law setting forth the duty of an insurance agent to an insured; (ii) erred in failing to apply the "collectibility rule"

set forth in *Stockdale v Jamison*, 416 Mich 217; 330 NW2d 389 (1982)[1], and *Frankenmuth Mut Ins Co v Keeley*, 436 Mich 372; 461 NW2d 666 (1990)[2], in determining the amount of damages; (iii) improperly denied defendant its right to a jury trial; and (iv) abused its discretion in denying admission of two of defendant's proposed exhibits: a letter allegedly sent to Terri's Lounge by its general commercial liability carrier advising it to retain counsel, and several tax returns of Terri's Lounge.

Defendant is an insurance agency based in Flint, Michigan. During the time period relevant to this litigation, Terri's Lounge, a bar located in Genesee County, maintained a general liability insurance policy with Essex Insurance Company ("Essex") purchased through defendant, and a separate liquor liability insurance policy with North Pointe Insurance Company ("North Pointe"), which was purchased through the Rumsey Insurance Agency ("Rumsey"). Three of defendant's employees, Patty Idalski, a customer service representative who services commercial accounts, Marian Hanel, who works in the claims department, and Robert Bourdeau, defendant's vice president for service and personal insurance lines, testified that defendant instructs commercial customers to bring in to their office any claims and legal documents they receive. Gene Reid, manager and part-owner of Terri's Lounge testified that he had been instructed to bring any pleadings or letters pertaining to claims to defendant by its staff and had complied with that instruction in this litigation.

On or about December 20, 2004, Reid received a letter from plaintiff's counsel, which read as follows:

> Please be advised that I represent the above-named who sustained extremely serious injuries as a result of an incident [on May 31, 2003,] involving an intoxicated patron of your establishment. That intoxicated person was Mr. Michael Howard Hensley and our investigation reveals that Mr. Michael Howard Hensley was served intoxicating beverages whilst he was visible [sic] intoxicated contrary to the dictates of the Michigan Dram Shop Act.
>
> This letter is an attempt to comply with the notice provision of that act, MCL 436.1801, et. seq. Kindly turn this letter over to your insurance company and I will be happy to supply them with the particulars.

The following day, Reid took the letter to defendant's Flint office and asked two women in the front office to give the letter to Idalski. Defendant's staff forwarded the letter to Essex the same day it was received from Reid.

In correspondence dated December 23, 2004, Essex informed Reid that it had received notice of plaintiff's claim from defendant. After citing several provisions of the insurance

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[1] Overruled in part on other grounds by *Frankenmuth Mut Ins Co v Keeley*, 436 Mich 372, 376; 461 NW2d 666 (1990).

[2] Adopting Justice Levin's dissenting opinion in *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525, 528; 447 NW2d 691 (1989).

contract between Essex and Terri's Lounge, including the liquor liability and assault and battery exclusions, Essex noted plaintiff's allegation that an intoxicated patron of the lounge injured him, and stated, "This claim likely arose from some sort of assault and/or battery." It also stated that Essex would investigate the matter, but did so "under a complete reservation of rights." Reid apparently received this letter on or about December 23, 2004, and took it to defendant's office. Reid received the summons and complaint in the underlying lawsuit against Terri's Lounge during the first week of January 2005, and took it to defendant's office. On January 6, 2005, defendant faxed the summons and complaint to Essex.

In a letter dated January 27, 2005, Essex informed Reid that it was declining coverage:

> This letter is to inform you that no coverage is afforded under the Commercial General Liability Policy issued by Essex Insurance Company. **It is therefore essential that you retain counsel of your choosing to respond to the Complaint filed against your company. Failure to do so could result in a judgment against you.**

The letter stated that there was no coverage because the allegations in the complaint did not meet the definition of an "occurrence," and because the specific policy exclusions for liquor liability and assault and battery applied. Reid apparently received this letter, though it is not clear when. Defendant was carbon copied on the letter and received it on February 1, 2005. On January 31, 2005, a default was entered against Terri's Lounge, and on February 14, 2005, a default judgment was entered in favor of plaintiff against Terri's Lounge in the amount of $3 million.

