Missouri Court of Appeals
Southern District

In Division

TIM JOHNSON,

Plaintiff-Appellant,

v.

ROBERT BERKE, BOB BERKE, INSURANCE AGENCY, INC., AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent-Respondent.

Number SD39363

Filed: October 30, 2026

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Daniel R. Wichmer, Judge

AFFIRMED

Tim Johnson ("Appellant") appeals the trial court's grant of summary judgment in favor of Robert Berke, Bob Berke Insurance Agency, Inc., and State Farm Mutual Automobile Insurance Company ("State Farm") (collectively, "Respondent").[1] Broadly,

[1] Appellant's claims against Bob Berke Insurance Agency, Inc., and State Farm in this matter are solely based on a theory of vicarious liability for Robert Berke's alleged actions as their agent.

Appellant's three points on appeal allege that the trial court misapplied the summary judgment standard in concluding there was no genuine dispute of material fact and entering judgment as a matter of law for Respondent. Finding no error, we affirm.

Factual Background and Procedural History

On April 30, 2013, Appellant requested that Respondent procure an insurance policy for his 2011 Toyota Tacoma ("2011 Tacoma") with "uninsured motor vehicle" coverage, a.k.a. uninsured motorist ("UM") coverage,[2] in the amount of $100,000 per person.[3] Respondent procured an insurance policy for the 2011 Tacoma from State Farm, commencing April 29, 2013, which provided UM coverage in the amount of $100,000 per person.

On November 1, 2016, State Farm issued an endorsement known as "6128CP" that was incorporated as part of State Farm automobile insurance policies issued or renewed following November 1, 2016. Endorsement 6128CP provides in relevant part that:

Accordingly, we treat the three respondents as one and the same except to the extent distinguishing an individual respondent is relevant to explaining the facts of this case.

[2] UM coverage "refers to coverage intended to provide a source of recovery for insureds who are legally entitled to recover damages for bodily injury caused by the negligent owner or operator of a completely uninsured motor vehicle." ***Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo.***, 992 S.W.2d 308, 313 (Mo. App. E.D. 1999).

[3] All of Appellant's requests to Respondent for UM coverage in this case also included requests for certain amounts of UM coverage per occurrence. However, because those particular coverage limits are not material to Appellant's claims in this matter, we do not address them further.

The following exclusion is added:

THERE IS NO COVERAGE TO THE EXTENT THE UNINSURED MOTOR VEHICLE COVERAGE LIMITS OF THIS POLICY EXCEED THE UNINSURED MOTOR VEHICLE COVERAGE LIMITS REQUIRED BY THE MISSOURI FINANCIAL RESPONSIBILITY LAW FOR AN ***INSURED*** WHO SUSTAINS ***BODILY INJURY***:

a. WHILE ***OCCUPYING*** A MOTOR VEHICLE ***OWNED BY YOU*** IF IT IS NOT ***YOUR CAR***[4] ….

On December 15, 2017, Appellant requested that Respondent procure an insurance policy for his 2017 Toyota Tacoma (2017 Tacoma") containing UM coverage in the amount of $100,000 per person. Respondent procured an insurance policy for the 2017 Tacoma from State Farm, commencing December 14, 2017, which provided UM coverage in the amount of $100,000 per person.

On December 28, 2017, Appellant (through Respondent) applied for insurance from State Farm for his 1975 Midas motorhome ("1975 Midas"), requesting UM coverage in the amount of $250,000 per person. Respondent procured an insurance policy for the 1975 Midas from State Farm, commencing December 28, 2017, which provided UM coverage in the amount of $250,000 per person.

On July 13, 2018, Appellant, while in his 2011 Tacoma, was involved in an accident with an uninsured motor vehicle. At the time of Appellant's accident, his State Farm policies for the 2011 Tacoma, 2017 Tacoma, and 1975 Midas each included

[4] Under the policies at issue in this case, "YOUR CAR" is defined as "the vehicle shown under 'YOUR CAR'" on each policy's respective declarations page. *See* ***Johnson v. State Farm Mut. Auto. Ins. Co.***, 604 S.W.3d 875, 880 (Mo. App. S.D. 2020) ("***Johnson***").

endorsement 6128CP. State Farm paid Appellant $100,000 per person in UM benefits pursuant to Appellant's 2011 Tacoma policy in addition to $25,000 per person in reduced UM benefits under each of Appellant's other policies for the 2017 Tacoma and 1975 Midas based on endorsement 6128CP.

