

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000030-MR

GEORGE STEPHEN WATSON
AND CHARMIN WATSON

APPELLANTS

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 11-CI-00820

KENNETH ELSWICK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

KRAMER, JUDGE: George Stephen Watson and Charmin Watson's adult son, Dustin, was injured in an automobile accident. After discovering that their insurance policies did not include underinsured motorist (UIM) coverage, the parents filed a complaint alleging negligence against their insurance agent, Kenneth Elswick. The Scott Circuit Court granted summary judgment to Elswick. It is from this opinion and order that the Watsons appeal.

Elswick is an agent for Kentucky Farm Bureau Insurance Company. The Watsons had been his clients for twenty-six years. According to Watson, he asked Elswick on several occasions if they had “full coverage” automobile insurance and was assured that they had “the best insurance money can buy.” Neither of the Watsons ever specifically asked about or requested UIM coverage, and testified that they did not even know what it was prior to their son’s accident.

At the time of Dustin’s accident in 2006, the Watsons had two insurance policies covering three vehicles. Neither policy included UIM coverage. Dustin, who was twenty-three years of age, resided with his parents. From our review of the record, he was not a named insured on either of the policies. Dustin was a passenger in a pickup truck belonging to a third party that went off the road and down a hillside. Dustin sustained severe injuries to his arms. The Watsons’ attorney advised them to check with their insurance agent to see if they had UIM coverage. Elswick initially told them Dustin would not be covered because he did not live with them. When they produced proof of his residency, he informed them that they did not have UIM coverage.

In his deposition, Watson testified that he then contacted Farm Bureau Insurance Company directly and spoke with a Mr. Sparrow, who agreed to investigate the matter. Mr. Sparrow reported that although he believed the Watsons should have been paid, Elswick refused to admit any mistake on his part that would trigger his errors and omissions insurance.

The Watsons filed suit against Elswick, seeking damages of \$75,000, the amount of UIM coverage they believed they should have had. The trial court granted summary judgment to Elswick, and this appeal followed.

The standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.”

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.* 807 S.W.2d 476, 480 (Ky. 1991). “Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court’s decision and will review the issue *de novo*.” *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The trial court’s grant of summary judgment was based in part on its determination that, under the factual circumstances of this case, Elswick had no duty to advise the Watsons regarding the availability and function of UIM coverage.

“The question of duty presents an issue of law.” *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992). Generally, “no affirmative duty to advise is assumed by mere creation of an agency relationship.” *Id.* The Watsons argue that the length of their relationship with Elswick, their discussions with him

regarding insurance coverage, and their persistence in inquiring whether they had “full coverage” would have put an experienced agent on notice to inform them of the availability of UIM coverage.

Kentucky Revised Statutes (KRS) 304.39-320(2) provides that

Every insurer shall make available **upon request** to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage not inconsistent with this section the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering.

In *Flowers v. Wells*, 602 S.W.2d 179 (Ky. App. 1980), a panel of this Court held that, based on the clear language of the statute, UIM coverage is optional and not mandatory. “The legislature obviously could have made underinsured coverage mandatory but elected to require it to be furnished only ‘upon request.’” *Flowers*, 602 S.W.2d at 181. The opinion then addresses whether a request for “full coverage” constitutes a request for UIM coverage, and concluded that it did not, reasoning as follows:

There are numerous optional coverages available. For example, upon payment of additional premium, higher limits may be provided; coverage for various deductible amounts on collision insurance; reimbursement for car rentals while your car is being repaired; reimbursement for towing and labor; accidental death and dismemberment can be included; theft of radio and sound equipment coverage is available; reimbursement for loss of wages during disability is another option, etc. We

cannot conceive that a request for “full coverage” would include all or even any optional coverages, unless specifically requested.

Id.

The opinion concludes that “‘full coverage,’ as used in relation to automobile or motor vehicle insurance, means insurance in such amount and for such coverage as is made mandatory by statute.” *Id.*

Additionally, KRS 304.20-040(13), which was amended after the *Flowers* opinion, provides that “[e]xcept where the maximum limits of coverage have been purchased, every notice of first renewal shall include a provision or be accompanied by a notice stating in substance that added uninsured motorists, underinsured motorists, and personal injury protection coverages may be purchased by the insured.” Our examination of the policies in the record shows that this notice provision was included in a separate paragraph with an italicized heading stating “You Should Review Your Coverage.” Thus, the policies at issue complied fully with the statutory requirements.

Apart from duties imposed by statute, an implied assumption of a duty expressly to advise an insured of UIM coverage may exist when:

- (1) the insured pays the insurance agent consideration beyond a mere payment of the premium; (2) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on; or (3) the insured clearly makes a request for advice.

Mullins, 839 S.W.2d at 248-49 (internal citations omitted).

In this case, there was no evidence that the Watsons paid Elswick any consideration beyond the policy premiums. Their twenty-six year course of dealing with Elswick was lengthy, but there was no evidence that they sought out and relied on his advice beyond the general request for “full coverage,” which the *Flowers* court determined was inadequate to trigger a duty to advise. Indeed, the deposition testimony indicates that the Watsons never spoke with Elswick about any specific aspects of their insurance coverage beyond such generalities as “full coverage.” Finally, there is no evidence that the Watsons made a clear request for advice regarding their insurance coverage.

Under the circumstances, the trial court correctly ruled as a matter of law that Elswick did not breach statutory or common law duties to advise. Thus, the opinion and order granting summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Thomas F. Towles¹
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BRIEF FOR APPELLEE:

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¹ Attorney Thomas F. Towles passed away shortly after this appeal was filed. Subsequently, the Watsons represented themselves *pro se*.