IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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DON MCARTHUR, et al., *Plaintiffs/Appellants*,

*v.*

MANNY DEMIGUEL, et al., *Defendants/Appellees*.

No. 1 CA-CV 16-0225
FILED 9-21-2017

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Appeal from the Superior Court in Maricopa County
No. CV2013-008370
The Honorable James T. Blomo, Judge

**AFFIRMED**

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COUNSEL

Surrano Law Offices, Scottsdale
By Charles J. Surrano, III, John N. Wilborn
*Counsel for Plaintiffs/Appellants*

Tyson & Mendes, LLP, Phoenix
By Lynn M. Allen, Arman Nafisi
*Counsel for Defendants/Appellees*

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**MEMORANDUM DECISION**

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

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**C A T T A N I**, Judge:

**¶1** Don McArthur and McArthur Sales Corporation ("MSC") appeal from the superior court's summary judgment ruling in favor of their insurance agent, Manny DeMiguel, on their claim for damages resulting from DeMiguel's alleged failure to procure adequate underinsured motorist ("UIM") coverage on McArthur's motorcycle. For reasons that follow, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

**¶2** McArthur is a part-owner of MSC. In 2005, MSC entered into a contract to supply food products to a local big box store, and the contract required $1 million in liability coverage for any vehicles used to deliver products to the store. MSC purchased a truck to use for the deliveries, and McArthur sought advice from DeMiguel regarding insurance coverage. After consulting with DeMiguel, MSC purchased a business automobile policy that provided $1 million in bodily injury, property damage, uninsured motorist ("UM"), and UIM coverage for the truck (the "Business Auto Policy"). The Business Auto Policy did not name McArthur as an additional insured.

**¶3** In 2011, McArthur obtained a new insurance policy through DeMiguel for a newly purchased motorcycle. This policy named McArthur and his wife, Mary, as insureds and identified the motorcycle as the insured vehicle. It provided $100,000/$300,000 bodily injury coverage and $100,000 property damage coverage, but only the minimum required UM/UIM coverage of $15,000 per person/$30,000 per accident (the "Motorcycle Policy").

**¶4** During the 2011 application process, a DeMiguel employee checked "yes" on the question "Is any vehicle used in occupation, sales or delivery," presumably referring to the motorcycle. But Mary, who handled insurance matters for both the family and the business, signed a form declining to purchase additional UM/UIM coverage under the Motorcycle

Policy, even though DeMiguel specifically recommended that she increase the UM/UIM limits. Mary later stated that she declined additional UM/UIM coverage because she believed the Business Auto Policy would also cover the motorcycle.

**¶5** McArthur suffered serious injuries in a May 2012 accident while riding the motorcycle "in the course and scope of his duties as President of McArthur Sales Corporation." McArthur received $100,000 from the other driver's insurance and made UIM claims under the Motorcycle Policy and the Business Auto Policy. The insurer paid the $15,000 UIM policy limits on the Motorcycle Policy but denied coverage under the Business Auto Policy on the basis that the motorcycle was not an insured vehicle under that policy.

**¶6** McArthur and MSC then sued DeMiguel, alleging that DeMiguel had negligently failed to procure adequate UIM coverage for the motorcycle. They alleged both that DeMiguel had wrongfully failed to offer UM/UIM coverage for the Motorcycle Policy consistent with the amounts covered by the Business Auto Policy, and that DeMiguel had wrongfully failed to ensure that the motorcycle was a covered vehicle or McArthur was a named insured under the Business Auto Policy. McArthur and MSC moved for partial summary judgment regarding offset of other UIM insurance proceeds received, but the superior court concluded that disputes of material fact precluded summary judgment on that issue at that time.

**¶7** DeMiguel then moved for summary judgment, arguing that McArthur and MSC could not establish causation under any of their theories of liability. DeMiguel argued that the form signed by the McArthurs declining additional UM/UIM coverage for the Motorcycle Policy precluded relief. DeMiguel further presented evidence that the McArthurs never asked to add the motorcycle to the Business Auto Policy and never asked to add McArthur individually as a named insured under the Business Auto Policy, and that, even if they had asked, the insurer would not have done so.

**¶8** Noting McArthur's concession that the policy he sought "could never have been written," the superior court granted summary judgment in favor of DeMiguel. McArthur and MSC timely appealed, and

we have jurisdiction under Arizona Revised Statutes ("A.R.S.") § 12-2101(A)(1).[1]

## DISCUSSION

**¶9** McArthur and MSC argue the superior court erred by granting summary judgment in favor of DeMiguel. Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a); *Orme Sch. v. Reeves*, 166 Ariz. 301, 305 (1990). We review the court's summary judgment ruling de novo, considering all facts in the light most favorable to the nonmoving parties. *Melendez v. Hallmark Ins. Co.*, 232 Ariz. 327, 330, ¶ 9 (App. 2013); *Dreamland Villa Cmty. Club, Inc. v. Raimey*, 224 Ariz. 42, 46, ¶ 16 (App. 2010).