Appellant initially filed suit against State Farm, alleging breach of contract and vexatious refusal to pay and seeking to recover the full per person UM coverage limits under the 2017 Tacoma and 1975 Midas policies based on the purported inapplicability of endorsement 6128CP.[5] *See* ***Johnson***, 604 S.W.3d at 878. Following cross-motions for summary judgment, the trial court entered summary judgment in favor of State Farm and Appellant appealed. ***Id***. Affirming, we held that Appellant's State Farm policies (all of which contained substantially identical policy language) were unambiguous and endorsement 6128CP applied to reduce the UM benefits provided under the 2017 Tacoma and 1975 Midas policies because Appellant was not occupying those vehicles at the time of the accident. ***Id***. at 879-81.

Appellant thereafter filed the present suit against Respondent for negligent failure to procure insurance, alleging Respondent failed to inform Appellant that the State Farm policies for his 2017 Tacoma and 1975 Midas did not provide the UM coverages Appellant requested. Respondent moved for summary judgment, arguing

[5] The existence of the 1975 Midas policy was not discovered by the parties until the appeal of ***Johnson***. *See* 604 S.W.3d at 877.

inter alia that there was no genuine dispute that Respondent procured the insurance Appellant requested. The trial court agreed with Respondent and granted summary judgment. This appeal follows.

Standard of Review

We review a grant of summary judgment *de novo*. ***Wilkinson v. Farmers Holding Companies***, 732 S.W.3d 93, 96 (Mo. banc 2026). In conducting such review, we apply "the same criteria as the trial court in determining whether summary judgment was proper." ***Green v. Fotoohighiam***, 606 S.W.3d 113, 115 (Mo. banc 2020) (quoting ***Goerlitz v. City of Maryville***, 333 S.W.3d 450, 452 (Mo. banc 2011)[6]). "Summary judgment practice in Missouri is governed by Rule 74.04 and [our Supreme Court's] decision in ***ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.***, 854 S.W.2d 371 (Mo. banc 1993)." ***Green***, 606 S.W.3d at 116. Accordingly, "[o]ur *de novo* standard of review means that we look at the summary judgment issues presented on appeal as the trial court should have initially under Rule 74.04, and we give no deference to the trial court's ruling." ***Great Southern Bank v. Blue Chalk Constr., LLC***, 497 S.W.3d 825, 834 (Mo. App. S.D. 2016).

Under Rule 74.04[7], summary judgment shall be granted if "the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any

[6] *Abrogated on other grounds by* ***Glendale Shooting Club, Inc. v. Landolt***, 661 S.W.3d 778 (Mo. banc 2023).

[7] Unless otherwise noted, all Rule references are to Missouri Court Rules (2025).

material fact and that the moving party is entitled to judgment as a matter of law." Rule 74.04(c)(6). In the summary judgment context, "[a] 'genuine issue' exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts" – *i.e.*, "a dispute that is real, not merely argumentative, imaginary or frivolous[.]" ***ITT***, 854 S.W.2d at 382. Material facts are facts "from which the right to judgment flows" – *i.e.*, the "ultimate facts that constitute [or negate] the elements of a cause of action or affirmative defense[.]" ***Custer v. Wal-Mart Stores E. I, LP***, 492 S.W.3d 212, 215 (Mo. App. S.D. 2016) (internal quotations and citations omitted).

Our review of the grant of a motion for summary judgment is confined to the facts contained in the corresponding summary judgment filings – viewed in the light most favorable to the party against whom summary judgment was entered – and does not extend to the entire trial court record. ***Holzhausen v. Bi-State Dev. Agency***, 414 S.W.3d 488, 492, 494 (Mo. App. E.D. 2013).

Analysis

Point 1

Appellant's first point alleges that the trial court did not view the summary judgment record in the light most favorable to him, resulting in the court ignoring a genuine dispute concerning the material fact of "the amount of UM coverage that Appellant requested … as opposed to the amount of UM coverage that Respondent …

actually procured." In other words, Appellant contends there was a genuine issue as to whether Respondent "failed to procure the agreed upon insurance." We disagree.

> In order to make a submissible case for an alleged negligent failure to procure insurance, a plaintiff must present evidence to show: (1) the defendant agent or broker agreed to procure, for compensation, the requested insurance on behalf of the plaintiff; (2) the defendant failed to procure the agreed upon insurance, and in so doing, failed to exercise reasonable care and diligence; and (3) damages resulted therefrom.

Bucksaw Resort, LLC v. Mehrtens, 414 S.W.3d 39, 43 (Mo. App. W.D. 2013). "If the insurance agent or broker cannot or does not obtain the requested insurance, the agent or broker has a duty to timely notify the insured." ***Id.*** (quoting ***Zubres Radiology v. Providers Ins. Consultants***, 276 S.W.3d 335, 341 (Mo. App. W.D. 2009)). As the "defending party" in this case (*see* Rule 74.04(b)), Respondent could establish the right to judgment as a matter of law by showing:

> (1) facts that negate *any one* of the [Appellant]'s elements facts, (2) that [Appellant], after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of [Appellant]'s elements, or (3) that there is no genuine dispute as to the existence of *each* of the facts necessary to support [Respondent]'s properly-pleaded affirmative defense.

ITT, 854 S.W.2d at 381.

Here, Appellant does not allege on appeal that Respondent's motion for summary judgment fails to comply with any Rule 74.04(c)(1) requirement or that Respondent's stated material facts, if admitted, do not entitle Respondent to judgment

as a matter of law. Consequently, because of our limited role as a court of review,[8] we presume that Respondent has made a *prima facie* showing supporting a right to summary judgment. *See* ***Schnurbusch v. West Plains Reg'l Animal Shelter***, 571 S.W.3d 191, 202 (Mo. App. S.D. 2019) (Because the question of whether a genuine dispute of material fact exists "does not arise in a Rule 74.04 analysis unless and until the [movant] has made a prima facie showing of a right to judgment," alleging error based on the existence of such a dispute "necessarily implicitly presuppose[s] that, based upon the [movant's] stated material facts, it made a prima facie showing of a right to summary judgment[.]"). Put another way, if it is uncontroverted that Respondent procured the insurance Appellant requested, Respondent is entitled to summary judgment.

Accordingly, it is Appellant's burden to show, via the framework established under Rule 74.04, that one or more of Respondent's material facts is genuinely disputed. ***ITT***, 854 S.W.2d at 381. To meet this burden, Appellant must direct us to specific responses to Respondent's enumerated material facts or additional facts Appellant asserted in his 74.04(c)(2) response. ***Great Southern Bank***, 497 S.W.3d at 833-34. We then compare the evidence specifically referenced in support of the identified fact(s) and corresponding response(s) to determine whether a genuine dispute of material fact exists. ***Id***.

[8] "A reviewing court is obliged to determine only those questions stated in the points relied on." ***Martin v. McNeill***, 957 S.W.2d 360, 366 (Mo. App. W.D. 1997) (quoting ***State v. Williams,*** 887 S.W.2d 769, 770–71 (Mo. App. S.D. 1994)).

With respect to Respondent's stated material facts ("DSUMF"), Appellant directs us to DSUMF 5, 7, and 10:

> 5. [Respondent] procured for [Appellant] a motor vehicle insurance policy on [his] 2017 Toyota Tacoma commencing December 14, 2017, which provided in part for uninsured motor vehicle coverage in the amount of $100,000 [per] person and $300,000 [per] accident. *See*: **Exhibit F**, [Respondent]'s Fourth Amended Responses to [Appellant]'s First Request for Production of Documents, JOHNSONTIM00002065-00002078.
>
> 7. [Respondent] procured for [Appellant] a motor vehicle insurance policy on [his] 1975 Midas motorhome commencing December 28, 2017, which provided in part for uninsured motor vehicle coverage in the amount of $250,000 [per] person and $500,000 [per] accident. *See*; **Exhibit H**, [Respondent]'s Second Amended Responses to [Appellant]'s First Request for Production of Documents, JOHNSONTIM000008-000019.
>
> 10. [Appellant] received notice that the 6128CP endorsement was incorporated into his motor vehicle policy on his 2011 Toyota Tacoma renewing on November 4, 2016, via a mailing from State Farm. ….

Regarding DSUMF 5, Appellant's 74.04(c)(2) response states the following:

> **Denied. The policy insuring the 2017 Toyota Tacoma did not provide $100,000 [per] person and $300,000 [per] accident in uninsured motor vehicle coverage. *See generally* Johnson v. State Farm Mutual Automobile Insurance Company, 604 S.W.3d 875 (Mo. App. 2020); Exhibit 1 - Endorsement 6128CP. Instead, contrary to the declarations page which states that the policy provided $100,000 per person and $300,000 per accident in uninsured motor vehicle coverage, the policy only provided $25,000 per person in uninsured motor vehicle coverage by operation of Endorsement 6128CP. *Id.;* Exhibit 6 - 2017 Toyota Tacoma policy declarations page.**

Other than details and exhibits specific to the 1975 Midas and its respective State Farm policy, Appellant's response to DSUMF 7 is substantially identical to his response to DSUMF 5. On appeal, Appellant contends that these denials and the supporting

materials referenced therein at minimum introduce a genuine dispute of material fact that the trial court ignored in entering summary judgment – *i.e.*, the summary judgment record supports a plausible, contradictory account of events where "Appellant requested a total of $450,000 in UM coverage[] but only received a total $150,000 in UM coverage." Such assertion is not supported by the summary judgment record.

At the outset, Appellant's attempts to characterize his requests to Respondent for insurance as a singular request for an aggregate amount of $450,000 in UM coverage are generalizations that elide the "specific facts" material to summary judgment in this case.[9] There is no *genuine* dispute of material fact with respect to what insurance Appellant actually *requested* Respondent to procure in this case. Appellant's 74.04(c)(2) responses expressly and unambiguously admit to three separate requests made on three different dates for three specific amounts of UM coverage on three discrete policies for three different vehicles – $100,000 per person for the 2011 Tacoma (requested on April 13, 2018), $100,000 per person for the 2017 Tacoma (requested on December 15, 2017), and $250,000 per person for the 1975 Midas (requested on December 28, 2017). Appellant does not contend, nor does anything in the summary judgment record show, that there were any other contemporaneous discussions with Respondent about the scope of the UM coverage requested. In fact, Appellant's affidavit

[9] A party's denials of a movant's asserted material facts on summary judgment "may not rest upon the mere allegations or denials of the party's pleading" but shall be supported "with specific references to the discovery, exhibits or affidavits that demonstrate *specific facts* showing that there is a genuine issue for trial." Rule 74.04(c)(2) (emphasis added).

does not describe his *request* to Respondent for insurance as a request for $450,000 in UM coverage but rather simply attests:

> [Appellant] requested that [Respondent] procure the following [UM] coverage for the three vehicles:
>
> (a) 2011 Toyota Tacoma - $100,000 per person;
> (b) 2017 Toyota Tacoma - $100,000 per person;
> (c) 1975 Midas motor home - $250,000 per person.

Further, there is no genuine dispute of material fact with respect to what insurance Respondent procured for Appellant. Copies of the subject State Farm policies for Appellant's 2017 Tacoma and 1975 Midas are attached to the summary judgment pleadings as supporting evidence, and Appellant does not contend in this case that these documents are ambiguous, incomplete, or inaccurate. The policies for the 2017 Tacoma and 1975 Midas respectively provide $100,000 and $250,000 per person in UM coverage, subject to various restrictions and endorsements including endorsement 6128CP.

Appellant relies on the application of the partial exclusion under endorsement 6128CP to argue there is a genuine dispute of fact that Respondent procured the insurance Appellant requested for the 2017 Tacoma and 1975 Midas. We disagree. "[N]either agents nor brokers have a duty to advise the insured on its insurance needs or on the availability of a particular coverage, unless they specifically agree to do so." ***Emerson Elec. Co. v. Marsh & McLennan Companies***, 362 S.W.3d 7, 13, 19-20 (Mo. banc 2012); *see also* ***Jones v. Kennedy***, 108 S.W.3d 203, 207 (Mo. App. S.D. 2003) ("Missouri

does not recognize a duty on the part of an insurance agent to advise customers as to their particular insurance needs or as to the availability of optional coverage.").[10] A necessary corollary of these principles is that if an insured wishes his agent to procure a particular coverage, he must specifically articulate that desire in his request for insurance to his agent. A negligent failure to procure claim contemplates that an agent "*agree*[*s*] to procure, for compensation, the requested insurance" and then "fail[s] to procure the *agreed upon* insurance." ***Bucksaw***, 414 S.W.3d at 43 (emphasis added); *see also* ***Busey Truck Equip., Inc. v. American Family Mut. Ins. Co.***, 299 S.W.3d 735, 738 (Mo. App. E.D. 2009). If an insured never actually requests a particular coverage, his agent has no duty to procure said coverage.

Here, the true thrust of Appellant's denials of DSUMF 5 and 7 is that the policies for his 2017 Tacoma and 1975 Midas did not pay out their full per person UM benefits *in the particular circumstances of this case – i.e.*, that his State Farm UM coverages were not fully stackable[11] in the event that Appellant was involved in an accident with an

[10] "An insurance agent works for and acts as an agent for a particular insurer or insurers." ***Emerson***, 362 S.W.3d at 12. "While an agent represents the insurer, an insurance broker, unless otherwise authorized and provided, represents the insured and, unless otherwise shown by the evidence, is to be regarded as the agent of the insured." ***Id***. (internal quotations and citations omitted).

[11] "'Stacking' refers to an insured's ability to obtain multiple insurance coverage benefits for an injury either from more than one policy, as where the insured has two or more separate vehicles under separate policies, or from multiple coverages provided for within a single policy, as when an insured has one policy which covers more than one vehicle." ***Niswonger***, 992 S.W.2d at 313.

uninsured motor vehicle while occupying the 2011 Tacoma and not the 2017 Tacoma or 1975 Midas.[12] However, nothing in the summary judgment record here – even viewed in the light most favorable to Appellant with all reasonable inferences afforded to him – plausibly supports that Appellant actually requested that Respondent procure fully stackable UM coverage or otherwise had some agreement with Respondent to procure such coverage. Appellant relies upon the unspoken premise that, when he made his unadorned requests to Respondent to procure insurance policies providing varying amounts of UM coverage for his three vehicles, there was an implicit request or understanding that the UM coverages be fully stackable in all circumstances. Appellant does not direct us to, and we have not located, any authority in the law supporting the existence of such a presumption here. Appellant's denials of DSUMF 5 and 7 therefore do not create any genuine dispute of material fact.

Turning to Appellant's denial of DSUMF 10, while Appellant's response references evidence that Appellant was not aware of endorsement 6128CP prior to his accident, the dispute raised is not one that is material here. The sole dispositive issue in this case is whether Respondent procured the insurance Appellant requested, and Appellant's

[12] We note that Appellant received the full amount of per person UM coverage under the policy Respondent procured for Appellant's 2011 Tacoma which contains substantially identical language to Appellant's 2017 Tacoma and 1975 Midas policies (including endorsement 6128CP). Indeed, Appellant conceded at oral argument that, had he been occupying the 2017 Tacoma or 1975 Midas at the time of his accident, endorsement 6128CP would not have applied to the State Farm policy for the vehicle involved and he would have been entitled to the full amount of per person UM coverage under that policy.

contemporaneous awareness, or lack thereof, of the contents of the insurance procured is immaterial. Moreover, DSUMF 10 speaks to the contents of the State Farm policy procured for Appellant's *2011* Tacoma, which is not one of the policies Appellant alleges Respondent failed to procure. We therefore find no genuine dispute of *material facts* with respect to DSUMF 10.

Appellant additionally directs us to 19 additional facts asserted in response to Respondent's motion for summary judgment ("PSUMF") which he claims also demonstrate the existence of one or more genuine disputes of material fact. We find no such dispute. Appellant's PSUMF asserts facts that are either 1) fully cumulative of facts already set forth by Respondent and admitted by Appellant, 2) immaterial to the dispositive issue raised in this case, or 3) not supported by the evidence cited.

A number of the additional facts and referenced supporting materials in Appellant's PSUMF merely reaffirm that he requested Respondent procure a policy for his 2011 Tacoma containing $100,000 per person in UM coverage, a policy for his 2017 Tacoma containing $100,000 per person in UM coverage, and a policy for his 1975 Midas containing $250,000 per person in UM coverage. There are no facts in Appellant's PSUMF (nor any other part of the summary judgment record) supporting that Appellant ever requested that these UM coverages be fully stackable without exception.

Other portions of Appellant's PSUMF advance facts regarding Appellant's and Respondent's respective knowledge of the State Farm policies' terms, Respondent's

receipt of compensation for the procuring of the State Farm policies, generic representations purportedly made by Respondent in marketing, the amount of compensatory damages sustained in Appellant's accident, the UM benefits Appellant received under the State Farm policies, and the lack of a reduction in Appellant's premiums following the issuance of endorsement 6128CP. Such facts, while providing context to the case, are simply not material to the dispositive issue here – whether Respondent procured the insurance Appellant requested.

Finally, the PSUMF's remaining assertion that Appellant did in fact request Respondent to procure $450,000 per person in UM coverage is primarily supported by references to Appellant's affidavit[13] and copies of documents related to the State Farm policies. These materials do not introduce any new facts related to the particular requests for insurance Appellant made in this case and, for the reasons discussed above, create no genuine dispute of material fact.

In light of the foregoing, Appellant failed to establish any genuine dispute of material fact in the summary judgment record, and the trial court did not err in finding that Respondent is entitled to judgment as a matter of law. Point 1 is denied.

Points 2 and 3

Appellant's remaining points on appeal allege the trial court's judgment improperly placed a burden on Appellant to prove his case and incorrectly inferred

[13] Appellant's PSUMF also cites to the affidavit of Appellant's wife. Her affidavit is substantially identical to Appellant's.

Appellant had prior knowledge of endorsement 6128CP based on matters outside the summary record. We do not read the trial court's judgment as applying the burden Appellant alleges. Nor do we find that the judgment relies upon the inference of prior knowledge or external materials Appellant complains of.[14] Nonetheless, even accepting Appellant's allegations at face value, we have conducted our own *de novo* review and concluded that Respondent is entitled to judgment as a matter of law under the undisputed material facts in this summary judgment record. "[I]f the trial court's judgment can be sustained on any ground as a matter of law, even if different than the one posited in the order granting summary judgment, it should be affirmed." ***Rice v. Shelter Mut. Ins. Co.***, 301 S.W.3d 43, 46 (Mo. banc 2009). Points 2 and 3 are denied.

Conclusion

The trial court's judgment is affirmed.

MATTHEW P. HAMNER, J. – OPINION AUTHOR

BRYAN E. NICKELL, J. – CONCURS

JOSEPH L. HENSLEY, J. – CONCURS

[14] Again, whether Appellant read or otherwise understood the subject of State Farm policies prior to his 2018 accident is immaterial in this case. As correctly stated in the trial court's judgment, "There is only one issue to be resolved in this case: Did [Appellant] request [Respondent] to purchase UM insurance payable in the amount of $450,000 for any vehicle, or coverage that was exempt from Endorsement 6128?"