DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOE CHALABI and EVA CHALABI, husband and wife, Plaintiffs/Appellants, v. RICHARD JAMES HOBBS; RICK HOBBS INSURANCE AGENCY, INC.; STATE FARM INSURANCE COMPANIES, dba STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendants/Appellees.	1 CA-CV 10-0070 DEPARTMENT A **MEMORANDUM DECISION** Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-007895

The Honorable John A. Buttrick, Judge

AFFIRMED

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B A R K E R, Judge

¶1 Although distinct in time and circumstances, this is essentially a companion case to an earlier decision from a panel of Division Two in *Ballesteros v. American Standard Insurance Co. of Wisconsin*, 223 Ariz. 269, 222 P.3d 292 (App. 2009). That case is presently under review by the Arizona Supreme Court. In *Ballesteros,* the court construed Arizona Revised Statutes ("A.R.S.") section 20-259.01, dealing with the statutory mandate to offer uninsured/underinsured ("UM/UIM") coverage. This court held that when the statutorily required form was provided in a language that the insured could not understand, the insurer must take additional steps to satisfy the statute. *Id*. at 277, ¶ 25, 222 P.3d at 300. Because of the procedural posture, we do not know whether *Ballesteros* will remain valid law or not. Even if *Ballesteros* remains in place, however, the rule it put into effect would not apply here. Thus, without determining whether to accept or reject *Ballesteros*, on the record before us neither the insurer nor its agent in this case was required to take additional steps to satisfy the statutory mandate or qualify for its protection. Accordingly, we affirm.

I.

¶2 Joe and Eva Chalabi ("Plaintiffs") appeal from the superior court's order dismissing their contract and negligence claims against Richard Hobbs ("Hobbs"), Rick Hobbs Insurance Agency, and State Farm Insurance Company ("State Farm").

Plaintiffs allege that Hobbs and Rick Hobbs Insurance Agency breached their duty of care by failing to advise Plaintiffs to obtain UM/UIM coverage on their automobile insurance policy and by failing to explain the principles of UM/UIM coverage to Plaintiffs. In early 2002, Plaintiffs sought to purchase a State Farm automobile insurance policy through Hobbs and Rick Hobbs Insurance Agency. At Plaintiff Joe Chalabi's initial meeting with Hobbs, he requested "full coverage," and Hobbs prepared an application for $100,000 per person/$300,000 per accident in liability coverage, comprehensive, collision, car rental, and travel expenses. Hobbs also provided a Department of Insurance-approved UM/UIM Acknowledgment of Coverage Selection or Rejection form informing Chalabi of the availability of UM/UIM coverage. The document consists of one page. At the top of the page with bold printing and capitalization as indicated, is the following:

WARNING!!
THIS IS AN IMPORTANT INSURANCE DOCUMENT
PLEASE READ CAREFULLY BEFORE SIGNING

The document contains an explanation of what UM/UIM coverage provides. The document also states that "I have read and I understand the above explanation and offer of Uninsured Motor Vehicle coverage and Underinsured Motor Vehicle Coverage." Plaintiff, however, signed the form declining coverage without reading it. Although English is not Chalabi's first language,

he was able to read the selection form at deposition. Plaintiffs do not allege that Chalabi lacked the ability to understand the form.

¶3 The form indicates that "I also understand that I have the opportunity to ask for an additional explanation from my agent." Chalabi did not do so. Likewise, Hobbs neither separately advised Plaintiff to read the forms nor gave a separate analysis as to the benefits of obtaining UM/UIM coverage. Hobbs also does not recall if, in addition to conveying the form, he explained UM/UIM coverage principles to Chalabi. When State Farm did not receive the original UM/UIM Acknowledgment form, Chalabi was later asked to re-sign it and did so without Hobbs initiating a discussion of UM/UIM coverage with Chalabi or Chalabi requesting such a conversation pursuant to the form.

¶4 In April of 2006, Chalabi was injured in an automobile accident with an impaired motorist. Chalabi's injuries exceeded the driver's coverage limits, meaning the driver was underinsured.

¶5 Plaintiffs brought claims against Defendants for breach of contract and insurance agent malpractice. According to Plaintiffs' expert, Hobbs breached his duty of care to Chalabi by failing to advise him about UM/UIM coverage and recommend that he obtain that coverage. Defendants filed a

motion for summary judgment on all claims, which the court granted. Plaintiffs timely appealed the dismissal of the malpractice claim. We have jurisdiction under A.R.S. § 12-2101(B) (2003).

