

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 8, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

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

**No. 99-1092**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**JANICE JOHNSON KUHN, PRESIDENT OF/AND MILWAUKEE  
AUCTION GALLERIES, LTD.,**

**PLAINTIFF-APPELLANT,**

**v.**

**FITZGERALD, CLAYTON, JAMES & KASTEN, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed and cause remanded with directions.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Janice Johnson Kuhn appeals from a judgment dismissing her action for damages suffered as the result of her business insurer's

denial of coverage for a series of employee theft claims filed by her consignment company, Milwaukee Auction Galleries (MAG). Kuhn's theory of liability was that Fitzgerald, Clayton, James & Kasten, Inc. (the Fitzgerald Agency) had negligently failed to advise her to purchase fidelity insurance to cover losses caused by employee dishonesty. She claims that the circuit court erred in determining that she had failed to establish a *prima facie* case and by dismissing a number of parties to the action. Because we agree with the circuit court's conclusion that Kuhn failed to present evidence sufficient to establish that the Fitzgerald Agency had any duty to advise Kuhn or MAG about fidelity coverage, we affirm the dismissal of the lawsuit, and we do not reach the question of who were the proper parties to the action. However, we remand this matter to the circuit court to ascertain whether Kuhn is entitled to a refund because she overpaid the transcript fee.

### **BACKGROUND**

¶2 In 1977, Kuhn bought MAG and became its president, chief operating officer, and only shareholder. The company received personal property on consignment to sell at public auctions, and returned the proceeds minus commissions to its consignor customers. Kuhn obtained business insurance for MAG through William Hoppenjan at the Fitzgerald Agency. Kuhn requested the same coverage as that obtained by MAG's prior owner, which did not include fidelity coverage.

¶3 Kuhn was convicted of four counts of felony theft for using consignment proceeds to cover other business expenses. Kuhn maintained, however, that the money had actually been embezzled by an employee, and she filed a series of insurance claims for MAG on that basis. After its claims were

denied for lack of fidelity coverage, MAG went out of business, and numerous consignors were unable to recover the proceeds from the sales of their personal property. Kuhn allegedly suffered depression and various health problems as the result of the denial of MAG's insurance claims. Kuhn eventually filed suit against the Fitzgerald Agency and its president Charles James on behalf of herself, MAG and its board members, a related appraisal business and its board members, and the consignors. The circuit court dismissed everyone but MAG and the Fitzgerald Agency from the suit prior to trial, and it dismissed all of the remaining claims at the close of the plaintiff's case.

### STANDARD OF REVIEW

¶4 WISCONSIN STAT. § 805.14(1) and (3) (1997-98)<sup>1</sup> permit a circuit court to dismiss an action at the close of a plaintiff's case when the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the plaintiff, there is insufficient evidence to support a verdict in the plaintiff's favor. Due to the circuit court's superior position for assessing the credibility, weight and relevance of the testimony, this court will not set aside a circuit court's decision to dismiss an action for insufficient evidence unless the record reveals that the circuit court's determination was "clearly wrong." See *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995). We will conclude that a circuit court is "clearly wrong" if there is any credible evidence to sustain a verdict in the plaintiff's favor. See *James v. Heintz*, 165 Wis. 2d 572, 576-77, 478 N.W.2d 31 (Ct. App. 1991).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

## DISCUSSION

¶5 In order to prevail on her claim that she was injured by the Fitzgerald Agency's negligent failure to advise her to purchase fidelity insurance, Kuhn needed to produce evidence showing that the Fitzgerald Agency breached a duty of care which caused her actual damages. See *Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.*, 181 Wis. 2d 565, 572, 511 N.W.2d 849 (1994). She failed to do so.

¶6 An insurance agent in this state has no duty to advise customers about the availability or advisability of coverage, absent special circumstances. See *Nelson v. Davidson*, 155 Wis. 2d 674, 676, 456 N.W.2d 343 (1990). Special circumstances may exist when there is an express agreement between the agent and the insured, the insured paid the agent compensation above the commission for advice, or the insured relied upon the agent's representation of expertise.

¶7 Here, there was no express agreement between Kuhn and the Fitzgerald Agency that the agency would provide consultation services, and Kuhn did not pay the agency anything beyond the standard commission based on the premium. Kuhn admitted that the insurance agent she had dealt with had never told her he was more highly skilled than any other insurance agent, and further testified that she maintained coverage identical to that obtained by MAG's prior owner because she believed that if the policy was good enough for a multi-millionaire, it was good enough for her. Based on the facts presented, the circuit court properly determined there was no credible evidence that Kuhn had any special relationship with the Fitzgerald Agency, and therefore properly concluded that Kuhn had failed to establish a *prima facie* case on the duty element of her claim.

¶8 Our decision that the Fitzgerald Agency lacked any duty to advise Kuhn about fidelity coverage is dispositive of the appeal. We therefore do not address any of the other issues Kuhn raises in her brief and we affirm the judgment of the circuit court. However, on November 5, 1999, Kuhn filed a “Motion to Compel Corrected Transcript Fee/Invoice & Refund” in the circuit court. She claims that the transcript fee, which was estimated to cost \$2,200 and was paid in full, totaled only \$922.90. Therefore, she alleges she is owed a refund. We cannot ascertain from the record whether she is owed a refund or whether such refund was paid. Accordingly, we remand this matter to the circuit court to address that issue.

*By the Court.*—Judgment affirmed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

