STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

DAVID FERGUSON and HEIDI FERGUSON,

Plaintiffs,

v

JOANNE GILLIAM and BAILEY AGENCY, INC d/b/a BONE & BAILEY INSURANCE AGENCY, a Michigan corporation,

Defendants.

File No.: 24-2705-NZ
Hon. Tara S. Hovey[1]

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OPINION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the courthouse in the City of Midland, County of Midland, State of Michigan on the _21st__ day of August 2025.

Present: Honorable Tara S. Hovey
Circuit Judge

I. Introduction

The matter before the Court is Defendants' motion for summary disposition under MCR 2.116(C)(10). As previously stated by this Court:

> In this case, Plaintiffs claim that Defendants were negligent upon their failure to procure appropriate insurance on a home that Plaintiffs owned but did not reside in. Subsequently, Plaintiffs suffered uninsured losses in the event of a fire in said home.

[1] Acting by assignment of the State Court Administrative Office.

TARA S. HOVEY
35TH CIRCUIT COURT JUDGE

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(Opinion and Order, filed September 20, 2024, p. 1.)

The Court has reviewed the motion and response and has heard oral argument on the matter. For the reasons below, Defendants' motion is denied.

II. Standard of Review

For a summary disposition motion under MCR 2.116(C)(10), this motion asserts "there is no genuine issue of material fact" and that Plaintiff is entitled to judgment as a matter of law. "[A]ffidavits, . . . the pleadings, depositions, admissions, and documentary evidence . . . must be considered" when evaluating the motion. MCR 2.116(G)(5). That evidence "shall only be considered to the extent that the content or substance would be admissible evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). A court must consider the evidence listed in MCR 2.116(G)(5) "in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. Facts

A. Background

These following events are generally not in dispute[2], and they are presented for the context of the disputed factual matters below. Plaintiffs own two properties: 618 W. Peterson, Sanford, MI ("Peterson") and 213 Ripley, Midland, MI ("Ripley"). (HF/6–10; DF/10–12.) Ripley was purchased in 2008, and Peterson was purchased in 2019 with the Plaintiffs' intent of eventually downsizing. (HF/8; DF/10–14.)

Plaintiff Heidi Ferguson primarily handled the household's insurance matters. (HF/13; DF/16–17; JG/83.) Plaintiffs initially had AAA for home insurance for Ripley, then Frankenmuth Insurance (through Defendant Bone & Bailey Insurance Agency), then State Farm (through Hantz). (HF/13–16, 18.) Heidi did not recall when the initial Bone & Bailey contact and coverage began, but Hantz began in August 2021. (*Id.*) From 2019 through 2021, Peterson was uninsured. (HF/16.) When going through Hantz, Plaintiffs had primary home

[2] This is based on the review of the attached documents provided by the parties' motion and responses. For ease of reference, the supplied transcripts will be identified by initials and page number (e.g., HF/1).

coverage for Ripley and secondary home coverage for Peterson. (HF/17.) That was because of their living arrangement then. (*Id.*) Plaintiffs did not move to Peterson until December 2021, after remodel renovations were completed. (HF/12; DF/15.) Plaintiffs contacted the agent at Hantz in December 2021, to inform him that Plaintiffs moved. (HF/19.) In the process of switching coverage, Plaintiffs had a hacking incident with their checking account that caused their failure to make a payment to State Farm. (HF/19–21.) Consequently, State Farm canceled the policy, and Hantz had no ability to assist Plaintiffs. (*Id.*)

Subsequent to the disputed insurance discussions below, a fire occurred at Ripley in May 2023. (DF/16; JG/72.) An insurance claim following the fire was denied because Plaintiffs were not living there. (DF/41.) By now, David Ferguson indicated that the City of Midland is requiring them to tear down Ripley. (DF/38.)

B. Insurance Coverage Discussions by the Parties

Following State Farm cancelation, and in January 2022, Heidi Ferguson contacted Defendant JoAnne Gilliam to address her insurance needs through Bone & Bailey; Heidi remembered JoAnne from the time when Heidi canceled her Frankenmuth Insurance coverage through Bone & Bailey. (HF/23.) Heidi explained her State Farm coverage situation to JoAnne and further stated they had moved to Peterson. (HF/30.) JoAnne completed the insurance application based on information provided by Heidi. (HF/32.) And from this, Plaintiffs had home insurance coverage from Auto-Owners Insurance. (*Id.*) However, the applications signed by Heidi listed Ripley as primary and Peterson as seasonal. (HF/38–41.) After Heidi's review[3], she did not notice this issue or bring it to JoAnne's attention. (*Id.*) Separately, Heidi did not recall reviewing renewal insurance documents on Peterson because nothing had changed. (HF/45–46.)

Despite the initial description of planned coverage above, Heidi Ferguson had the additional situation with Bone & Bailey, where she claims that the Frankenmuth Insurance on Ripley was never canceled in 2022. (HF/46–49.) Heidi claims JoAnne never submitted the cancelation, which had the effect of paying for Frankenmuth Insurance and Auto-Owners Insurance at the same time. (*Id.*) This means that Frankenmuth covered Ripley, and Auto-

[3] In addition to the review Heidi provided, and prior to the fire, David Ferguson reviewed the policy, though not word-for-word; at the time, he did not realize the difference between coverage of a primary property and secondary property because he did not own two properties before. (DF/30–32.)

Owners covered Peterson. (*Id.*) Heidi was regularly on the phone with JoAnne to try to correct this situation, as this situation resulted in Plaintiffs' escrow paying Frankenmuth while Plaintiffs were getting billed from Auto-Owners. (*Id.*) No coverage was changed at this time, because Heidi accepted JoAnne's description that the policies were correct. (*Id.*)

Further, Heidi Ferguson described getting a cancelation notice from Frankenmuth Insurance in April 2023 because the Plaintiffs were not residing at Ripley. (HF/52–53.) Heidi contacted JoAnne about this situation, and she claims JoAnne knew Plaintiffs were not living at Ripley, and further JoAnne said she would have the policies fixed. (*Id.*)

JoAnne Gilliam has the position of an independent agent at Bone & Bailey. (JG/85.) JoAnne Gilliam denies any discussion of Plaintiffs' move, which would have had the effect of a change of primary residence. (JG/84.) At her deposition, JoAnne reviewed download reports of her agency's management software; she was generally unaware of how to explain the contents of the reports, particularly an entry that appears to make Peterson the primary household for Plaintiffs. (DG/passim, 63.)

IV. Analysis

C. Background

This is an insurance negligence case. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (footnote omitted).

Insurance agents have certain duties to the insured. For instance: "An insurance agent owes a duty to procure the insurance coverage requested by an insured. The insured's agent must strictly follow the insured's instructions which are clear, explicit, absolute, and unqualified." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 37–38; 761 NW2d 151 (2008) (cleaned up).

However, "under the common law, an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage." *Harts v Farmers Ins Exch*, 461 Mich 1, 8; 597 NW2d 47 (1999). This puts the agent in the position of an "order taker" whose "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 8–9. *Harts* recognizes "the general no-duty-to-advise rule . . . is subject to change when an event

occurs that alters the nature of the relationship between the agent and the insured." *Id.*, at 9–10. The often-quoted test in *Harts* considers events such as.

> (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 (cleaned up). The conclusion of *Harts* has been extended to independent insurance agents. See, e.g., *Five Waters Properties, LLC v Bone*, unpublished opinion of the Court of Appeals, issued February 22, 2024 (Docket No. 366075), 2024 WL 748484, p *3; *Johnson v USA Underwriters*, 328 Mich App 223; 936 NW2d 834, 842 (2019).

D. Defendants' Argument – No Duty

Defendants argue that there is no genuine issue of material fact that they did not breach any duty to Plaintiffs. Defendants are incorrect.

The facts, described above, show a genuine issue of material fact to be decided by the trier of fact at trial. It is undisputed that Defendants acted as independent agents for Plaintiffs. As a result, Defendants have a duty to procure the insurance that was offered through Defendants and that Plaintiffs requested to be ordered. Plaintiffs present a number of circumstances surrounding their insurance situations and needs that suggest they did make requests for coverage of Peterson as the primary house; and to that end, Defendants dispute that. At this time, to believe one party over the other, would be a determination of the parties' credibility, which is inappropriate for summary disposition. See *Franks v Franks*, 330 Mich App 69, 85; 944 NW2d 388 (2019) (citation omitted). This is without regard to whether or not Plaintiffs made any request for changes in coverage; this event does not address Defendants' duty at outset of the parties' client-agent relationship.

In addition, the disputed facts to be determined at trial may tend toward an alternate approach to duty under *Harts'* special relationship. The particular focus, here, is the agent misrepresenting the nature and extent of the coverage. In at least two instances that Heidi Ferguson described—from the reason for returning to Bone & Bailey after her checking account hack to the end of getting a cancelation notice on Ripley—she claims to have communicated Plaintiffs' move to Peterson to JoAnne Gilliam. These situations are not one where, say, (1) the parties have a long-standing relationship, (2) Plaintiffs acquired a separate property, (3) which was insured, and (4) Plaintiffs moved and simply failed to update the

insurer. Plaintiffs' described-interaction with Defendants was closely connected with the fact that they moved from one residence to another. This demonstrates that summary disposition is inappropriate by the alternative fact that Defendants deny knowledge of that move and claim they provided policies in accord with the request.