II.

¶6 A trial court may grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). In reviewing a motion for summary judgment, an appellate court determines de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

¶7 In Arizona, insurance companies, such as State Farm, are required to:

> [B]y written notice offer the insured and at the request of the insured shall include within the policy underinsured motorist coverage . . . in limits of not less than the liability limits for bodily injury or death contained within the policy. The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director shall be valid for all insureds under the policy.

A.R.S. § 20-259.01(B) (2002). Here, State Farm, through its agent, Hobbs, provided Chalabi with a Department-approved UM/UIM selection form. Plaintiffs correctly concede that this

constituted a valid "offer" of UM/UIM insurance under § 20-259.01(B). The statute does not require explanation or advice as to UM/UIM coverage beyond what is contained on the approved form. It further provides that either a "selection of limits" or a "rejection of coverage" on an approved form "shall be valid." *Id*.

¶8 Plaintiffs argue, the statutory language notwithstanding, that Hobbs and Rick Hobbs Insurance Agency (and State Farm under a vicarious liability theory) may still be held liable in negligence due to Hobbs' failure to explain UM/UIM coverage beyond what is on the form or to advise Mr. Chalabi to obtain it.[1] Plaintiffs also claim that the statute refers only to insurance companies, such as State Farm, and does not set the standard of care for insurance agents, such as Hobbs. They argue the standard of care for insurance agents is a question of fact to be decided by the jury and the issue is therefore inappropriate for dismissal on summary judgment. We reject Plaintiffs' arguments for the reasons that follow.

[1] Plaintiffs also argue that Defendants failed to raise the argument that § 20-259.01 precluded Plaintiffs' claim in the trial court and that the argument is therefore waived. Defendants sufficiently raised the statutory argument in their motion for summary judgment by arguing that § 20-259.01 did not require an insurance agent to explain UM/UIM coverage and that the standard of care did not require them to do more than what was required by the statute. Further, in Plaintiffs' Opening Brief, they refer to Defendants' "safe harbor" argument. Accordingly, Defendants did not waive this issue.

A.

¶9 First, as a frame of reference for each of Plaintiffs' arguments, we must determine what the statute intended to do. *Scottsdale Healthcare, Inc. v. Ariz. Healthcare Cost Containment Sys. Admin.*, 206 Ariz. 1, 5, ¶ 10, 75 P.3d 91, 95 (2003) ("In interpreting a statute we first look to the language of the statute itself. Our chief goal is to ascertain and give effect to the legislative intent."). As the language in A.R.S. § 20-259.01(B) provides, a selection or rejection of coverage on a pre-approved form is statutorily mandated to be "valid." The court discussed the scope of that provision in *Ballesteros*, and specifically, whether it "provides a 'safe harbor' for insurers, insulating them from litigation." 223 Ariz. at 273, ¶ 7, 222 P.3d at 296.

¶10 In *Ballesteros*, the issue was whether an insurer was immune from liability when it provided the Department-approved form in English to a prospective insured that was known to speak only Spanish, and the insurer took no further steps to explain the contents of the form. 223 Ariz. at 277-78, ¶ 26, 222 P.3d at 300-01. The court determined that "even assuming, without deciding, a safe harbor generally exists, we would conclude it is not absolute and does not apply under the circumstances presented here." *Id*. at 273, ¶ 9, 222 P.3d at 296. The court reasoned:

> [W]hen the insurer knew or should have known that merely providing the offer form would be insufficient to convey the offer of coverage to the potential insured because the insured could not read it, the insurer must take additional steps reasonably calculated to ensure the offer is communicated effectively to the insured.

Id. at 277, ¶ 25, 222 P.3d at 300.

¶11 We need neither endorse nor reject the rule from *Ballesteros*. Under *Ballesteros*, if an insurer "knew or should have known" that the manner in which it provided the form was inadequate to communicate what was intended by the statute, the statutory protection would not apply. *Id*. In *Ballesteros*, the knowledge that the insured only spoke Spanish provided such a circumstance. *Id*. at 277-78, ¶ 26, 222 P.3d at 300-01. Here, however, there is no such circumstance. Chalabi was able to read the form at the deposition and had no difficulty understanding it. He simply chose not to read it before signing it. Nor is there any evidence Hobbs knew or should have known that Chalabi would not have understood the form. Thus, the rule in *Ballesteros* is not invoked and the statutory language providing that selection of limits or "rejections of coverage . . . shall be valid" must be given effect.

¶12 We also need not decide whether § 20-259.01(B) abolishes all possible negligence claims for agent malpractice

in the area of UM/UIM coverage.[2] But when the only assertion supported by the evidence is that the agent should have done "something more," yet the statute has been complied with, summary judgment in favor of the insurer and agent is appropriate. The language of the statute must be given effect. *E.g., Scottsdale Healthcare,* 206 Ariz. at 5, ¶ 10, 75 P.3d at 95. Under these circumstances, to hold that an insurer that complied with the statute providing a rejection of coverage "shall be valid" and then expose that insurer and its agent to liability for negligence based on failure to advise would in effect impose the same burdens on the insurer and agent that the statute attempts to relieve and circumvent one of the statute's stated purposes.

B.

¶13 Plaintiffs assert, however, that a defendant's duty of care may exceed what is mandated by statute. Such could be the case when a statute, for example, sets forth minimal precautions or safety standards. Restatement (Second) of Torts § 288C cmt. a (noting that compliance with a statutory speed limit will not preclude finding that driver should have driven more slowly

[2] For instance, assume an insured initially completed the form and rejected coverage but the next day requested in writing the agent change his coverage to include UM/UIM insurance. If the agent knew of the request and negligently failed to amend the insured's policy to add coverage, the facts would be materially different than those presented to us.

given traffic conditions); *Peterson v. Salt River Project Agric. Improvement & Power Dist.*, 96 Ariz. 1, 7, 391 P.2d 567, 571 (1964) ("The jury may find that under certain circumstances the standard of due care requires more than compliance with the minimum standards of a statute."). But that is not the circumstance before us. The statutory mandate is that either selection or rejection "shall be valid." A.R.S. § 20-259.01(B) ("The selection of limits *or rejection of coverage* by a named insured or applicant on a form approved by the director *shall be valid* for all insureds under the policy.") (emphasis added). This statutory provision is not similar to a statutory provision that provides a minimum standard to be met. Section 20-259.01(B) provides some certainty to insurers when they comply. The prior versions of the statute bear this out.

¶14 In 1992, the Arizona legislature amended § 20-259.01 to validate all offers made on an approved selection form. 1992 Ariz. Sess. Laws ch. 147. Those amendments are reflected in our current version of the statute. Older versions of the statute had required the insurer to offer UM/UIM coverage, but they did not contain a provision stating that either a selection of limits or a rejection of coverage "shall be valid" if an approved form is used. *See, e.g.*, A.R.S. § 20-259.01(C) (1986) (requiring insurer to "make available . . . and . . . by written notice offer" underinsured motorist coverage to new policy

holders). We presume that an amendment to a statute was intended to change (or clarify) the law, and we have a duty to give effect to those amendments. *Finch v. State Dep't of Pub. Welfare*, 80 Ariz. 226, 229, 295 P.2d 846, 848 (1956). Thus, by its very language, the amendments by which we are bound provide that selections of coverage and rejections of UM/UIM coverage made on approved forms "shall be valid." We are not at liberty to ignore the legislature's language. *Williams v. Thude*, 188 Ariz. 257, 259, 934 P.2d 1349, 1351 (1997) ("Each word, phrase, clause and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial."). Our conclusion is also consistent with prior case law that anticipated the amendments.

¶15 In *Tallent v. National General Insurance. Co.*, the Arizona Supreme Court considered whether insurers offering UIM coverage under the former law "must also provide an explanation of the nature of such coverage." 185 Ariz. 266, 266, 915 P.2d 665, 665 (1996). The court held that "the statute does not require the offer to contain an explanation of the nature of UIM insurance." *Id*. at 267, 915 P.2d at 666. Referring to the law now in place that was enacted but not effective at the time *Tallent* was decided, the court went on to note:

> Perhaps questions of this type will not arise in the future because the law now provides that "[t]he selection of limits or

> the rejection of coverage by a named insured or an applicant on a form approved by the director [of insurance for the state of Arizona] shall be valid for all insureds . . . ." A.R.S. § 20–259.01(B) (Supp. 1995).

Id. at 267 n.2, 915 P.2d at 666 n.2. Contrary to Plaintiffs' position, the Arizona Supreme Court also held that "the imposition of a requirement for an explanation of coverage is, we believe, both unwarranted by the statute and unwise." *Id*. at 268, 915 P.2d at 667. The court noted that the form in question "certainly seems sufficient to cause any insured or potential insured who has questions about the meaning of UM or UIM coverage to ask for an explanation." *Id*. Indeed, the approved form under which we operate on the facts of this case expressly makes that consultation available. Our supreme court also noted, but declined to follow, cases in other states that have construed their statute to require additional explanations of UIM coverage. *Id*.

¶16 Plaintiffs also contend that *Giley v. Liberty Mutual Fire Insurance Co.*, 168 Ariz. 306, 812 P.2d 1124 (App. 1991), supports their position that the insurance agent is required to do more to avoid liability than simply provide the UM/UIM form. Like *Ballesteros*, *Giley* decided whether an offer of UM/UIM coverage was valid. In *Giley*, an insurance agent "did not describe underinsured coverage," but "handed [the insured] a

form and asked her to sign it if she wanted coverage." *Id*. at 306, 812 P.2d at 1124. The court held that this conduct did not, as a matter of law, meet the requirement to "make available" underinsured coverage. *Id*. Whether one agrees or disagrees with the reasoning in *Giley* (a decision we need not reach), that case was decided under the previous statute. As noted above, that statute did not contain the central provision before us that "the selection of limits or rejection of coverage" on an approved form "shall be valid." *Giley* is of no support to Plaintiffs.

¶17 Accordingly, we decline to read the statute to permit the negligence claim asserted here.

C.

¶18 Plaintiffs also assert that the statute insulates only the insurer and not the insurance agent. Notably, this court has held that insurance agents may be held liable for failure to comply with § 20-259.01's UM/UIM offer requirement even though the statute imposes the offer requirement only on the "insurer." *Millers Nat'l Ins. Co. v. Taylor Freeman Ins. Agency*, 161 Ariz. 490, 493-94, 779 P.2d 365, 368-69 (App. 1989). Because the statute imposes liability on insurance agents, the agents should receive the corresponding protections that insurers receive.

¶19 Additionally, it would hardly be practical in this scenario to differentiate between the insurer and the agent by

imposing distinct sets of duties on each. Insurers are typically not people; they are most often legal entities that perform their work through agents and employees. *See* A.R.S. § 20-104 ("'Insurer' includes every person engaged in the business of making contracts of insurance."); -105 ("'Person' includes an individual, company, insurer, association, organization, society, reciprocal or inter-insurance exchange, partnership, syndicate, business trust, corporation, and entity."). When insurers can be held liable for certain actions of their agents through vicarious liability, it follows that the duties and statutory protection flowing to the insurer for that conduct will generally apply to the agent and/or employee of the insurer who engaged in the conduct unless circumstances warrant otherwise. Here no such other circumstances are present.

¶20 Finally, the plain language of § 20-259.01(B) states that rejections on approved forms "shall be valid"; it does not differentiate between forms offered by the insurer and those offered by agents. Thus, we reject the request to construe the statute to protect insurers but not their agents or employees.

D.

¶21 Plaintiffs also refer to Arizona cases holding that the finder of fact should determine whether failure to advise an insurance customer as to the recommended coverage was a breach of the agent's duty of care. For example, in *Southwest Auto*

Painting & Body Repair, Inc. v. Binsfeld, this court held that a question of fact for the jury existed when the plaintiff presented expert testimony that the standard of care required an insurance agent to recommend fidelity coverage, and the defendant insurance agent did not recommend such coverage. 183 Ariz. 444, 448, 904 P.2d 1268, 1272 (App. 1995). Likewise, *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.* held that "[a]n insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance." 140 Ariz. 383, 397, 682 P.2d 388, 402 (1984) (quoting *Quality Furniture v. Hay*, 595 P.2d 1066, 1068 (Haw. 1979)). These cases, however, did not implicate express statutory language providing protection to the insurer when the statute has been complied with and no other circumstances exist, *see supra* n.2, ¶ 12, that cast into doubt that statutory protection. Thus, they do not provide a basis for relief here.

III.

¶22 For the foregoing reasons, the decision of the trial court is affirmed. Both parties request fees pursuant to A.R.S. § 12-341.01(A), as this matter arises out of a contract of insurance. We deny Plaintiffs' request for fees and award costs and fees to Defendants in an amount to be determined after compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge