STATE OF MICHIGAN

COURT OF APPEALS

JEANETTE MATE, as Personal Representative of the Estate of SHANE MATE, Deceased,

Plaintiff-Appellant,

v

WOLVERINE MUTUAL INSURANCE CO., and BUITEN, TAMBLIN, STEENSMA & ASSOCIATES, INC., and PAUL BUITEN,

Defendants-Appellees.

FOR PUBLICATION
December 1, 1998
9:05 a.m.

No. 201125
Kent Circuit Court
LC No. 93-082574

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

GRIFFIN, J.

Plaintiff estate of Shane Mate, deceased, by and through its personal representative Jeanette Mate, appeals as of right orders granting summary disposition in favor of defendants. Although Jeanette Mate (now Jeanette Hylarides) in her individual capacity was a party plaintiff in the lower court and filed a claim of appeal, Jeanette Mate, individually, has not filed a brief with this Court and therefore has abandoned any individual claims. MCR 7.216(A)(10). MCR 7.212(C)(5). *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). We affirm.

I

The following are facts not in dispute. Shane Mate was killed in a motor vehicle accident on October 17, 1992. At the time of the tragic mishap, Shane Mate was an adult, then eighteen years old, residing with his mother, Jeanette Mate. James Mate is Jeanette Mate's ex-husband and despite the similarity of last names, is neither the father nor a relative of Shane Mate. Further, at the time of the accident, Jeanette Mate and her ex-husband James Mate resided in separate households.

support because of some deficiency which cannot be overcome. See *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Unfortunately, the majority provides a skeletal rendition of the facts and a terse discussion of plaintiff's breach of contract claim. Its analysis completely misses the point, and consequently fails to address the true breach of contract issue. The breach of contract must be and is the threshold issue for analysis in this case. An insurance policy is first and foremost a contract. Specifically, an insured pays money in the form of premiums to obtain, in this case, no-fault auto insurance. After plaintiff and James Mate were divorced in 1989, plaintiff still required automobile insurance coverage for herself, and, concomitantly, for anyone else living in her household. In 1991, the defendant Buiten, Tamblin, Steensma & Associates, Inc. (the "Buiten agency") first properly sold plaintiff a separate no-fault policy. Then, in 1992, the agency merely added the vehicles plaintiff owned to James Mate's no-fault policy, issued certificates of insurance for those vehicles, and accepted premiums for the coverage. In other words, defendant Wolverine Mutual Insurance Company, through the Buiten agency, agreed to provide no-fault insurance to plaintiff Jeanette Mate, i.e. the parties entered into a contract. In reality, plaintiff and her son, Shane, fell within no definition of an insured under Wolverine's policy language. Consequently, Jeanette Mate had no no-fault coverage whatsoever[1] which, in turn, means that no one residing in her home was insured under the Wolverine policy she believed provided her no-fault coverage. Thus, when the majority decides the breach of contract claim in reference to whether the policy covered Shane Mate for underinsured motorists, it is putting "the cart before horse." Obviously, there must be a policy in effect before one can analyze its terms of coverage. At the time of the accident the only persons truly insured under the policy were James Mate and any of his resident relatives.

Here, though the majority recites the applicable standard of review, I believe it impossible to consider these facts in a light most favorable to the non-moving party, and applying the standards for the grant or denial of summary disposition, and not find it evident that a genuine issue of material fact exists as to whether plaintiff has a viable cause of action for breach of contract. Thus, I would reverse the grant of summary disposition as to plaintiff's breach of contract claim.

II

AGENCY

Plaintiff also claims that a genuine issue of material fact exists as to whether the Buiten agency was an agent of Wolverine Mutual Insurance Company. I again agree that a genuine issue of material fact exists as to this claim.

The majority correctly quotes from *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995) and *Mayer v Auto-Owners Ins Co*, 127 Mich App 23, 26; 338 NW2d 407 (1983) when it states that "ordinarily, an independent insurance agent or broker is an agent of the insured, not the insurer." In their respective analyses, *Harwood* refers only to *Mayer* and *Mayer* refers only to Appleman, Insurance Law & Practice, and to Restatement 2d, Agency.

On appeal, we review de novo the lower court's decision whether to grant or deny summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

III

Breach of Contract

Underinsurance automobile insurance protection is not required by law and therefore is optional insurance offered by some, but not all, Michigan automobile insurance companies. Because such insurance is not mandated by statute, the scope, coverage, and limitations of underinsurance protection are governed by the insurance contract and the law pertaining to contracts. *Auto-Owners Ins Co v Leefers*, 203 Mich App 5, 10-11; 512 NW2d 324 (1993). As the Supreme Court stated in *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993), regarding substantially similar uninsured motorists benefits:

> PIP [personal protection insurance] benefits are mandated by statute under the no-fault act, MCL 500.3105; MSA 24.13105, and, therefore, the statute is the "rule book" for deciding the issues involved in questions regarding awarding those benefits. On the other hand, the insurance policy itself, which is the contract between the insurer and the insured, controls the interpretation of its own provisions providing benefits not required by statute. Therefore, because uninsured motorist benefits are not required by statute, interpretation of the policy dictates under what circumstances those benefits will be awarded.

First, we conclude that plaintiff's claim of a breach of the insurance contract is without merit. It is clear that the Wolverine policy of automobile insurance did not by its terms provide underinsurance coverage to Shane Mate. The underinsurance motorist provision at issue extends coverage under the policy only to "the *named insured*, his spouse if a resident of the same household and any family member." Family member is defined in the policy as

> a person related to *you* [the named insured or a spouse if a resident of the same household] by blood, marriage or adoption who is a resident of your household. [Emphasis added.]

Shane Mate was neither a named insured in the policy nor was he related to James Mate or a resident of James Mate's household. Accordingly, the lower court correctly granted summary disposition in regard to plaintiff's contract claim.

IV

Agency

Next, plaintiff claims that a genuine issue of material fact exists regarding whether Buiten was an agent of Wolverine Mutual Insurance Company. We disagree.

* * *

> Finally, a sales representative often acts on behalf of both the insurer and the applicant, and such an intermediary owes a duty to exercise due care and reasonable diligence in the pursuit of the insured's or the applicant's business. [Keeton & Widiss, Insurance Law, § 2.5(3), pp 89-90.] Emphasis added.

In this case, Paul Buiten referred to plaintiff and her ex-husband as his "clients." He further indicated that "as agents, we're contracted with insurance companies to place business with them. We are given binding authority."

The tenor of Mr. Buiten's testimony suggests that from his perspective his primary relationship is with the insurance companies with which he contracts and by which he is paid. Hence, because there is no well-settled law in Michigan unequivocally characterizing an independent insurance agent at the agent of the insured, there exists a genuine issue of both law and fact. Moreover, depending on the facts of a specific case, an agent could be dually serving two principals.

The analysis proffered by Keeton and Widiss takes into account the realities of the relationship between an independent agent and the insurance company and provides a far more fair and sensible approach to the characterization of the intertwined relationships among insurers, insureds, and independent agents or brokers.

Thus, for these reasons and because I do not believe either *Hardwood* or *Mayer* are controlling on this issue, MCR 7.215(H)(1), I believe there exists a genuine issue of the material fact as to whether the Buiten agency was an agent of Wolverine Mutual Insurance Company, and/or a dual agent of both Wolverine and plaintiff.

III

EQUITABLE ESTOPPEL

I also firmly believe that there exists a genuine issue of material fact as to whether Wolverine is estopped from disclaiming coverage for plaintiff's claim. As the majority noted, there are circumstances where estoppel may operate to hold a defendant liable for coverage that differs from the express terms of the contract. *Parmet Homes Inc, v Republic Ins Co*, 111 Mich App 140, 148; 314 NW2d 453 (1981). Equitable estoppel exists "when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts." *Lichon v American Universal Ins Co*, 435 Mich 408, 415; 459 NW2d 288 (1990).

Here, the record evidences that both Buiten and Wolverine knew these important facts: (1) that Jeanette and James Mate had been divorced for several years and were living at separate addresses; (2) that Jeanette Mate was legally required to have her own no-fault insurance policy

Plaintiff argues that Buiten's silence regarding the fact that Shane Mate was not "fully covered" under the automobile insurance policy satisfies the first element of equitable estoppel. Plaintiff has presented no evidence that either Buiten or Wolverine intentionally or negligently induced Shane Mate to believe that he would be insured under the policy for underinsurance benefits. Although the record reveals that both Buiten and Wolverine were aware that Jeanette and James Mate were living at separate addresses, plaintiff presented no evidence that defendants were aware of Shane Mate's presence in either household. Jeanette Mate testified that she had not inquired as to the type of coverage Shane would receive but merely assumed that he would be "covered" under the policy.

"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). "Instead, the insured is obligated to read the policy and raise questions concerning coverage within a reasonable time after issuance." *Id.* Therefore, it was Jeanette Mate's failure to notify Buiten that Shane was living in her household which resulted in Shane's lack of underinsurance coverage. Because Buiten was under no obligation to advise plaintiff regarding the adequacy of coverage[2], Buiten's silence on such adequacy cannot constitute the culpable negligence or intentional act required for equitable estoppel. Therefore, the trial court properly granted Wolverine's motion for summary disposition regarding plaintiff's assertion of equitable estoppel.

VI

Negligence - Professional Malpractice

Plaintiff estate also argues that a genuine issue of material fact exists regarding the existence of a special relationship between plaintiff and Buiten. We disagree. In *Bruner, supra* at 34, we stated the following test for a special relationship:

> While it is perhaps difficult to derive any absolute rule of law from these cases, it is apparent that something more than the standard policy-holder-insurer relationship is required in order to create a question of fact as to the existence of a "special relationship" obligating the insurer to advise the policyholder about his or her insurance coverage. There must be, in a long-standing 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.

Here, no relationship of any kind existed between Shane Mate and Buiten. The record lacks any evidence that Buiten advised Shane in any way regarding the adequacy of his insurance coverage. In fact, Paul Buiten testified that he was unaware that Shane even existed. Because plaintiff has failed to sustain its burden of submitting evidence in support of its claim of a special relationship between plaintiff and Buiten, the trial court correctly granted summary disposition in favor of defendant Buiten. MCR 2.116(G)(4).

household which resulted in Shane's lack of underinsurance coverage" is mystifying and has frightening ramifications for thousands of parents who have children living with them. Were this a situation where Jeanette Mate *had* maintained her own policy as the law requires, and that insurance did not contain a provision providing for underinsurance, the majority's "inadequacy of insurance" analysis would be well taken. However, the issue here is clearly not one of "inadequacy of coverage," and the trial court clearly erred in granting defendant's summary disposition on this issue as well.

IV

NEGLIGENCE - PROFESSIONAL MALPRACTICE

Finally, I also agree that there exists a genuine issue of material fact regarding the existence of a special relationship between plaintiff and Buiten agency so as to invoke a duty of care. As previously discussed, an insurance agent generally does not have an affirmative duty to advise a client regarding the adequacy of a policy's coverage. But as also noted in *Bruner, supra* at 31-32, a duty may arise where a "special relationship" exists between the insurer or its agent and the insured. If that duty is breached, liability may be imposed based on that breach.

Bruner, in my opinion, supports plaintiff's claim for professional negligence against the Buiten agency, but at the very least there exists a question of fact as to the existence of a "special relationship." In discussing what constitutes a "special relationship" the court in *Bruner*, *supra* at 34 stated in pertinent part:

> There must be, in a long standing 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 determent.

Again, the majority concludes that no special relationship of any sort existed between Shane Mate and the Buiten agency. And, again, the majority, in a rationale that is puzzling, states that "[t]he record lacks any evidence that Buiten advised plaintiff in any way regarding the adequacy of his insurance coverage." The majority again misses the point: the focus is on the agency's relationship with Jeanette Mate, not with her resident child, Shane. The Buiten agency had a long term relationship both with Jeanette and James Mate since 1978, had many, many contacts with them over numerous years, and had interaction on coverage questions.

Here, the transcripts unequivocally demonstrate that Jeanette Mate conversed with the Buiten agency and specifically asked whether there was any reason she couldn't be covered under her ex-husband's policy. The Buiten agency's witnesses themselves recalled many conversations with Mrs. Mate, their file notes reflect coverage changes, address changes, notice of divorce, etc. Unlike the plaintiff in *Bruner*, Jeanette and James Mate, based on the Buiten agency's own witnesses' testimony, appeared to have had far more dealings with their insurance agency than is usually found in a "standard" client-agent relationship. *Bruner*, *supra* at 34. Moreover, again unlike the plaintiff in *Bruner*, plaintiff previously had underinsured motorist coverage when she had her separate policy, and so did James Mate in his policy in effect at the time of this accident. Plaintiff expressly requested the Buiten agency to provide her with no-fault insurance benefits,

Our dissenting colleague writes as if Jeanette Mate, individually, were the plaintiff. She is not. The plaintiff is the *estate of Shane Mate, deceased,* not Jeanette Mate. Although the dissent's position on the issues of agency and estoppel is contrary to established Michigan law, the more fundamental error of the dissent is a misunderstanding that plaintiff estate has no standing to assert the tort claims. Absent a duty, assumed or otherwise, defendants owed no obligation to plaintiff. See, generally, *Panich, supra.* Here, no duty to plaintiff is alleged.

In conclusion, we have not "bizzarely twisted both the facts of this case and their application to the pertinent law." Rather, we have applied the established law to the facts, parties, and claims.

Affirmed.

/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] It is unclear whether James Mate possessed an insurable interest in the vehicle. Nevertheless, this issue is waived because it was not raised in the lower court or on appeal.

[2] We disagree with plaintiff's underlying premise that automobile insurance without optional underinsurance protection is "inadequate coverage."