Rumsey first learned of the claim and lawsuit on February 14, 2005, when it received "a liquor liability claim" sent by Reid on behalf of Terri's Lounge. Rumsey mailed the documents to North Pointe the same day. Rumsey received a response on February 16, 2005, in which North Pointe informed Rumsey that it would try to set aside the default judgment on behalf of Terri's Lounge. On February 18, 2005, defendant forwarded the documents it had received in connection with the incident involving plaintiff to North Pointe.

Plaintiff, as assignee of any and all claims of Reid and Terri's Lounge against defendant, filed his complaint in this action on May 5, 2005.[3] Among other arguments, plaintiff alleged that defendant breached its duty to Reid and Terri's Lounge to provide proper advice and to correctly and appropriately process claims submitted to its office by failing to submit the December 20, 2004, letter to the company or agent that provided liquor liability insurance coverage, failing to advise Terri's Lounge that Essex did not provide liquor liability insurance coverage and would exclude coverage for the claim, and failing to advise Terri's Lounge to retain personal counsel. Following a bench trial, the trial court granted judgment in favor of plaintiff, finding that defendant had a duty to advise Reid and Terri's Lounge with respect to insurance coverage and

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[3] Terri's Lounge assigned its claims to plaintiff after the default judgment was entered against it in the underlying lawsuit, in which plaintiff sued Terri's Lounge in connection with injuries he received when he was shot outside Terri's Lounge on May 31, 2003, allegedly by an intoxicated patron of the establishment.

breached that duty by failing to either forward the December 20, 2004, letter and related documents to the liquor liability insurance carrier for Terri's Lounge or advise Reid that he should do so. On appeal, defendant argues that the trial court erred in finding that such a duty existed. We agree.

Questions regarding the existence of a duty are issues of law, *Pressey Enterprises, Inc v Barnett-France Ins Agency*, 271 Mich App 685, 687; 724 NW2d 503 (2006), which we review de novo, *Frans v Harleysville Lakes States Ins Co* (*On Reconsideration)*, 270 Mich App 201, 203; 714 NW2d 671 (2006).

In general, an insurance agent has no duty to advise "an insured about the adequacy or availability of coverage." *Pressey*, *supra* at 687. Based on a review of Michigan statutes regulating insurance products, the Michigan Supreme Court has characterized insurance agents as "order takers," in contrast to insurance counselors, "who function primarily as advisors." *Harts v Farmers Ins Exch*, 461 Mich 1, 9; 597 NW2d 47 (1999). "This limited role of the insurance agent . . . is consistent with an insured's obligation to read the insurance policy and raise questions concerning coverage within a reasonable time after the policy has been issued." *Id*. at 9, n 4. However, four situations have been identified that constitute exceptions to the general rule that an insurance agent owes an insured no duty to advise, which arise 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." [*Pressey*, *supra* at 687, quoting *Harts*, *supra* at 10-11.]

The trial court determined that the second *Harts* situation for establishing a "special relationship" existed. The trial court found that, by testifying that the December 20, 2004, letter "was vague enough that it referred to an incident and serious injuries which potentially could have been covered under the general liability policy," defendant's expert had essentially admitted that the letter "could have been both a claim for general liability and for dramshop." Based on that finding, the trial court concluded that, "when Defendant requested that Gene Reid bring in such vague documents[,] it was obligated to clarify what needed to be done and [] Defendant failed in its duty to do so."

The trial court also determined that the fourth situation designated in *Harts* existed. The trial court found that, by voluntarily setting up a claims department and instructing Reid to bring in documents pertaining to insurance claims and lawsuits, defendant assumed an additional duty, which it breached by failing to inform Reid that he should file the documents pertaining to liquor liability with the proper carrier or forward those documents to the carrier itself. Defendant contests these findings on appeal, arguing that Reid knew or should have known, because he had a duty to read and understand the policy, that defendant did not provide his liquor liability insurance coverage. Defendant also argues that *Harts* never contemplated imposing a duty on an insurance agent in connection with a policy it did not service, sell, or administer.

