COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 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. 96-0499

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

CHARLES GRAY BEVERAGE COMPANY, INC.,

Plaintiff-Respondent,

v.

UTICA MUTUAL INSURANCE COMPANY, DANIEL D. BOUTELLE and COMBINED INSURANCE GROUP, LTD.,

Defendant-Appellants.

APPEAL from a judgment of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Utica Mutual Insurance Company, Daniel D. Boutelle, and Combined Insurance Group, Ltd. appeal summary judgment holding them jointly and severally liable, in contract and in tort, for $29,095, due to Boutelle's failure to procure the same business interruption insurance coverage for the Charles Gray Beverage Company as it had maintained in the

past. On appeal, the appellants contend the contract claims were extinguished when Gray Beverage accepted settlement on the policy which was in effect on the date of the loss, and that it was error to grant summary judgment on the tort claims because there are disputed issues of material fact. Because no release of the appellants occurred as a result of the settlement with the unnamed insurer, and because there are no material factual disputes relative to the contract claims, we affirm.

BACKGROUND

Boutelle, whose errors and omissions carrier was Utica Mutual and who was an insurance agent for The Combined Insurance Group (hereinafter collectively "Boutelle"), approached Bob Gray of Gray Beverage to solicit Gray Beverage's insurance business. Gray Beverage agreed to transfer its insurance to Boutelle and requested that Boutelle provide business insurance, effective November 24, 1988. Boutelle provided Gray Beverage with a CIGNA policy that had business interruption coverage[1] of $50,000, with no co-insurance provision[2].

Gray Beverage uneventfully renewed the CIGNA policy over the next few years, with routine adjustments for inflation, resulting in $55,000 of business interruption coverage requiring no co-insurance. In 1991, a change in status between CIGNA and Boutelle led Boutelle to solicit bids from other insurance providers for the Gray Beverage account. Boutelle explained this to Gray, who approved, but requested that the coverage under any new policy remain identical to the coverage of the CIGNA policy. Boutelle understood it was to provide coverage that mirrored the CIGNA coverage. Boutelle sent an insurance application to the Northbrook Property and Casualty Insurance Company, requesting a quote on a policy which would provide $55,000 business interruption coverage and require no co-insurance. Notwithstanding that directive, Northbrook issued a policy containing $55,000 of business interruption coverage which required 100% co-insurance. Neither Gray Beverage nor Boutelle were aware of this change.

A fire destroyed Gray Beverage's bottling plant while the 1991-92 Northbrook policy was in effect. Gray Beverage sustained a business interruption loss, for which Northbrook paid $29,095 less than would have been paid under the former CIGNA policy. Gray Beverage then sued Boutelle on breach of contract and tort theories. The trial court granted Gray Beverage summary judgment on both theories, and Boutelle appealed.

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[1] Business interruption insurance covers profits lost and continuing normal operating expenses incurred while the business is not fully operational.

[2] Co-insurance provisions require the insured to maintain insurance sufficient to cover its actual business interruption exposure, or a stated percentage thereof, for the policy period. If the required level of insurance is not purchased and a loss occurs, the insurer makes a reduced payment in the same proportion as the coverage carried is to the coverage which should have been carried.

DISCUSSION

Scope of Review.

A grant of summary judgment is an issue of law which we review *de novo*, by applying the same standards as employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint, to determine whether it states a claim, and then we review the answer, to determine whether it presents a material issue of fact. ***Id.*** If they do, we examine the moving party's affidavits, to determine whether that party has made a *prima facie* case for summary judgment. ***Id.*** If it has, we look to the opposing party's affidavits, to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** at 372-73, 514 N.W.2d 49-50.

Motion for Summary Judgment.

Gray Beverage complains that Boutelle did not provide the insurance coverage it requested and that it suffered an under-insured loss as a result. An insurance agent may bind himself by parole to procure insurance, and is liable in damages for a breach of that contract, if he fails to do so. *See* ***Wagner v. Falbe & Co.***, 272 Wis. 25, 27, 74 N.W.2d 742, 744 (1956). In order to prevail on a contract-to-procure claim, a plaintiff must show that an insurance agent agreed to procure insurance coverage effective as of a certain date and time, and then failed to do so. ***Hause v. Schesel***, 42 Wis.2d 628, 635, 167 N.W.2d 421, 424 (1969). The proposed insured's agreement to pay the premiums and accept delivery of the policy provides consideration in exchange for the agent's promise to procure the insurance. ***Id.*** It is not necessary that an insured understand the formal terms used by the insurance industry in relation to insurance coverage. It is sufficient if the insured explains in lay terms what he wants. *See* ***Appleton Chinese Food Service, Inc. v. Murken Insurance, Inc.***, 185 Wis.2d 791, 800, 519 N.W.2d 674, 676 (Ct. App. 1994) (finding a contract to procure "replacement cost" rather than "actual cash value" coverage despite insured's lack of understanding of the distinction between these terms). "Damages arising out of a broker's failure to procure insurance are commonly determined by the terms of the policy the agent failed to procure." ***Wagner***, 272 Wis.2d at 27-28, 74 N.W.2d at 744.

In the case at hand, the complaint alleged that when Gray Beverage began doing business with Boutelle, it requested coverage equal to that provided under its then current policy, and that Boutelle's failure to procure such coverage resulted in damages to Gray Beverage. In the alternative, the complaint claimed that Boutelle had a duty to provide Gray Beverage with coverage equal to that set forth in the policy it had when it began doing business with Boutelle, and that Boutelle breached its duty when it provided Gray Beverage with $55,000 of business interruption coverage that required 100% co-insurance. Boutelle denied liability on both grounds and asserted various affirmative defenses. Therefore, the complaint states two claims on which relief may be granted, and the answer and affirmative defenses join issue in regard to both claims.

Gray Beverage's motion for summary judgment and supporting evidentiary materials focused on the coverage that was in effect under a CIGNA policy which had been sold to Gray Beverage for the year immediately proceeding the change to the Northbrook insurance. Gray Beverage provided evidentiary facts, through Daniel Boutelle's sworn testimony, showing that Boutelle agreed to provide coverage for the year when the loss occurred which was identical to that which had been in effect for the previous year. He also testified that the Northbrook policy did not provide identical coverage. Gray Beverage established that its business interruption loss due to the co-insurance penalty was $29,095. Boutelle offered no conflicting evidence, as to contract liability or damages.

Rather than controverting the facts set forth in support of summary judgment, Boutelle complains that the focus of the summary judgment motion was an agreement that occurred at a later point in time than the agreement alleged in the complaint. However, summary judgments are often based on facts learned during the course of discovery. Perhaps Gray Beverage could have amended its complaint to restate the facts in accord with what it had learned during discovery, and such an amendment would typically be allowed. Section 802.09, STATS. However, it seems an unnecessary exercise because Boutelle has not argued that it was misled or in any way prejudiced in presenting its position in opposition to Gray Beverage's motion. And although the facts were more fully developed through discovery, Gray Beverage's theory remained the same throughout, i.e., that it was damaged because of a co-insurance provision in effect at the time of its loss.

Boutelle also argues it was released from liability for breach of contract when Gray Beverage accepted payment from Northbrook; and therefore, Gray Beverage's only remaining claim against Boutelle sounds in tort. Boutelle cites ***Appleton Chinese Food Service*** to support its assertion.

In ***Appleton Chinese Food Service***, the plaintiff requested that an independent insurance agent provide a particular type of fire insurance coverage. The agent did not do so and a fire loss occurred which was not fully covered. The plaintiff sued the agent and the underwriter. Later the plaintiff settled with the underwriter and gave a Pierringer release. When the agent argued that he too was released by the settlement with the underwriter, this Court disagreed stating, "An agent of a disclosed principal is relieved of liability where the agent effects a binding contract of insurance *that conforms to the agreement between the agent and the insured*". ***Id.*** at 804, 519 N.W.2d at 677 (emphasis added).

The condition precedent to a release described in ***Appleton Chinese Food Service*** has not been met here because the policy obtained by Boutelle did not conform to the agreement between Gray Beverage and Boutelle. The trial court properly granted summary judgment to Gray Beverage on its contract claims.

Finally, when a "cause of action based on contract stands, there is no reason to take up the cause of action based on tort." ***Hause***, 42 Wis.2d at 635, 167 N.W.2d at 424. Because we determine that summary judgment was properly granted on the contract claims, we do not address whether summary judgment would have been appropriate for the tort claims.

CONCLUSION

We hold that Gray Beverage properly stated claims in contract and in tort for Boutelle's failure to procure requested insurance, and that the trial court properly found no genuine issue of material fact existed as to Boutelle's liability, or the amount of damages, for the contract claims. Accordingly, we affirm the trial court's summary judgment in favor of Gray Beverage in the amount of $29,095, based on its breach of contract claims. We do not reach the question of whether summary judgment would have been proper on the tort claims.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.