COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1653 **Cir. Ct. No. 2004CV1402**

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

AMERICAN NATIONAL PROPERTY & CASUALTY COMPANY,

PLAINTIFF-APPELLANT,

V.

TOM BRASS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. American National Property & Casualty Company (American) appeals from an order entered after a second trial to resolve disputes between it and a former agent, Tom Brass. We conclude that the circuit court did not err in ordering a second trial after the first jury returned an inconsistent

verdict, the customer information used by Brass after he left American was not a trade secret subject to protection against misappropriation under WIS. STAT. § 134.90 (2003-04)[1] (the Uniform Trade Secrets Act), and the circuit court did not err in admitting the 2003 version of American's Agent Advance Agreement into evidence at the second trial. We affirm the order.

¶2 In late 1998, Brass signed an Agent Agreement and an Agent Advance Agreement. The advance agreement stated that the agent was required to repay unearned commissions upon demand by American. During the course of his relationship with American, Brass received monthly advances which were offset against his monthly earned commissions. Brass terminated his relationship with American in 2004. As of that date, Brass had been advanced $71,046 more than he had earned in commissions. American sued to recover the advance, to enforce a contractual covenant not to compete,[2] and to obtain damages and injunctive relief arising from Brass' alleged misappropriation of American's trade secrets.

¶3 At trial, Brass admitted that the parties entered into contracts and that he was overpaid on his commissions. However, Brass contended that Jim Pettit, an American employee, told him that if he left the company, he would not owe the overpaid commissions. Brass also claimed that he was told that American had never sought repayment of overpaid commissions from former agents.

¶4 At the end of the first trial, the jury returned the following verdict:

[1] All subsequent references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The covenant not to compete claim was dismissed during the first trial, and it is not an issue on appeal.

> Question 1: Did the contract between American National Property & Casualty Company and Tom Brass require Brass to repay [American] any and all advance compensation Monies not repaid as of the termination date of the contract? ANSWER: YES
>
> Regardless of how you answered the preceding question, you must also answer this question.
>
> Question 2: Did Tom Brass reasonably rely on the representations made to him [about his liability for overpaid commissions] by Jim Pettit [an American employee]? ANSWER: YES
>
> Question 3: Was Mr. Brass unjustly enriched by the advance payment which he retained? ANSWER: YES
>
> Question 4: What sum of money, if any, is due American National Property & Casualty Company as a result of advance compensation payments made by [American] to Tom Brass? $71,046.56

¶5 On motions after the verdict, the circuit court determined that the verdict was inconsistent. The court found that answers one, three and four favored American and answer two favored Brass. The court concluded that reasonable reliance was inconsistent with recovery under a contract or unjust enrichment. The court ordered a new trial on all issues except damages.

¶6 A verdict is inconsistent when the jury's answers "are logically repugnant to one another." ***Imark Indus. v. Arthur Young & Co.***, 148 Wis. 2d 605, 623, 436 N.W.2d 311 (1989). We review whether, in granting a new trial due to an inconsistent verdict, the circuit court misused its discretion. ***State v. Mills***, 62 Wis. 2d 186, 189, 214 N.W.2d 456 (1974).

¶7 We conclude that the jury's answers are hopelessly inconsistent. Question one found that the parties had an enforceable contract relating to advances, and question three found that Brass was unjustly enriched by retaining the advances. A claim of unjust enrichment does not lie where the parties have

entered into a contract. ***Watts v. Watts***, 137 Wis. 2d 506, 530, 405 N.W.2d 303 (1987). Question two, that Brass reasonably relied upon Pettit's representations regarding his liability for advances, is at odds with question three, that Brass was unjustly enriched by the advances he retained. The jury's answers cannot be reconciled, and the court did not misuse its discretion in ordering a new trial.

¶8 We turn to American's trade secret claim. The claim was litigated and dismissed in the first trial. American claimed that when Brass departed American, he took with him the names of American's insureds so that he could solicit their insurance business. Brass testified that the names of American's insureds appeared on his monthly commission statements, along with other information including the transaction date, the effective date of the policies, the policy number, the type of insurance coverage, the policy's renewal date, and the amount of premium. Brass also used information from the insureds' declaration pages to solicit American's insureds after he left American. The declaration pages were provided to Brass during his tenure at American when Brass' policyholders were ready for renewal. The information on the declaration pages duplicated the compilation of information found in American's proprietary database. Brass kept copies of the declaration sheets because there was a regulatory requirement that he do so. Insureds also had copies of their declaration sheets and could share that information with Brass in response to a solicitation. Brass had access to the database until he terminated his employment with American, but he did not use the database to solicit American's insureds.

¶9 Pat Leeper, an American assistant vice president responsible for overseeing agent licensing, testified that American did not consider its insureds' names to be trade secrets. Leeper conceded that the monthly agent's commission statements containing information about American's insureds were the agent's

property, not American's property. Leeper agreed that information regarding insureds' locations, coverages and other characteristics could be obtained from other sources, including the insureds' themselves, whose identity was not considered a trade secret by American. Leeper admitted that, as required by the agent contract, Brass made his files available to American to retrieve; however, the files went unretrieved for eighteen months.

¶10 In granting Brass' motion to dismiss American's trade secrets claim, the circuit court cited Leeper's testimony that the names of American's insureds were not trade secrets. In addition, other information relating to the insureds was readily ascertainable by Brass.

¶11 We independently review a circuit court's decision to grant a motion to dismiss for insufficient evidence at the close of the plaintiff's case. ***Kain v. Bluemound East Indus. Park, Inc.***, 2001 WI App 230, ¶21, 248 Wis. 2d 172, 635 N.W.2d 640. A motion to dismiss should be granted after "considering all credible evidence in the light most favorable to the party against whom the motion is made" and concluding that "there is no credible evidence to sustain a finding in favor of such a party." ***Id.*** (citation omitted). Whether the evidence adduced at trial satisfies the legal standard of a trade secret presents a question of law we decide independently. ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989).

¶12 On appeal, American argues that the circuit court erroneously relied upon ***Corroon & Black-Rutters & Roberts, Inc. v. Hosch***, 109 Wis. 2d 290, 325 N.W.2d 883 (1982), in ruling that the insureds' names were not a trade secret. American argues that ***Corroon*** has been superseded by WIS. STAT. § 134.90 and the decision in ***Minuteman***. We disagree with American's characterization of the

court's ruling. The court's mention of ***Corroon*** does not mean that the court relied upon the case. Although ***Corroon*** has been superseded by statute, subsequent cases have made clear that ***Corroon*** continues to provide guidance because its analysis was based upon the six trade secret factors set out in 4 RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939). ***Corroon***, 109 Wis. 2d at 295. While ***Minuteman*** held that the ***Corroon*** definition of a trade secret no longer applied after the enactment of § 134.90, the ***Minuteman*** court recognized that the trade secret requirements of the RESTATEMENT "still provide helpful guidance in deciding whether certain materials are trade secrets under our new [statutory] definition." ***Minuteman***, 147 Wis. 2d at 853. Therefore, the circuit court did not err in referring to ***Corroon***.

¶13 Misappropriation of trade secrets is barred by WIS. STAT. § 134.90(2). A trade secret is defined as information that "derives independent economic value … from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and "[t]he information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances." Sec. 134.90(1)(c)1. and 2.

¶14 It is clear that the circuit court applied the definition of trade secrets found in WIS. STAT. § 134.90 when it concluded that American did not consider the insureds' names to be a trade secret: the insureds' names are disclosed to the agent and other information about the insureds is readily ascertainable because an

agent may contact that insured and solicit additional information about coverages and premiums.[3]

¶15 We turn to whether the circuit court erroneously admitted into evidence the 2003 version of American's Agent Advance Agreement at the second trial. American argues that the parol evidence rule barred admission of the document. Brass contended that the 2003 Agent Advance Agreement was relevant because the 2003 agreement altered provisions of the 1998 Agent Advance Agreement Brass had signed. At trial, Brass testified that American attempted to get him to sign the 2003 agreement, but he refused. Brass' 1998 contract provided that, upon termination of both the Agent Agreement and the Agent Advance Agreement, the agent agreed to forfeit commissions and payments after the termination date. The 2003 Agent Advance Agreement included the former information and added a paragraph stating that upon termination of the Agent Agreement, commission advances were due and payable within one year following the termination date. However, if after one year following termination, the agent had not violated the terms of the Agent Agreement, then American would forgive the balance due from the agent.

¶16 We agree with the circuit court that the 2003 Agent Advance Agreement was relevant to Brass' claim that Pettit told him that American would not enforce the 1998 Agent Advance Agreement against him. In addition, American asked Brass to sign the 2003 agreement. The circuit court did not

[3] We do not address whether an enforceable covenant not to compete would preclude such conduct.

misuse its discretion in admitting the 2003 agreement into evidence. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

By the Court.—Order affirmed.

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