STATE OF MICHIGAN

COURT OF APPEALS

MARY BARBER and DARIN BARBER,

Plaintiffs-Appellants,

v

PETER ROSE and ALLSTATE INSURANCE CO,

Defendants-Appellees.

UNPUBLISHED
July 22, 1997

No. 189705
Wayne Circuit Court
LC No. 94-426263 NZ

Before: Gribbs, P.J., and Holbrook, Jr., and J.L. Martlew,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part.

Plaintiffs argue in this appeal that the trial court erroneously dismissed their claims for fraudulent misrepresentation and innocent misrepresentation on the ground that plaintiffs failed to demonstrate the existence of a special relationship between themselves and their insurance agent, defendant Peter Rose. Plaintiffs argue that these claims were based on evidence of Rose's misfeasance in falsely representing to plaintiffs the reason defendant Allstate Insurance Company did not offer uninsured motorist coverage in higher amounts than $20,000 per person, $40,000 per occurrence. Plaintiffs claim that they are able to prove that Rose misrepresented either that Allstate's filing with the state prevented Allstate from offering higher levels of coverage, or that higher levels of coverage were unavailable in Michigan. Plaintiffs argue that these facts support a claim of fraudulent misrepresentation or innocent misrepresentation.

Relying on *Stein v Continental Casualty Co*, 110 Mich App 410, 413-414; 313 NW2d 299 (1981), and *Bruner v League General Insurance Co*, 164 Mich App 28, 34; 416 NW2d 318 (1987), the trial court dismissed plaintiffs' claims, finding that plaintiffs had not established the requisite "special relationship" between themselves and Rose so as to impose a duty on Rose to advise them regarding the adequacy of insurance coverage. We conclude that this was error. *Bruner* and *Stein* involved tort claims in the nature of malpractice (i.e., professional negligence), rather than affirmative acts of fraud or misrepresentation. Thus, to the extent that plaintiff's

* Circuit judge, sitting on the Court of Appeals by assignment.

claims allege such misfeasance, reliance on *Bruner* and *Stein* is misplaced. Accord *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988) (noting distinction between tort liability for nonfeasance and misfeasance, and reluctance of courts to impose liability for *non*feasance in absence of "special relationship" between the parties).

In Michigan, fraudulent misrepresentation and innocent misrepresentation constitute causes of action that are "substantially similar," but also "significantly different." *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). To establish common-law fraudulent misrepresentation, a plaintiff must prove that (1) the defendant made a material misrepresentation, (2) that was false, (3) that when it was made, the defendant knew it was false, or made it recklessly, without any knowledge of its truth or falsity, (4) that it was made with the intention that the plaintiff act upon it, (5) that the plaintiff relied upon it, and (6) that the plaintiff suffered injury. *Hi-Way Motor Co v International Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976). A claim of innocent misrepresentation, however, eliminates elements (3) and (4), while adding the requirements that the misrepresentation occur in the context of contractual negotiations, and that the injury suffered by the plaintiff must inure to the benefit of the misrepresenter. *USF&G v Black, supra*. Briefly then, to establish a claim of innocent misrepresentation, a plaintiff need not show that the innocent misrepresenter knew his representation was false, but it is necessary to show that not only does the victim suffer injury, but also that the injury inured to the misrepresenter's benefit. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Lash v Allstate Insurance Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* This Court is liberal in finding a genuine issue of material fact. *Id.* Here, viewing the evidence in a light most favorable to plaintiffs, we find that a genuine issue of material fact exists whether defendant Rose's misrepresentation constituted common-law fraud or innocent misrepresentation. Accordingly, we reverse the trial court's order granting summary disposition of these claims in favor of defendants.

We reject plaintiffs' alternative argument that Allstate's $20,000/$40,000 uninsured motorist coverage limits are inadequate per se to cover any claim serious enough to trigger the residual liability provisions of the no-fault insurance act. See MCL 500.3135; MSA 24.13135. Plaintiff couches this argument as silent fraud. Liability for silent fraud is established by showing suppression of the facts and of the truth, as well as by openly false assertions. *Id.* at 125; *In re People v Jory,* 443 Mich 403, 416; 505 NW2d 228 (1993). "When the circumstances surrounding a particular transaction are such as to require the giving of information, a deliberate and intentional failure to do so may properly be regarded as fraudulent in character." *Ainscough v O'Shaughnessey*, 346 Mich 307, 316; 78 NW2d 209 (1956). Here, plaintiffs would have to demonstrate that Rose had a duty to disclose that the $20,000/$40,000 limits would most likely be inadequate to compensate plaintiffs for any claim not excluded by the no-fault statute. Given that Michigan's no-fault act permits automobile insurance carriers to sell policies in which residual liability coverage is limited to $20,000 per

person and $40,000 per occurrence, MCL 500.3009(1); MSA 24.13009(1), and does not require policies to include coverage for uninsured motorist liability, defendant Allstate and its agents had no duty to advise insureds that uninsured motorist coverage limits of $20,000/$40,000 are inadequate per se. Accordingly, the trial court properly dismissed plaintiffs' silent fraud claim.

Given our resolution of the above issues, we need not address plaintiffs' remaining arguments.

Affirmed in part and reversed in part.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew