REL: December 21, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170250

Somnus Mattress Corporation d/b/a Posturecraft Mattress Company

v.

Stephen Hilson and Crutchfield & Graves Insurance Agency, LLC

Appeal from Winston Circuit Court
(CV-15-900038)

MENDHEIM, Justice.

Somnus Mattress Corporation d/b/a Posturecraft Mattress Company ("Somnus") appeals from a summary judgment entered by the Winston Circuit Court in favor of Stephen Hilson and

Crutchfield & Graves Insurance Agency, LLC ("CGIA"), on Somnus's claim that Hilson and CGIA were negligent in advising Somnus not to purchase insurance coverage for business interruption and loss of profits (hereinafter collectively referred to as "business-income coverage"). We affirm.

I. Facts

Somnus manufactured mattresses at a facility in Winston County. Charles Jones founded Somnus, served as its president, and made all the consequential business decisions for Somnus -- including decisions concerning business property insurance. Jones opened his first mattress store in 1981. By 1987, Jones had grown his business to include 15 stores, a warehouse in Ashridge, and his own mattress-manufacturing factory ("the factory") located in Double Springs. In 2006, a fire at the Ashridge warehouse facility resulted in a total loss of that property. Jones testified that the property was "severely underinsured" but that he had completely relied upon his insurance agent at the time "to keep me covered."[1]

[1]Jones testified that his insurer at that time was Robert Blake Insurance Company, located in Hamilton, and that he had relied upon Robert Blake to provide him with the proper amount of insurance coverage.

Hilson, on behalf of CGIA, first contacted Jones in 2009 about providing property-insurance coverage for the factory. Jones testified that during 2009 Hilson came out to the factory to inspect it and to talk to Jones about insurance coverage. Jones stated that during one of those trips the two men discussed business-income coverage.

> "[Jones:] ... I remember Stephen [Hilson] and I, we used to -- we would walk out into the factory, and we'd just look around.
>
> "And he would kind of look and see what all -- what it looked like make sure that wasn't nobody smoking, no cigarette butts and stuff like that that, you know -- and I remember we were -- and I remember we were standing near the foundation department near a couple some overhead doors. And from what I remember, the subject did come up. I asked -- I asked Stephen -- 'What do you think about it?'
>
> "And, Stephen, you -- you told me that 'It's pretty expensive, and it's hard to get because you've got to come up with a lot of records to verify whatever you're claiming; and so I don't think you need it.'"

Hilson testified that their discussion about business-income coverage occurred during his first telephone call with Jones. Hilson testified that he told Jones that he needed such coverage.

> "Q. Did you think Mr. Jones needed business income insurance?

"A. [Hilson:] Yes.

"Q. Did you advise him that?

"A. Yes.

"Q. All right. So you advised Mr. Jones to buy business insurance but he declined?

"A. Yes.

"Q. Do you have anything in writing on that?

"A. No, I did not. Other than he purchased and paid premiums on the amount without business income."

Hilson noted in his testimony that the proposal he submitted to Jones for insurance coverage of the mattress factory in 2009 included a quote with business-income coverage and a quote without business-income coverage because Jones asked for both quotes.

"Q. Now, I notice that this one has -- in your quotes, you have two quotes. See if I can find what page they're on. It would be on the page that's called premium summary, which would be the --

"....

"Q. The fourth page. Sure, Crutchfield Graves [exhibit] 7. Is that what it is?

"A. [Hilson:] Yes.

"Q. And there are two premium quotes. Why are there two premium quotes?

> "A. We had quoted -- we had quoted the [policy] with business income coverage, and then Mr. Jones wasn't sure if he wanted it. He asked to quote it with and without."

Hilson testified that ultimately Jones elected not to pay for business-income coverage because he stated it was too expensive.

Both Hilson and Jones agree that each year after 2009 when the insurance policy for the mattress factory came up for renewal, Hilson would visit Jones to discuss Somnus's insurance needs. Hilson testified that he told Jones at every renewal period that Somnus needed business-income coverage but that Jones always declined the business-income coverage because "[i]t was too expensive." Jones testified that he could not recall any discussion about business-income coverage at the renewal meetings between him and Hilson; the only conversation he remembered about business-income coverage was the one in 2009. It is undisputed that the written proposals for insurance Hilson submitted on behalf of CGIA to Jones for Somnus in 2010, 2011, and 2012 did not include business-income coverage.

On April 12, 2013, a fire occurred at the factory. The fire rendered the factory a total loss. Somnus was forced to

move its operation to a location in Mississippi in an attempt to stay in business. Somnus stayed in business for two more years. Ultimately, Somnus went out of business in 2015.

During the period after the fire while Somnus remained in business, Somnus continued to get its insurance through Hilson and CGIA. Hilson testified that he continued to recommend business-income coverage to Jones but that Jones still declined it because he said it was too expensive.

> "Q. Okay. And is that also true even after the fire [Jones] still declined the business interruption insurance?
>
> "....
>
> "A. [Hilson:] We offered him $1 million in business income the last year he was in business, and he made us take it off because it was too expensive."

Jones testified that his decision not to purchase business-income coverage even after the fire at the factory was based on what Hilson had told him in 2009 about it being expensive and difficult to obtain.

> "Q. So during that time, you never had business income insurance? Even after this fire?
>
> "A. [Jones:] I don't believe I did.
>
> "Q. Okay. Why not?

> "A. Because it was -- I was -- I was told that it was expensive and it required a lot of record -- to produce a lot of records and it was hard to get."

On April 8, 2015, Somnus sued Hilson, CGIA, and Acceptance Indemnity Insurance Company ("Acceptance").[2] Somnus alleged claims of negligence against Hilson and CGIA and breach of contract and bad faith against Acceptance. On April 30, 2015, Somnus dismissed its claims against Acceptance. On the same date, Somnus filed an amended complaint in which it asserted a single count of negligence against Hilson and CGIA, which specifically alleged that Hilson and CGIA

> "were negligent in not advising [Somnus] in regard to insurance coverage for business interruption and loss of profits which was available under an insurance policy similar to the one attached as Exhibit 'A.' Had [Hilson and CGIA] offered business interruption and loss of profits coverage, [Somnus] would have certainly accepted the same and would have had insurance coverage for all of the income losses sustained as a result of the fire loss and continuing. Therefore, the negligence of [Hilson and CGIA] in failing to advise and failing to procure business interruption and loss of profits coverage has proximately caused [Somnus] to be damaged in excess of Two Million Dollars ($2,000,000.00), and the losses are continuing."

[2]Acceptance was the underwriter of the policy Somnus had purchased through CGIA.

On June 27, 2017, Hilson and CGIA filed a motion for a summary judgment. In the motion, they contended that Hilson and CGIA did not have a duty to advise Somnus on the types of insurance coverage it needed, that Hilson and CGIA did not breach a voluntary duty to advise Somnus about the adequacy of its coverage, and that, in any event, it was undisputed that Hilson advised Somnus to purchase business-income coverage during each renewal period, including for the 2012 policy renewal under which the fire loss occurred, and that Jones declined to purchase that coverage.

On August 25, 2017, Somnus filed a response in opposition to the motion for a summary judgment. Somnus maintained that Hilson and CGIA had voluntarily assumed a duty to advise Somnus and that they had been negligent in their advice concerning business-income coverage.

On October 24, 2017, the circuit court entered a summary judgment in favor of Hilson and CGIA. The summary-judgment order did not provide the specific reasons for the court's judgment. Somnus filed a timely appeal.

II. Standard of Review

> "'The standard of review applicable to a summary judgment is the same as the standard for granting

the motion....' McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957, 958 (Ala. 1992).

> "'A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact -- "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Ala. Code 1975, § 12-21-12; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
>
> "Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994). Questions of law are reviewed de novo. Alabama Republican Party v. McGinley, 893 So. 2d 337, 342 (Ala. 2004)."

Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006).

III. Analysis

Somnus presents two arguments on appeal. First, it contends that an issue of fact exists as to the advice Hilson gave Jones with respect to business-income coverage because Jones testified that Hilson advised him that Somnus did not need such coverage, whereas Hilson testified that he told Jones that Somnus should procure business-income coverage. Second, Somnus argues that Hilson and CGIA voluntarily assumed a duty to advise Somnus about the adequacy of its insurance coverage and that they were negligent in carrying out this duty because Hilson inappropriately advised Somnus not to purchase business-income coverage.

