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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARY CANAN et al.,

Plaintiffs and Appellants,

v.

JONES AND MAULDING INSURANCE AGENCY,

Defendant and Respondent.

2d Civil No. B269916
(Super. Ct. No. 56-2014-00454419-CU-NP-VTA)
(Ventura County)

Richard and Mary Canan purchased a personal umbrella policy through the Jones and Maulding Insurance Agency (the Agency). When the Canans' son was injured by an underinsured motorist four months later, they learned that their policy was for personal liability only, and did not have excess uninsured/underinsured motorist (UM) coverage. The Canans sued the Agency for negligently failing to disclose that the umbrella policy lacked UM coverage.

An agent has no duty to advise an insured to purchase UM coverage in excess of the amount mandated by state law. Nor is the agent required to ferret out additional facts from an insured. The Canans never requested UM umbrella coverage from the Agency; therefore, the Agency was under no duty to supply it. The trial court correctly granted summary judgment for the Agency, because the Agency breached no duty of care, as a matter of law. We affirm.

FACTS

The Canans use the Agency for their insurance needs. Through the Agency, the Canans purchased an auto policy from Allied Insurance (Allied). In January 2011, the Canans requested a quote for a $1 million umbrella policy from Allied. Brian Martinez, an Agency representative, sent the Canans "a copy of the $1 million excess liability (umbrella) quote for [their] review." The Allied proposal cost $256 per year, covered "personal liability" and did not reference UM coverage. Martinez averred that the Canans never asked him for an umbrella policy with UM coverage.

Martinez informed the Canans that they would not qualify for an umbrella policy until they upped their auto policy liability limits to $500,000. The Canans eventually agreed to pay for higher liability limits. The UM coverage in their auto policy increased to $500,000, as well.

Martinez re-quoted the $256 Allied "personal liability" proposal in September 2011, after the initial proposal expired. His email to the Canans mentioned that umbrella policies are available from another carrier, American Alternative Insurance Corporation (AAIC), for $447-$550 per year. In March 2012, 15 months after their initial inquiry, the Canans applied

for an Allied umbrella policy. Their signed application did not mention UM coverage.

Allied issued the Canans an umbrella policy (the Allied Umbrella). The declarations page states, under "coverage," that the policy provides $1 million for "personal umbrella liability." The "insuring agreement" is that Allied will pay damages when an insured becomes legally liable for bodily injury or property damage. The policy's "endorsements summary" does not list UM coverage. The "exclusions" provision reads, "We do not provide . . . uninsured motorist coverage, underinsured motorist coverage."

The Canans deny receiving a copy of the Allied Umbrella policy from the insurer. They did not ask the Agency for a copy, as they had recently done for their homeowner's policy.

The Allied Umbrella solely provides excess liability coverage, according to the Agency's expert witness. Coverage would activate if the Canans incurred liability for negligence that exceeded their primary auto and homeowner's policies. It does not provide UM coverage to compensate the Canans for injuries they sustain at the hands of an uninsured or underinsured motorist. UM umbrella coverage requires an endorsement that may cost twice as much as an unadorned excess liability policy. Allied does not offer its customers UM umbrella endorsements.

In July 2012, the Canans' teenage son Myles was struck by a car while skateboarding across a street in Camarillo. He was hospitalized with major injuries. Two insurance carriers paid the Canans full policy limits, as a result of the accident. The insurer for the driver who hit Myles paid $100,000; Allied paid $400,000, under the UM clause in the Canans' primary auto policy.

After Myles's accident, the Canans wrote the Agency to inquire why the Allied Umbrella did not provide UM coverage, as they had expected. The Agency's president replied that the Allied Umbrella did not include UM coverage. He offered them a proposal from AAIC with both liability and UM coverage.

The Canans wrote the Agency again, stating, "[w]hen we originally contacted Brian regarding the Umbrella Coverage, we wanted coverage that would cover everything." The letter continues, "I was very clear to Brian that we wanted Full protection across the board on our Auto insurance[.] We always told Brian that we wanted Full Complete coverage so Everything and everyone was covered." Also, "[w]e never declined Uninsured/underinsured motorist coverage for the excess policy. As [t]his was one of the reasons why we wanted to purchase the excess policy!"

The Agency responded that the limits for UM coverage are stated on the Canans' primary auto policy. No mention of UM coverage appeared in the Canans' application for the Allied Umbrella. The Agency noted that Allied does not offer excess UM coverage, so the Canans could not have declined it.

The Canans reiterated that they told Martinez a $1 million excess policy was required because "it was of utmost importance that the Family and Home were covered, [and] we requested Coverage for the Autos and anyone riding in the vehicles! And expected this Umbrella to attach to our Uninsured Motorist Coverage."

In a deposition, Mrs. Canan testified that she requested "coverage for everything," and "I asked Brian for a coverage that covered everything." When asked, "Did you ever ask Mr. Martinez to place a $1 million dollar uninsured motorist

policy on top of the umbrella?" Mrs. Canan replied, "No." When asked, "Did Mr. Martinez ever tell you that it included uninsured motorist?" she answered, "He never said it did not."[1] Though Martinez did not tell her that UM coverage attached to the Allied Umbrella, she believed that UM coverage existed because "we asked for the umbrella to cover everything." Mrs. Canan declares, in opposition to summary judgment, that Martinez did not disclose that the Allied Umbrella did not include UM coverage, or that UM coverage was available with a different insurance carrier.

Mr. Canan was asked, "Did you ever ask [Martinez] for a million dollar uninsured motorist coverage limit?" He answered, "Not that I recall." He did not know whether Martinez ever represented that the Allied Umbrella included UM coverage. Mr. Canan recalled that "in all previous requests for insurance" he and his wife asked for "full coverage" and it included UM coverage.

The Canans' insurance expert opined that the Agency failed to explain that "coverage for everything" does not exist; failed to ask follow-up questions to find out what the Canans wanted; failed to disclose that UM coverage was excluded from the Allied Umbrella; and failed to explain the difference between the Allied proposal and the more costly AAIC proposal.

In 2014, the Canans cancelled their existing umbrella policy and purchased a $1 million policy from the Interinsurance Exchange of the Automobile Club (AAA). The AAA umbrella policy, produced in discovery, covers personal liability. AAA, like

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[1] Mrs. Canan was also asked, "Did Brian ever tell you that the Allied policy had a million dollar uninsured motorist option to it?" She replied, "I don't know."

Allied, does not offer excess UM coverage, according to the Canans' AAA agent. The Canans never requested that their AAA primary auto policy have $1 million in available UM coverage.

Mrs. Canan was asked about her family's new AAA policy. She had read the policy—including the declarations page—and insisted that it covers "everything." She believes that she now has $1 million excess UM coverage with AAA.

PROCEDURAL HISTORY

The Canans filed suit for negligence, alleging that the Agency's failure to obtain a UM umbrella policy deprived them of an additional $1 million in insurance benefits for Myles's accident. The Agency sought summary judgment, arguing that the Canans' vague requests did not give rise to any duty to recommend a certain type of policy or coverage. The Canans countered that prior requests to the Agency for "full coverage" led to UM coverage in their primary auto policy; further, Martinez did not disclose the availability of UM coverage from other insurance companies.

The trial court granted the Agency's motion, finding no triable issue of material fact as to whether the Agency breached its duty of care. The court entered judgment for the Agency and dismissed the complaint, on January 15, 2016. The appeal is timely.

DISCUSSION

Summary Judgment Review

Summary judgment is granted if there is no triable issue as to any material fact, entitling the moving party to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) It is "a mechanism to cut through the parties' pleadings" to determine whether "trial is in fact necessary to resolve their

dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A moving defendant must show a complete defense, or that plaintiffs cannot prove an element of their cause of action; the burden then shifts to the plaintiffs to show a triable issue. (Code Civ. Proc., § 437c, subd. (p)(2).)

Reviewing courts independently examine the record to look for triable issues of material fact. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.) In conducting de novo review, we strictly scrutinize the moving defendant's evidence, resolving doubts and ambiguities in favor of the plaintiffs. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832.)

The Canans' Claims

The Canans allege that they contacted the Agency "to request coverage that protected the Canan family in all eventualities, which included (but was not limited to) increasing all limits on their automobile policy as well as purchasing an umbrella policy." The Agency offered several options, but "never disclosed the extent of uninsured/underinsured motorist coverage provided by any of the proposed umbrella policies" and "never ascertained the precise coverage desired by plaintiffs." Apart from having a duty of care to act in the Canans' best interests, the Agency "voluntarily assumed additional duties to plaintiffs, including . . . a duty [to] disclose to plaintiffs relevant information."

Had the Canans known that the Allied Umbrella provided $1 million in liability protection from third party claims, but no coverage in the event of a UM incident, the Canans would have purchased a different umbrella policy, with UM coverage.

There Are No Triable Issues of Material Fact

The Canans contend that the Agency breached a legal duty to disclose the difference between the AAIC umbrella policy with UM coverage versus the Allied policy without UM coverage. "The existence of a legal duty is a question of law for the court. [Citation.]" (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188.) We must decide "whether the defendants owed a duty to the [plaintiffs] to procure the additional coverage or to advise them about the availability of such coverage." (*Ahern v. Dillenback* (1991) 1 Cal.App.4th 36, 42.)

The Agency had no duty to discuss with the Canans the availability of a personal umbrella policy offering excess UM coverage, or procure excess UM coverage for them. As this court has observed, insurers and brokers have no affirmative duty to advise the insured to procure particular or different coverage, or to advise the insured that a policy lacks certain coverage, because the insured is bound to know the scope of his insurance contract. (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1049.)

a. Applicable Law Regarding the Duty of Insurance Agents to Recommend Extra UM Coverage

Auto liability policies must include a minimum level of UM coverage. (Ins. Code, § 11580.2, subds. (a)(1), (m)(1)-(2), (p)(7) [the minimum coverage is $30,000 per person/$60,000 for two or more persons].) The purpose of the UM statute is not to make injured persons whole from accidents with uninsured drivers; rather, it ensures that the injured are protected at the minimum level, had the driver at fault carried the statutory minimum of liability insurance. (*Pabitzky v. Frager* (1985) 164 Cal.App.3d 401, 403; *Hartford Casualty Ins. Co. v. Cancilla* (1994) 28 Cal.App.4th 1305, 1311.)

An insurance agent's duty is to ensure that a client's policy complies with the minimum levels of UM coverage mandated by statute. (*Pabitzky v. Frager, supra,* 164 Cal.App.3d at p. 403.) The agent does not breach his duty to clients "by not advising them to carry uninsured motorist insurance in an amount greater than the statutory minimum." (*Id.* at pp. 402-403.) The rule is that an insurer owes no duty to its insured (1) to make available a particular kind of insurance; (2) to advise about the availability of such insurance from another carrier; or (3) to inform the insured of inadequacies in coverage. (*Gibson v. Government Employees Ins. Co* (1984) 162 Cal.App.3d 441, 452.) An injured insured cannot sue his insurer for wrongfully failing to recommend a higher level of UM coverage. (*Id.* at pp. 443-444.)

The rule absolving the insurer and its agent from a duty to advise the insured to obtain more UM coverage in a primary policy applies with equal force to UM coverage in an umbrella policy. The leading case on this point is *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916 (*Fitzpatrick*).)

In *Fitzpatrick*, the plaintiff was standing next to her car when she was struck by an underinsured motorist. She suffered brain damage and was not made whole by her auto insurance, though she was carrying the maximum UM coverage offered by her insurer. Fitzpatrick sued her long-time insurance agent, Hayes, for negligently failing to advise her of the availability and advantages of a personal umbrella policy with $1 million in UM coverage. (*Fitzpatrick, supra,* 57 Cal.App.4th at pp. 918-920.)

In a motion for summary judgment, Hayes argued that he had no legal duty to recommend that Fitzpatrick

purchase an umbrella policy with UM coverage. The trial court agreed, and entered judgment for the defense. (*Fitzpatrick, supra,* 57 Cal.App.4th at p. 920.) The reviewing court cited the rule that an agent's duty of care does not include responsibility for ensuring the insured has adequate coverage to protect against all eventualities. That rule changes only if (1) the agent misrepresents the scope of the coverage provided, (2) the insured requests a particular type of coverage, or (3) the agent assumes an additional duty by express agreement or by promising special expertise. (*Id.* at p. 927.)

Hayes's awareness that Fitzpatrick generally wanted the upper limits of coverage was not dispositive. The critical point was that Fitzpatrick never raised the subject of excess UM coverage with Hayes, which defeated the claim that Hayes knew or should have known that Fitzpatrick wanted a UM umbrella policy. (*Fitzpatrick, supra,* 57 Cal.App.4th at pp. 927-929.) Public policy does not impose a duty on agents "to affirmatively volunteer advice . . . regarding not just additional underinsured motorist coverage, but indeed the availability of a new and separate policy to effectuate that additional coverage," even if Hayes had a 20-year business relationship with Fitzpatrick as well as superior knowledge regarding coverage. (*Id.* at p. 929.) The Court of Appeal affirmed the judgment in favor of Hayes.

An agent's general lack of duty to disclose the availability of UM coverage in an umbrella policy is not affected simply because a client requests coverage for "everything." Asking an insurance agent for "'the best policy there is'" and being assured of "full insurance coverage" does not give rise to a duty to procure UM coverage for the insured or to advise the insured about the availability of such coverage. (*Ahern v.*

Dillenback, supra, 1 Cal.App.4th at pp. 40, 42-43.) An agent may point out ""“the advantages of additional coverage and may ferret out additional facts from the insured applicable to such coverage, but he is under no obligation to do so[.]”"" (*Id.* at p. 43, quoting *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.)

b. The Law Applied to the Facts of this Case

The evidence does not present a triable issue of material fact because it does not support a finding that the Canans ever requested UM excess coverage. Their communications to the Agency, following Myles's accident, state that they asked for "full complete coverage" to cover "everything" and "everyone." Asking for "full" coverage is too vague to constitute a request for UM coverage, and Martinez was under no obligation to point out the advantages of excess UM coverage. (*Ahern v. Dillenback, supra,* 1 Cal.App.4th at p. 43.) The Canans' expectation that the umbrella expanded their existing $500,000 primary UM coverage is not actionable, because the Canans never articulated this expectation to the Agency before the accident.

None of the three exceptions listed in *Fitzpatrick* is supported by the record.

First, Martinez did not misrepresent the scope of coverage. Neither of the Canans claimed, during their depositions, that Martinez promised $1 million UM coverage with the Allied Umbrella.

Second, the Canans did not specifically request UM coverage. Mr. Canan did not recall ever asking the Agency for $1 million in UM coverage. Mrs. Canan unequivocally replied "No" when asked if she directed Martinez to place $1 million in UM coverage. Although Martinez "never said [the policy] did not"

include UM coverage, according to Mrs. Canan, an agent has no duty to tell an insured that a policy lacks excess UM coverage if the insured never raised the subject, under the *Fitzpatrick* holding.

Third, there is no evidence that the Agency assumed additional duties by express agreement or by promising special expertise. Instead, the evidence shows that the Canans originally requested an umbrella policy from Allied, specifically. The Agency carried out the Canans' request, without any further agreement or promises.

The Canans rely primarily upon *Eddy v. Sharp* (1988) 199 Cal.App.3d 858. In *Eddy,* an insurance agent represented in a cover letter that a proposed business insurance policy covered "'All Risk' subject to All Risk Property Coverage Exclusion list attached for reference.'" No exclusion was listed for water backing up through drains or sewers. The insured property was damaged when water and sewage flooded the building during a rainstorm, and the insurer refused to cover the loss. (*Id.* at pp. 862-863.) The reviewing court found a triable issue as to whether the agent negligently misrepresented the scope of coverage by failing to list the exclusion for clogged drains/sewers in his cover letter. (*Id.* at p. 866.)

Eddy does not create a general duty on the part of agents to write cover letters listing every policy exclusion. Rather, it holds that *if* the agent undertakes to list all of the exclusions, he may be liable for negligent misrepresentation if he omits some exclusions.

The *Eddy* case is distinguishable, as it involved the agent's provision of erroneous information to the insured regarding exclusions. Unlike the agent in *Eddy,* Martinez did not

describe the Allied Umbrella as "All Risk," nor did he purport to list all applicable exclusions. On the contrary, Martinez's January and September 2011 transmittal emails did not list any exclusions, and he correctly described the Allied insurance proposal as "the $1 million dollar (*sic*) *excess liability* (umbrella) quote." (Italics added.) The proposal states, on its face, that it covers "personal liability."

A cover letter attaching a proposal for "excess liability" or "personal liability" coverage is manifestly not a proposal for UM coverage. UM coverage is the opposite of liability coverage. The Canans could not have read Martinez's cover letters and attached proposals, and thought that he offered anything more than personal liability umbrella coverage.

The record suggests, at most, that the Canans misunderstand the difference between UM insurance in a primary auto policy versus excess UM insurance. They testified that prior requests for "full coverage" resulted in UM coverage in their auto policy. Of course, state law *requires* the provision of UM coverage when consumers purchase an auto liability policy. (Ins. Code, § 11580.2.) The Canans assumed that the same law applies to excess insurance. They persisted in this belief when they cancelled the Allied Umbrella and purchased the AAA umbrella policy. AAA, like Allied, does not offer excess UM umbrella coverage. Mrs. Canan testified to her mistaken understanding that the $1 million AAA umbrella policy includes UM coverage.

The Canans offer no reason why the Agency came under a special duty when Martinez wrote, "[i]f you are interested in coverage, Allied would be the way to go." An agent assumes no special duty to disclose by opining that a policy

provides the best coverage for the insured, unless no reasonable agent would have made the claim given the narrowness of the policy. (Crosky et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2016) ¶ 2:54.1, pp. 2-25, 2-26.)

The Canans asked for a $1 million umbrella policy from Allied. Martinez sent them the Allied proposal, and briefly mentioned AAIC. The Canans expressed no interest in the more costly AAIC insurance, nor inquired why it was so expensive. The Allied proposal was not overly narrow because it had the $1 million coverage that the Canans requested.

The Canans cite no insurance cases supporting their view that Martinez assumed a special duty by mentioning the cost of an AAIC policy. Even a longtime agent for the insured is not obliged to point out the advantage of excess UM insurance coverage. (*Fitzpatrick, supra,* 57 Cal.App.4th at p. 929.) "The mere existence of [an agency] relationship imposes no duty on the agent to advise the insured on specific insurance matters. [Citations.]" (*Jones v. Grewe*, *supra*, 189 Cal.App.3d at p. 954.)

The Canans contend that the Agency violated its own internal rules, giving rise to a negligence claim. The Agency has no written procedures. Its representatives "find out what the customer wants, what their questions are, and do the best to resolve their issues[.]" With umbrella policies, Agency representatives "ask the client . . . how much excess liability do they wish to get quotes for." There is no triable issue here. The Canans contacted the Agency and asked for a $1 million umbrella policy from Allied. That is exactly what they received. No Agency rule required Martinez to ask the Canans about excess UM coverage, which is not available from Allied.

California law is clear on the issue of insurance agencies' duties. Accordingly, we need not consider the out-of-state authorities cited by the Canans. The Agency had no duty to advise the Canans to purchase excess UM insurance from another carrier, after the Canans specifically requested a $1 million umbrella policy from Allied, which only provided excess liability coverage.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to Respondent.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

John Nho Trong Nguyen, Judge

Superior Court County of Ventura

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