The existence of duty is undisputed by the parties' relationship, considering *Harts* and its progeny. Whether Defendants followed through with their duty is a question for a jury.

E. Defendants' Argument – No Causation

Defendants argue that there is no genuine issue of material fact that their actions were not the cause of Plaintiffs' loss. Defendants are incorrect.

Defendants generally reiterate an argument on causation in a motion for summary disposition that was previously denied by this Court. (See Opinion and Order, filed September 20, 2024.) This time, there is reference to deposition testimony. Given the presented factual allegations, the deposition testimony does not change the result, and, in fact, they demonstrate that a jury resolution is necessary.

Particularly, and again, the Court notes Defendants' reading of *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16; 761 NW2d 151 (2008) is too broad. As the Court previously stated:

> For example . . . "The insured has a duty to read its insurance policy and to question the agent if concerns about coverage emerge. A jury should consider these corresponding duties in the crucible of comparative negligence." *Zaremba Equip, Inc*, 280 Mich App at 36. See also *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004) ("[T]he trier of fact in a tort action shall determine by percent the comparative negligence of all those who are a proximate cause of the plaintiff's injury and subsequent damages.")

(Opinion and Order, filed September 20, 2024, p. 3.) The causation elements—being cause in fact and legal cause (*Skinner v Square D Co*, 445 Mich 153, 162–63; 516 NW2d 475 (1994)) —are controverted by the parties' deposition testimony (particularly the disputes over whether a change of primary residence was actually part of the application). The risk of uninsured loss in the failure of an application for insurance is evidently foreseeable. Defendants' emphasis on the insurance renewals and Plaintiffs' lack of changes requested does not change the initial issue of whether or not Defendants breached their duties to Plaintiff[4]. At best, Defendants'

[4] Defendants rely on the noted obligation from *VanDyke v League Gen Ins Co*, which states: "An insured is obligated to read his or her insurance policy and to raise questions concerning coverage within a reasonable time after the policy is issued." *VanDyke*, 184 Mich App 271, 275; 457 NW2d 141 (1990) (citation omitted). While

arguments go to the issue of damages (not causation), and whether they are reduced by comparative negligence. See *Zaremba Equip,* supra.

Finally, at this time, no weight is given to Defendants' expert opinion from Michael S. Hale. He is offering an interpretation of the law and facts that are properly the province of the Judge and jury in this case, respectively. See *People v McFarlane*, 325 Mich App 507, 519; 926 NW2d 339 (2018) (citing *People v Drossart*, 99 Mich App 66, 75; 297 NW2d 863 (1980)).

Like the issue above, questions of causation are a matter for a jury to decide.

F. Attorney Fees

Plaintiffs request attorney fees under MCR 1.109(E)(6) as a sanction for rearguing the alleged lack of causation, above, considering this Court's previous ruling that denied summary disposition. (See Opinion and Order, filed September 20, 2024.)

Plaintiffs' request will be denied. The order after the previous motion, which was argued under MCR 2.116(C)(8), followed a reading of Plaintiffs' complaint as understood through applicable case law. The order recognized that the issues of this case needed additional factual development. The parties have since provided that development, particularly via the depositions. In this instance, the depositions do not materially change the positions of the parties, as it relates to the causation issue. The fact remains that Plaintiffs did not notice the provisions limiting their insurance to their primary residence, and thus they did not request any change from Defendants after the policies were issued. However, these events did not exist in a vacuum. There are also allegations (supported by deposition) that Plaintiffs *did* make the request to change their primary residence before the policies were issued, though Defendants dispute that occurrence. In light of that allegation, and of the alleged facts of this case generally, this reaffirms the fact that liability, if any, is to be determined through comparative negligence. Again, just like the previous order of this case noted, *Zaremba Equipment* directs: "The insured has a duty to read its insurance policy and to question the

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this obligation is good policy and common sense, its utility is not applicable to the analysis of the instant case. *VanDyke* was a contract interpretation case, and interpretation cases can turn on whether disputed provisions are ambiguous or not. Plaintiffs, in this case, are not arguing that the insurance applications and policies are ambiguous; they are arguing that Defendants did not fulfil their duties to them, and that caused damages through uninsured loss. The fact that Plaintiffs may not have read, understood, and/or questioned their policy does not change the initial factual relation that is disputed in this case: did Plaintiffs order secondary/seasonal homeowners' coverage for Ripley after they moved, or not.

Approved, SCAO

JIS CODE: POM

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☐ Juvenile In the matter of _____

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On the date below I sent by first-class mail a copy of Opinion and Order on Defendants' Motion for Summary Disposition

to: List names and addresses.

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I declare that the statements above are true to the best of my information, knowledge, and belief.

8/21/2025
Date

Angela S. Cullen
Signature

Angela S. Cullen
Name (type or print)

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MCR 2.107(C)(3), (D)