**¶10** A claim for negligence requires proof of four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9 (2007). The parties agree that, as McArthur and MSC's insurance agent, DeMiguel owed them a duty of reasonable care in procuring insurance. *See, e.g.*, *Webb v. Gittlen*, 217 Ariz. 363, 366–67, ¶ 18 (2008). And McArthur presented undisputed expert testimony that DeMiguel breached the applicable standard of care by "failing to disclose the limitations in UIM commercial coverage and otherwise failing to rectify the limitations to ensure that the McArthurs received the insurance they thought they had purchased."[2]

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[1] Absent material revisions after the relevant date, we cite a statute's current version.

[2] We note that, although not in effect at the time the Motorcycle Policy was issued, our Legislature has since extended the safe-harbor provisions of A.R.S. § 20-259.01 to protect insurance agents who use approved forms to offer and explain UM and UIM coverage. *See* A.R.S. § 20-259.01(B) ("An insurance producer that uses such a form in offering underinsured motorist coverage and confirming the selection of limits or rejection of coverage by a named insured or applicant satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of underinsured motorist coverage."), (A) (same, with regard to UM coverage); *see also* 2016 Ariz. Sess. Laws, ch. 180, § 1 (52d Leg., 2d Reg. Sess.) (H.B. 2129). Under the current version of the statute, McArthur's expert's standard of care opinion would be incorrect as a matter of law.

**¶11** But even taking duty and breach as established, the undisputed facts show no causal connection between DeMiguel's conduct and McArthur's damages. *See Gipson*, 214 Ariz. at 143 & n.1, ¶ 9 (noting that although causation is generally a question of fact, summary judgment may be appropriate if no reasonable juror could conclude the defendant's conduct caused the plaintiff's damages); *see also Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292, ¶ 18 (App. 2010) ("Frequently, a motion for summary judgment involves an assertion by a defendant that the plaintiff has insufficient evidence to meet its burden of production at trial. The well-accepted logic of the argument is that because plaintiff cannot establish a prima facie case worthy of submission to a jury, defendant is necessarily entitled to judgment as a matter of law.").

**¶12** Regarding the Motorcycle Policy itself, the McArthurs' minimum UM/UIM limits (which created the gap in coverage) were not caused by DeMiguel's failure to offer increased coverage, but rather by the McArthurs' decision to decline (against DeMiguel's advice) additional UM/UIM coverage on a form that in fact offered higher limits. That the McArthurs' decision to decline additional UM/UIM coverage under the Motorcycle Policy may have been based on their misapprehension of the scope of the Business Auto Policy is inapposite given the undisputed record showing that Mary never asked DeMiguel whether the Business Auto Policy as written could or would provide UIM coverage for the motorcycle.

**¶13** Moreover, the fact that the Business Auto Policy did not provide additional coverage under the circumstances of McArthur's accident was not caused by DeMiguel's failure to adjust the terms of the policy. Rather, such coverage was never possible—regardless of DeMiguel's conduct—because, as McArthur himself acknowledged, the insurer would not write the policy to include McArthur as a named insured or add the motorcycle as a covered vehicle.

**¶14** It is of no moment that an explanation that the Business Auto Policy could not be written to cover the motorcycle or McArthur as a named insured could have given the McArthurs an opportunity to look elsewhere for coverage. Although McArthur and MSC contend that DeMiguel did not give them adequate information to make an informed decision regarding UIM coverage, there is no evidence that McArthur ever made DeMiguel aware of his apparent concerns. And the record is devoid of any suggestion that, had they known, the McArthurs would in fact have sought coverage elsewhere. *See Orme Sch.*, 166 Ariz. at 310 ("If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that

there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted.").

**¶15** McArthur and MSC also cite *Wilks v. Manobianco*, 235 Ariz. 246 (App. 2014), *aff'd and remanded by* 237 Ariz. 443 (2015), for the proposition that "the mere signing of the UM/UIM Selection Form [is] not sufficient" to defeat his claim. But *Wilks* is inapposite because the plaintiffs there in fact requested specific UIM coverage and based their claim on their insurance agency's "alleged failure to obtain the UIM coverage [they] requested," not on allegations regarding failure to explain UIM coverage. *Id*. at 250, ¶ 17. Here, the McArthurs offered no evidence that they ever requested $1 million in UIM coverage for the motorcycle, and their claim was premised on DeMiguel's alleged failure to explain the need for more coverage, even though they rejected DeMiguel's advice to obtain additional UM/UIM coverage.

**¶16** Finally, McArthur and MSC assert that their standard of care expert's affidavit provided evidence of causation by stating that "[b]ut for the errors of DeMiguel, McArthur would have had [UIM coverage] with a limit of $1,000,000." But on the issue of causation, the expert only testified that "[t]he errors of Mr. DeMiguel have caused damage to the McArthurs." This conclusory statement does not create a genuine issue of material fact. *See Florez v. Sargeant*, 185 Ariz. 521, 526 (1996) (stating that expert "affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment").

**¶17** Accordingly, we affirm the superior court's ruling granting summary judgment in favor DeMiguel. In light of this ruling, we do not reach the parties' arguments regarding whether McArthur's damages exceeded other insurance proceeds available to him. Similarly, we need not consider McArthur and MSC's challenge to the superior court's denial of their motion for partial summary judgment because the question of whether DeMiguel is entitled to an offset for other UIM insurance proceeds McArthur received is moot.

## CONCLUSION

**¶18** We affirm the judgment and award DeMiguel his costs on appeal upon compliance with ARCAP 21.


AMY M. WOOD • Clerk of the Court
FILED: AA