On the surface, whether an issue of fact exists as to whether Hilson and CGIA negligently advised Somnus about business-income coverage seems straightforward because the testimony of the two principals -- Jones and Hilson -- conflicts with regard to what Hilson advised Jones in 2009 concerning Somnus's need for business-income coverage. As Hilson and CGIA observe, however, whatever the content of the conversation may have been in 2009 is irrelevant because the active insurance policy at the time of the fire was the one

Somnus renewed in 2012. Testimony about conversations in 2012 are not in dispute. Hilson testified that he met with Jones annually before it was time for Somnus to renew the insurance policy and that each year Hilson told Jones that Somnus needed business-income coverage.

> "Q. Okay. Every year that you met, did you meet with [Charles] Jones and maybe a couple other employees but at least Jones and a representative of Somnus every year from 2009 to the last year that you wrote insurance for them?
>
> "....
>
> "A. [Hilson:] Yes.
>
> "Q. All right. And every time that you met with Jones to discuss renewal of his policy for Somnus, did you always recommend that he get business interruption insurance?
>
> "....
>
> "A. Yes.
>
> "Q. Okay. And what happened every time you recommended it? Did he reject it? What did he say?
>
> "A. It was too expensive.
>
> "Q. Okay. So he always declined the coverage?
>
> "A. Yes."

As noted in the rendition of the facts, for his part, Jones admitted that he met with Hilson each year, but he

testified that he could not remember the content of those conversations and specifically that he could not recall whether Hilson told him during those conversations that Somnus needed business-income coverage.

> "Q. And, Mr. Jones, this is the insurance proposal from Somnus to Somnus Mattress from [CGIA] and Stephen Hilson, dated October 20, 2010. So it would have been the next year.
>
> "A. [Jones:] Yes, ma'am.
>
> "Q. Now, do you recall -- remember Stephen in 2010 coming to your office and meeting with you to discuss renewing your policy?
>
> "A. Yes, ma'am.
>
> "Q. Okay. Do you recall Stephen talking to you about, you know, '[Charles], you really need to get this business income insurance' -- talking to you about that?
>
> "A. No, ma'am.
>
> "Q. You don't remember any conversations about getting business income insurance?
>
> "A. Now, one conversation I remember.
>
> "Q. Okay. The one in 2009?
>
> "A. I think that's when it was.
>
> "....
>
> "Q. Now, whenever you would meet with Stephen during renewal time, did y'all usually go over, you know, new property that you would acquire? Whether

> it was more automobiles or if you had more employees that you needed to insure, things like that.
>
> "Did y'all talk about those type of things?
>
> "....
>
> "A. I don't. I don't remember any particular time. I know that we would always meet when the policy expired and when it was time to renew. And we would discuss whatever -- whatever needed to be added.
>
> "Q. Okay.
>
> "A. But I don't remember any particular conversations --"

In sum, the record reflects that Hilson testified that he advised Jones in 2012 to purchase business-income coverage, that Jones could recall meeting with Hilson each year, but that Jones could not recall the content of those conversations. Not remembering a conversation does not constitute evidence indicating that what the opposing party contends was relayed in that conversation did not occur. This Court described a similar evidentiary situation in Giles v. Brookwood Health Services, Inc., 5 So. 3d 533, 554 (Ala. 2008):

> "Dr. Adcock established a prima facie case that no genuine issue of material fact existed as to the first element of Giles's failure-to-obtain-informed-consent claim and that he was entitled to judgment as a matter of law on that

> claim. According to Dr. Adcock's testimony and medical notes, he had certain conversations with Giles regarding the intended scope and potential risks of the operation, including the possibility that either or both ovaries would be removed. Dr. DeSalvo testified that the conversations described by Dr. Adcock's testimony and his contemporaneous notes would have met the standard for informing Giles that he might remove either ovary, or both, and the risks and long-term effects of doing so.
>
> "Therefore, the burden then shifted to Giles to put forth evidence creating a genuine issue of material fact as to whether Dr. Adcock failed to inform her of all material risks associated with the procedure. Giles did not meet this burden. She submitted no evidence that the conversations Dr. Adcock described did not occur. At most, she provides evidence indicating that she does not recall whether Dr. Adcock had those conversations with her. Giles's inability to recall those conversations does not constitute substantial evidence that the conversations did not occur, only that she cannot remember whether they occurred or what Dr. Adcock discussed with her. Therefore, no genuine issue of material fact exists, and Dr. Adcock is entitled to judgment as a matter of law on Giles's failure-to-obtain-informed-consent claim."

(Emphasis added.)

Somnus attempts to counter its lack of evidence resulting from Jones's failure to recall those conversations by arguing that the "Insurance Proposal" submitted by CGIA to Somnus in October 2012 did not include business-income coverage. Moreover, the cover page of this document stated:

> "This presentation is designed to give you an overview of the insurance coverages we recommend for your company. It is meant only as a general understanding of your insurance needs and should not be construed as a legal interpretation of the insurance policies that will be written for you. Please refer to your specific insurance contracts for details on coverages, conditions, and exclusions."

(Emphasis added.) Somnus essentially contends that this document constitutes substantial evidence that Hilson did not advise Somnus to purchase business-income coverage in 2012.

The difficulty with this contention is that the document in question does not directly contradict Hilson's testimony because it addresses what CGIA recommended following Hilson's conversations with Jones each year, not what was discussed during their conversations. In other words, the insurance proposal does not actually speak to the fact at issue, i.e., whether Hilson recommended business-income coverage for Somnus in 2012 during their conversations and such coverage was declined by Jones. Because the document does not directly contradict Hilson's unrefuted testimony that he recommended business-income coverage to Jones in 2012 but that Jones opted not to purchase it, it does not constitute substantial evidence that Hilson negligently advised Somnus that it did

not need to purchase business-income coverage. Accordingly, the circuit court correctly concluded that no issue of fact existed concerning Somnus's negligent-advice claim.

Even if Somnus had presented substantial evidence creating a genuine issue of material fact as to what Hilson's advice actually was, Somnus also had to demonstrate that Hilson and CGIA are not entitled to a judgment as a matter of law, i.e., that Hilson and CGIA had a duty to advise Somnus concerning the adequacy of its insurance coverage and that they breached that duty. Hilson and CGIA correctly observe that jurisdictions throughout the country have overwhelmingly concluded that insurers have no such duty to advise clients. A leading insurance treatise ably summarizes the general rule:

> "Absent a specific agreement to do so, an insured's agent does not have a continuing duty to advise, guide, or direct the insured's coverage after the agent has complied with his or her obligation to obtain coverage on behalf of the insured. Insurance agents do not have an independent duty to identify their clients' needs and to advise them regarding whether they may be underinsured because it is the client's responsibility or duty, not the insurance agent's, to determine the amount of coverage needed and advise the agent of those needs. In addition, upon receiving the policy of insurance, the client has a duty to review the policy to ascertain that his or her needs are met. In addition, insurance agents generally are not liable for actions other than

> obtaining insurance coverage for their insureds unless a special relationship has been established between the parties."

3 Steven Plitt et al., Couch on Insurance § 46:38 (3d ed. 2011) (footnotes omitted).

Several cases from other jurisdictions have explained the reasons for the courts' unwillingness to impose such a duty upon insurance agents.

> "A majority of courts that have considered the issue have held that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage. See, e.g., Peter v. Schumacher Enterprises, Inc., 22 P.3d 481, 482–83, 486 (Alaska 2001); Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092, 1094 (Me. 1991); Sadler v. Loomis, 139 Md. App. 374, 776 A.2d 25, 46 (2001); Robinson v. Charles A. Flynn Ins. Agency, 39 Mass. App. Ct. 902, 653 N.E.2d 207, 207–08 (1995); Harts v. Farmers Ins. Exchange, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); Murphy v. Kuhn, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); Nelson v. Davidson, 155 Wis. 2d 674, 456 N.W.2d 343, 344 (1990). But see SW Auto Painting v. Binsfeld, 183 Ariz. 444, 904 P.2d 1268, 1271–72 (1995); Dimeo v. Burns, Brooks & McNeil, Inc., 6 Conn. App. 241, 504 A.2d 557, 559 (1986).
>
> "That general duty of care excludes an affirmative obligation to give advice regarding the availability or sufficiency of coverage for several persuasive reasons. Some courts have reasoned that insureds are in a better position to assess their assets and the risk of loss to which they may be

> exposed. See, e.g., Peter, 22 P.3d at 486; Sadler, 776 A.2d at 40; see also Annotation, Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs, 88 A.L.R.4th 249, 257 (1991) ('unrealistic to impose on an insurance agent the ongoing duty of surveillance with respect to an insured's constantly changing circumstances'). These courts have also noted that decisions regarding the amount of insurance coverage are personal and subjective, based upon a trade-off between cost and risk. See Peter, 22 P.3d at 486; Sadler, 776 A.2d at 40. An insurance agent is in no better position than the insured to predict the extent of damage that the insured might incur at some time in the future. See Sadler, 776 A.2d at 40; Murphy, 660 N.Y.S.2d 371, 682 N.E.2d at 976.
>
> "Imposing liability on insurance agents for failing to advise insureds regarding the sufficiency of their insurance coverage would 'remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available,' Nelson, 456 N.W.2d at 346, and would convert agents into 'risk managers with guarantor status.' Sadler, 776 A.2d at 40-41 (quotation omitted); see also Murphy, 660 N.Y.S.2d 371, 682 N.E.2d at 976. Significantly, 'the creation of a duty to advise could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered.' Nelson, 456 N.W.2d at 346. 'This would amount to retroactive insurance, a concept that turns the entire theory of insurance on its ear.' Peter, 22 P.3d at 486 (quotation omitted)."

Sintros v. Hamon, 148 N.H. 478, 480-81, 810 A.2d 553, 555-56 (2002). See, e.g., Peter v. Schumacher Enters., Inc., 22 P.3d 481, 486-87 (Alaska 2001); Harts v. Farmers Ins. Exch., 461

Mich. 1, 9–11, 597 N.W.2d 47, 51–52 (1999); and Nelson v. Davidson, 155 Wis. 2d 674, 681–82, 683-84, 456 N.W.2d 343, 346, 347 (1990).

Somnus appears to concede that an insurer has no general duty to advise clients concerning the adequacy of their insurance coverage. Somnus insists, however, that an insurer can voluntarily assume such a duty by offering advice to a client about the level of insurance the client should purchase. As Somnus states in its reply brief: "The issue before this Court is ... whether once an agent does advise an insured as to coverages and amounts of insurance to purchase, and the insured follows such advice to its detriment, can the agent/agency be liable if they were negligent in volunteering such advice?" Somnus's reply brief, p. 8.

There is no dispute that the general notion of voluntary assumption of a duty can be applied to insurance companies and agents.

> "No doubt, ... although a person may not owe a duty to another, a duty can arise when that person volunteers to act on behalf of another. Berkel & Co. Contractors, Inc. v. Providence Hospital, 454 So. 2d 496, 503 (Ala. 1983); Rudolph v. First Southern Federal Savings & Loan Association, 414 So. 2d 64, 67 (Ala. 1982); Dailey v. City of Birmingham, 378 So. 2d 728, 729 (Ala. 1979). This principle of

> law applies to insurance agents and insurance companies. See, e.g., Barnes v. Liberty Mutual Insurance Co., 472 So. 2d 1041, 1042 (Ala. 1985); United States Fidelity & Guar. Co. v. Jones, 356 So. 2d 596, 597-98 (Ala. 1978); Waldon v. Commercial Bank, 50 Ala. App. 567, 281 So. 2d 279 (1973)."

Palomar Ins. Corp. v. Guthrie, 583 So. 2d 1304, 1306 (Ala. 1991).

However, in this case the questions are whether this particular duty -- the duty to advise a client concerning the adequacy of insurance coverage -- can be voluntarily assumed, and, if so, what triggers such a duty? Hilson and CGIA observe that in its appellate brief Somnus failed to cite a single case in which an Alabama court has concluded that an insurer has voluntarily assumed such a duty. In its reply brief, Somnus attempts to respond to this point by quoting from Highlands Underwriters Insurance Co. v. Elegante Inns, Inc., 361 So. 2d 1060, 1065 (Ala. 1978):

> "The law in regard to the duty that insurance agents or brokers owe to their principals, the insureds, is stated as follows:
>
> > "'... when an insurance agent or broker, with a view to compensation, undertakes to procure insurance for a client, and unjustifiably or negligently fails to do so, he becomes liable for any damage resulting therefrom. (See annotation at 29 A.L.R.2d 171.)' Timmerman Ins. Agency,

> Inc., v. Miller, 285 Ala. 82, 85, 229 So.2d 475, 477 (1969).
>
> "Once the parties have come to an agreement on the procurement of insurance, the agent or broker must exercise reasonable skill, care, and diligence in effecting coverage. Crump v. Geer Brothers, Inc., 336 So. 2d 1091 (Ala. 1976); Waldon v. Commercial Bank, 50 Ala. App. 567, 281 So. 2d 279 (1973). When the agent or broker has failed in the duty he assumes, the principal may sue either for breach of the contract or, in tort, for breach of the duty imposed on the agent or broker. Waldon v. Commercial Bank, supra."

(Emphasis added.)

The problem with using Highland Underwriters is that it concerns a voluntary duty to procure requested insurance coverage, not a voluntary duty to advise clients about the adequacy of their insurance coverage. Several Alabama cases hold that if a client asks an insurance agent to procure a particular type of insurance coverage, the agent can be held liable for failing to fulfill that duty. See, e.g., Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240, 1248 (Ala. 2014). That is not the duty Somnus accuses Hilson and CGIA of breaching in this case: Somnus did not ask Hilson and CGIA to procure an insurance policy that included business-income coverage, which Hilson and CGIA ultimately failed to provide. Instead, Somnus alleges that Hilson proactively convinced Jones that Somnus

did not need business-income coverage and Somnus therefore did not purchase such coverage. In short, procuring insurance requested by a client and advising a client about all the types of insurance coverage the client may possibly need are two entirely different duties; therefore, Highland Underwriters does not provide Somnus with legal authority for establishing the existence of such a duty in Alabama.

Indeed, we have been unable to find any Alabama authority holding that an insurer may voluntarily assume a duty to advise a client regarding the adequacy of the client's insurance coverage. Moreover, to the extent that courts in other jurisdictions have concluded that such a duty can be voluntarily assumed, they have done so only in instances in which the insurer misrepresented information the client could not have known from reading the insurance policy or in which a "special relationship" existed.

One case relied upon by Somnus, Mladineo v. Schmidt, 52 So. 3d 1154 (Miss. 2010), summarized in the following quote from Robichaux v. Nationwide Mutual Fire Insurance Co., 81 So. 3d 1030, 1040 (Miss. 2011), illustrates the instances in which

a factual misrepresentation is made to the insured and not clarified by the insurance policy:

> "The plaintiffs in Mladineo were told by their agent that they were not in a flood plain and were advised not to procure flood insurance. [Mladineo, 52 So. 3d at 1162]. That was incorrect, as a portion of the plaintiffs' property was located in a flood plain and was damaged by storm surge. Id. at 1157. This Court recognized that the plaintiffs could not have known their property was located in a flood plain by reading their policy; thus, even though they were imputed with the knowledge of the policy's contents, an issue of material fact existed as to whether they detrimentally relied on their agent's misrepresentation regarding their lack of need of flood insurance."

Somnus has not alleged that Hilson misrepresented whether Somnus qualified for business-income coverage; Jones was fully aware in 2009 that business-income coverage was available. Somnus simply chose not to purchase such coverage because, it alleges, Hilson told Jones: "I don't think you need it." This was not a misrepresentation as to coverage; at most, it was Hilson's assessment of whether Somnus should purchase insurance for an uncovered risk that was known to Somnus. Somnus has provided no authority for the proposition that Hilson and CGIA could voluntarily assume a duty to advise on that basis.

The other way some jurisdictions have concluded that an insurance agent has voluntarily assumed a duty to advise a client about the adequacy of coverage is if a "special relationship" exists between the agent and the client. The criteria for how such a "special relationship" is formed vary among the courts that have adopted this approach.

> "It is more difficult to derive any absolute rule from the caselaw as to the requirements of a 'special relationship.' However, it is apparent that something more than the standard insured-insurer relationship is required in order to create a special relationship obligating the insurer to advise the policyholder concerning his or her insurance coverage. Bruner v. League General Ins. Co., 164 Mich. App. 28, 416 N.W.2d 318 (1987). Some courts require an express agreement, or a long established relationship of entrustment from which it clearly appears the agent appreciated the duty of giving advice, and compensation for consultation and advice was received apart from the premiums paid by the insured. See, e.g., Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984); Gibson [v. Government Emps. Ins. Co.], 162 Cal. App. 3d [441,] at 448-49, 208 Cal. Rptr. 511 [(1984)]; Nowell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 617 P.2d 1164, 1168 (Ariz. App. 1980); Fleming v. Torrey, 273 N.W.2d 169 (S.D. 1978). Other courts hold that a special relationship may be shown by an insurance agent who holds himself or herself out as being a highly-skilled insurance expert, coupled with the insured's reliance on the expertise of the agent to the insured's detriment. See Hardt [v. Brink], 192 F. Supp. [879,] at 881 [(1961)]."

Nelson, 155 Wis. 2d at 683-84, 456 N.W.2d 343, 347 (emphasis added). See also Sintros v. Hamon, 148 N.H. 478, 481-82, 810 A.2d 553, 556 (2002) ("An insured can demonstrate a special relationship by showing that there exists something more than the standard insurer-insured relationship. ... Examples include express agreement, long established relationships of entrustment in which the agent clearly appreciates the duty of giving advice, additional compensation apart from premium payments, and the agent holding out as a highly-skilled expert coupled with reliance by the insured. ... Some courts also recognize a special relationship when the insured relies upon an agent's offered expertise regarding a question of coverage, or where there is a course of dealing over time putting the agent on notice that his advice is being sought and relied upon."); Harts v. Farmers Ins. Exch., 461 Mich. 1, 9-11, 597 N.W.2d 47, 51-52 (1999) (holding that the general rule of no-duty changed and a special relationship exists "when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice

that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured." (footnotes omitted)); and Rawlings v. Fruhwirth, 455 N.W.2d 574, 576-77 (N.D. 1990) ("[W]here an agent also holds himself out as a consultant and counselor, he does have a duty to advise the insured as to his insurance needs, particularly where such needs have been brought to the agent's attention. And in so doing, he may be held to a higher standard of care than that required of the ordinary agent since he is acting as a specialist.").

Another case cited by Somnus, European Bakers, Ltd. v. Holman, 177 Ga. App. 172, 338 S.E.2d 702 (1985), illustrates a special relationship. In Holman, the insured's agent recommended a change in the form of business-interruption coverage the insured had. After the insured accepted the change for its renewal of the policy, an explosion of an oven caused an interruption in business production for the insured. It then became apparent that the insured was underinsured, a situation that triggered a co-insurance penalty and resulted in the insured receiving compensation for only 28 percent of its loss. The Georgia Court of Appeals concluded that the

independent insurance agent was acting as the insured's agent and that the agent must be held to a higher standard of care because "[t]he uncontradicted evidence in this case is that [the insured's agent] held himself out as an expert and undertook to advise [the insured] on its insurance needs, and that [the insured] relied on [the insured's agent] to do so." 177 Ga. App. at 175, 338 S.E.2d at 705.

In contrast to Holman and similar cases, in this case Somnus never demonstrated that a "special relationship" existed between it and Hilson. None of the characteristics cited by courts for a "special relationship" was argued by Somnus or was present in the record. There was no express agreement, nor was Hilson paid additional compensation to provide advice about the adequacy of Somnus's insurance coverage. Somnus did not claim the existence of a long-established relationship of entrustment. There was no evidence indicating that Hilson held himself out as an expert and that Somnus justifiably relied upon that expertise.

In short, even if we were inclined to adopt the notion from certain other jurisdictions that an insurance agent can voluntarily assume a duty to advise a client concerning the

adequacy of the client's insurance coverage, the types of elements that trigger such a duty were not present in this case. At most, even viewing the evidence in the light most favorable to Somnus, Hilson simply relayed information to Jones that Somnus has never contended was false or misleading -- that obtaining business-income coverage is difficult because it is expensive and requires a great deal of documentation -- and then he offered an opinion based upon that information, i.e., "I don't think you need it." It was up to Jones to accept or reject that opinion, knowing Somnus's finances and needs. Indeed, Somnus never explains how Jones, who had been operating a mattress business since 1981 and who had previously suffered a fire loss to business property in 2006, could have justifiably relied upon Hilson's opinion even if Hilson had a duty to advise Somnus about the adequacy of its insurance coverage.

Based on the foregoing, we conclude that Hilson and CGIA did not have a duty to advise Somnus concerning the adequacy of its insurance coverage. Without such a duty, as a matter of law Somnus could not establish that Hilson and CGIA were negligent in their actions. Therefore, the circuit court did

not err in entering a summary judgment in favor of Hilson and CGIA.

IV. Conclusion

Somnus failed to present substantial evidence creating a genuine issue of material fact as to the advice Hilson gave Jones in 2012 with respect to Somnus obtaining business-income coverage. Somnus also failed to establish that Hilson and CGIA had voluntarily assumed a duty to advise Somnus concerning the adequacy of its insurance coverage. Accordingly, the circuit court's summary judgment in favor of Hilson and CGIA is due to be affirmed.

AFFIRMED.

Stuart, C.J., and Parker, Main, and Bryan, JJ., concur.