Examining the second *Harts* scenario for establishment of a "special relationship," we find that the trial court's determination that there was an "ambiguous request" in this case is not

supported by case law. As "an example of an ambiguous request for coverage," the *Harts* Court cited the request of a plaintiff for "full coverage." *Harts*, *supra* at 11, n 11. In *Pressey*, *supra* at 689, this Court distinguished *Harts,* stating: "Unlike the ambiguous request for 'full coverage' discussed in *Harts*, plaintiffs' request for contents coverage was not a request for an inexact or nonexistent type of coverage. It was a request for a specific and available additional policy." Even accepting the trial court's finding that the December 20, 2004, letter was "ambiguous" because it could have been interpreted as involving a claim relevant to either Terri's Lounge's general liability or liquor liability insurance carrier, it is a stretch to characterize Reid's delivery of the December 20, 2004, letter to defendant as a "request." The "request" contemplated by *Harts* and *Pressey* was a request by the insured for new or additional insurance coverage. There was no such request on the part of Reid or Terri's Lounge at issue here.

With respect to the fourth *Harts* situation, the trial testimony established that defendant processes insurance claims and tells its customers to notify it when they have a claim. The testimony also established that, although they are not required to do so, most insurance agencies process claims. Plaintiff's insurance expert testified that while an insurance agency has no duty to have a claims office, and some agents instruct their clients to call the insurance company's claims office, in general, when an insured has a claim, he submits it to his insurance agent. Defendant's expert testified, "[i]t is customary for independent agents to be involved in the handling of the paper to refer [a claim] to the insurance company." A Rumsey insurance agent testified that Rumsey did not maintain a claims department or claims office; that no employee is assigned or responsible only for claims; and that Rumsey does not instruct its customers to bring in legal documents. However, the agent also said that customers telephone Rumsey when they have a claim and Rumsey processes the paperwork in order to pass the claim on to the insurance company. Therefore, the record does not support the proposition that defendant assumed a special duty "by either express agreement with or promise to" Reid beyond the very limited duty of an insurance agent that is the general rule under *Harts*, *supra* at 9-11, or that defendant does anything markedly different from most insurance agencies with respect to claims.

It would be inconsistent with that limited duty to hold an insurance agent such as defendant liable in connection with an insurance policy it did not write and an insurance company with which it had no relationship. Further, as the *Harts* Court noted, the limited duty of an insurance agent "is consistent with an insured's obligation to read the insurance policy and raise questions about coverage within a reasonable time after the policy is issued." *Harts*, *supra* at 9, n 4. See also, *Zaremba Equip, Inc v Harco Nat'l Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 274745, issued July 31, 2008), slip op, p 7. This duty of the insured certainly encompasses an obligation to know and understand which types of insurance one has and through which insurance agents and insurance companies. Moreover, there was evidence to suggest that Reid actually knew the difference between his liquor liability and general commercial liability insurance carriers. Idalski and Bourdeau testified that Reid knew defendant did not handle the liquor liability insurance coverage for Terri's Lounge and Bourdeau pointed out that Terri's Lounge had previous dram shop claims that had been handled by North Pointe, through Rumsey. Defendant's employees may reasonably have expected that Reid would also submit the letter to the insurance agency that was responsible for writing his liquor liability insurance policy. Finally, the language of the letter from plaintiff's attorney was sufficient to put anyone on notice that the claim was likely to involve liquor liability, even if there was a possibility that it would also involve general commercial liability. The letter stated that plaintiff

sustained serious injuries "as a result of an incident involving an intoxicated patron of your establishment," it identified the "intoxicated person" as Hensley, and alleged that Hensley "was served intoxicating beverages whilst he was visible [sic] intoxicated contrary to the dictates of the Michigan Dram Shop Act." Consequently, we find that defendant did not assume an additional duty by asking customers to bring in claims and legal documents, nor did it breach any duty owed to Reid, as representative of Terri's Lounge, by failing to advise him to submit the December 20, 2004, letter to Rumsey or North Pointe.

Defendant's second argument on appeal is that the trial court erred in failing to apply the "collectibility rule," established by *Stockdale*, *supra*, and its progeny. Because we find that defendant owed no duty to Terri's Lounge and is therefore not liable to plaintiff in this case, it is unnecessary for this Court to address either the issue of damages or the remainder of defendant's assertions of error on appeal.

Reversed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray