COURT OF APPEALS
DECISION
DATED AND RELEASED

March 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0134

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

REDGIE STASKAL and
MELLY STASKAL,

Plaintiffs-Appellants,

GOLDEN RULE INSURANCE COMPANY,
a foreign insurance corporation,

Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
a Wisconsin insurance corporation, and
STEPHEN E. WRIGHT,

Defendants-Respondents,

CYNTHIA L. YOUNT,
BOBBIE J. YOUNT and
MILWAUKEE MUTUAL INSURANCE CORPORATION,
a Wisconsin insurance company,

Defendants.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Redgie and Melly Staskal appeal from an order granting summary judgment to American Family Mutual Insurance Company and Stephen E. Wright (collectively Wright). The trial court ruled that there was no express agreement between Redgie Staskal and Wright, his insurance agent, that Wright would advise him with respect to underinsured motorist coverage. We affirm.

Redgie Staskal was injured in September 1990 when his car was rear-ended by a vehicle driven by Cynthia Yount.[1] At the time of the accident, the Staskals did not have underinsured motorist coverage and were underinsured for the damages arising from the accident with Yount. The Staskals sued American Family and Wright on the grounds that Wright failed to advise Redgie of the availability and advisability of underinsured motorist coverage.

The trial court considered the submissions on summary judgment and concluded that there were no factual issues which brought this case within the three special circumstances set forth in ***Nelson v. Davidson,*** 155 Wis.2d 674, 456 N.W.2d 343 (1990), which can create a duty on the part of an insurance agent to advise an insured regarding coverage.

On review, we apply the summary judgment methodology set forth in § 802.08, STATS., in the same manner as the trial court. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Where, as here, the pleadings state a claim for relief, *see* ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994), we examine the moving

[1] Bobbie Yount owned the vehicle Cynthia was driving. The claims against the Younts and their insurer, Milwaukee Mutual Insurance Company, were settled and are not the subject of this appeal.

party's submissions to determine if they make a *prima facie* case for summary judgment. ***Id.*** If they do, we turn to the opposing party's submissions to determine whether there are any material issues of fact in dispute which would entitle the opponent to a trial. ***Id.*** at 372-73, 514 N.W.2d at 49-50. In the absence of material issues of fact, summary judgment is appropriate. *See* ***Rach v. Kleiber,*** 123 Wis.2d 473, 478, 367 N.W.2d 824, 827 (Ct. App. 1985).

On appeal, the Staskals argue that there were material factual issues as to whether Redgie had an express agreement with Wright to advise him regarding insurance coverage. We agree with the trial court that the Staskals' submissions in opposition to summary judgment did not establish the existence of such factual issues.

An insurance agent does not have an affirmative duty to advise an insured about insurance coverage absent special circumstances. ***Nelson,*** 155 Wis.2d at 685, 456 N.W.2d at 347. These special circumstances include: (1) an express agreement between the agent and the insured; (2) a long-established relationship of entrustment from which it clearly appears that the agent appreciated the duty of giving advice and the agent received compensation for this consultation and advice beyond the agent's standard commission; and (3) the agent held himself or herself out as a highly-skilled insurance expert, and the insured relied on the expertise of the agent to the insured's detriment. ***Lisa's Style Shop v. Hagen Ins. Agency,*** 181 Wis.2d 565, 573, 511 N.W.2d 849, 852-53 (1994) (citing ***Nelson***).

The Staskals' arguments on appeal are limited to the first type of special circumstance: whether an express agreement existed between Redgie Staskal and his insurance agent. Accordingly, we similarly limit ourselves and review the parties' summary judgment submissions to determine whether there was a genuine issue of material fact as to the existence of an express agreement.

According to his affidavit in support of summary judgment, Stephen Wright has sold homeowners and automobile insurance to the Staskals since approximately 1982. Wright's compensation was the standard commission he received based upon the standard insurance premiums the Staskals paid; the Staskals never separately compensated him for consultation or advice about insurance matters. Wright denied the existence of an express

agreement that he would advise the Staskals about their specific insurance needs. Wright never made any changes to the Staskals' insurance policies unless he was authorized to do so by them.

Wright also submitted excerpts from Redgie Staskal's deposition. In those excerpts, Staskal stated that he placed his business-related worker's compensation, health and life insurance with other insurers. Staskal acknowledged that in the years he had insurance with Wright, he and Wright discussed the cost of insurance and the possible benefits and Staskal would determine whether a particular type of coverage should be placed on a particular vehicle. Staskal stated that the coverages on the vehicle involved in the accident were recommended by Wright and agreed to by him and changes in his automobile insurance coverage were made only after Staskal authorized them.[2]

In his disposition, Staskal conceded the absence of a written agreement that Wright would take care of all his insurance needs and that he had never asked Wright to review all of the possible coverages available under an automobile liability policy. However, at some point, Staskal informed Wright that he felt Wright was looking out for his insurance needs and he was going to accept policy changes as they came through. Staskal believed he and Wright had "an agreement and understanding that [Wright] would take care of my insurance needs." Staskal did not request underinsured motorist coverage before the September 1990 accident because he "figured [Wright] was taking care of my insurance needs."[3]

Based on these submissions, Wright argued that he did not have an affirmative duty under ***Nelson*** to inform Redgie Staskal about the availability or adequacy of his insurance coverage because none of the special circumstances described in ***Nelson*** existed. We conclude that Wright's submissions made a *prima facie* case for summary judgment.

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[2] For example, Redgie Staskal ordered the comprehensive and collision coverage removed from the vehicle which was involved in the accident.

[3] The Staskals did not ask Wright to procure underinsured motorist coverage for them until January 1994, over three years after the accident with Yount.

In opposition to Wright's summary judgment motion, Staskal submitted excerpts from his deposition and an affidavit. In his affidavit, Staskal stated that Wright handled his home and automobile insurance needs and that on several occasions, Wright made "unilateral changes in my insurance coverage without consulting me first." He stated that on other occasions Wright recommended insurance coverage and he always accepted Wright's recommendations. Staskal trusted Wright to advise him regarding his insurance needs and he made Wright aware of that trust by indicating he would no longer call Wright to discuss coverage issues. Staskal stated that "Stephen Wright agreed to accept this position of trust," and that he and Wright expressly agreed that Wright would take care of Staskal's insurance needs by informing him of the coverage he needed. Notwithstanding this alleged agreement, Wright failed to recommend that Staskal obtain underinsured motorist coverage.

We conclude that the Staskals' submissions did not create factual issues regarding the existence of an express agreement which would bring this case within one of the special circumstances described in ***Nelson.*** Redgie Staskal's allegations that he trusted Wright to advise him regarding his insurance needs and that he followed Wright's recommendations amount to no more than allegations that Staskal relied upon and had great confidence in Wright. Such allegations are insufficient to suggest the existence of an affirmative duty to advise Staskal concerning the availability or advisability of underinsured motorist coverage. *See* ***Nelson,*** 155 Wis.2d at 684, 456 N.W.2d at 347. Staskal's allegation that he and Wright had an express agreement is unsupported by evidentiary facts. The Staskals' submissions were insufficient to create factual issues necessitating a trial on the question of whether the parties had an express agreement. *See* ***Hopper v. City of Madison,*** 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977).

In order to raise a factual question regarding the existence of an express agreement, a summary judgment affidavit must offer evidentiary facts suggesting a mutual meeting of the minds and an intention to contract. *See* ***Theuerkauf v. Sutton,*** 102 Wis.2d 176, 183, 306 N.W.2d 651, 657 (1981) (quoted source omitted). While Redgie Staskal's affidavit alleges that Wright agreed to accept a position of trust with regard to the handling of the Staskals' insurance needs, it does not offer any evidence from which Wright's concurrence in mental intent can be inferred. While the Staskals were not required to prove the existence of an express agreement in order to survive Wright's summary

judgment motion, they were required to allege evidentiary facts supporting the existence of such an agreement. They did not do so, and therefore summary judgment was appropriate.

Redgie Staskal's claim that he and Wright expressly agreed that Wright would take care of his insurance needs is further undermined by the following undisputed facts. Staskal contacted other agents regarding insurance and placed his health, worker's compensation and life insurance with other agents and insurers. Staskal assessed the cost and benefit of coverages before ordering them from Wright. Staskal declined to insure additional real estate with American Family because the premiums were too high. These facts do not suggest the existence of an express agreement that Wright would handle all of the Staskals' insurance needs.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.