

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2007

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2006AP2873

Cir. Ct. No. 2003CV2874

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**CERTAIN UNDERWRITERS AT LLOYD, LONDON, AND BJB, INC., D/B/A
CITY NEWS,**

PLAINTIFFS,

v.

**AMERICAN COLLOID COMPANY, ABC INSURANCE COMPANY, AND DEF
INSURANCE COMPANY,**

DEFENDANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

v.

PAUL T. KLEIN, D/B/A FNG INDUSTRIES,

THIRD-PARTY DEFENDANT-RESPONDENT,

UTICA MUTUAL INSURANCE COMPANY AND CALANDRA-LADD AGENCY, INC.,

THIRD-PARTY DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARK S. GEMPELER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Calandra-Ladd Agency Inc. and Utica Mutual Insurance Company appeal from the order granting summary judgment to Paul Klein. Calandra-Ladd argues that the circuit court erred when it concluded that Klein was entitled to summary judgment, because Klein breached a duty to disclose. Because we conclude that Klein did not have a duty to disclose information to Calandra-Ladd under the circumstances of this case, we affirm the judgment of the circuit court.

¶2 The relevant facts are not disputed. Paul Klein helped his daughter start her business, A & B Enterprises, which receives materials from manufacturers in the foundry industry and repackages them into smaller packages. Klein agreed to help obtain insurance for the company. He contacted his personal insurance agent, who referred him to Calandra-Ladd. Klein called Calandra-Ladd and spoke with Chad Bubeck about obtaining a CGL insurance policy for A & B Enterprises. During this conversation, Klein described the material that A & B bagged as a “sand-type” substance and either “ferroalloys” or “metal insulators” with industrial applications. Klein invited Bubeck to visit A & B to inspect the machinery and the “Material Safety Data Sheets” for the material that A & B

bagged.¹ The Data Sheets reveal that the material was “Ferrux,” an “Exothermic Hot Topping Compound.” Bubeck took notes on this conversation.

¶3 Bubeck then prepared an application for insurance.² Klein did not sign the application, nor is there any evidence that he ever saw it. Bubeck did not visit the A & B site, nor did he review the Material Data sheets. Bubeck was a relatively new agent and had not prepared many commercial applications. He assumed, based on the information he received from Klein, that the materials were neither flammable, dangerous, nor explosive. Calandra-Ladd submitted the application to Acuity Mutual Insurance Company, and Acuity issued the insurance policy.

¶4 A & B’s building was damaged by fire in October 2002. Acuity was sued by various parties. It in turn brought this action against Calandra-Ladd. Acuity alleged that it was misled by the inaccurate information into issuing an insurance policy to A & B. Calandra-Ladd then brought a third-party complaint against Klein alleging that he had misled them by not revealing the dangerous nature of Ferrux. Eventually, Klein brought a motion for summary judgment, and

¹ A “Material Data Safety Sheet” apparently is a document that contains information about, among other things, the chemical composition, hazards, and toxic exposure limits of a particular substance.

² The parties apparently dispute whether Bubeck prepared the application during the conversation or afterwards. We are not convinced that this fact affects the outcome.

the circuit court granted it, finding that there were no issues of material fact in dispute and that Klein was entitled to judgment.³

¶5 Our review of the circuit court’s grant of summary judgment is *de novo*, and we use the same methodology as the circuit court. *M&I First Nat’l Bank v. Episcopal Homes Management, Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. If we determine that the complaint and answer are sufficient to join issue, we examine the moving party’s affidavits to determine whether they establish a *prima facie* case for summary judgment. If the movant has carried his [or her] initial burden, we then look to the opposing party’s affidavits to determine whether any material facts are in dispute that entitle the opposing party to a trial.

Schurmann v. Neau, 2001 WI App 4, ¶6, 240 Wis. 2d 719, 624 N.W.2d 157 (citations omitted). In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support and opposition to the motion. *See Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988).

³ The order granting summary judgment states that the motion is granted for the reasons stated on the record and because there are no genuine issues of material fact. At the hearing on the summary judgment motion, Judge Gempeler stated only that he was “satisfied” that Klein should prevail, and that he was “satisfied with the argument that Klein has presented regarding misrepresentations by omissions, application – of the law, and the lack I think a – any reason for me to keep Klein in the case at this point...” While this court reviews summary judgment *de novo*, we benefit from knowing the circuit court analysis of the issue. *Yahnke v. Carson*, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102. The record in this case is notably devoid of the circuit court’s reasons for granting the motion.

¶6 Calandra-Ladd alleged that Klein engaged in “negligent, intentional, and/or strict responsibility misrepresentation” when he failed “to disclose any and all material facts regarding the subject risk to these third-party defendants.” Calandra-Ladd asserts that Klein misrepresented the nature of the business in the conversation he had with Bubeck about obtaining insurance. Klein denied all of the cross-claims, and stated that he provided complete and accurate answers to all of the questions put to him by Calandra-Ladd. Further, he argues that he suggested that Bubeck inspect the site and examine the Data Sheets, but that Bubeck did not do either of these things.

¶7 Calandra-Ladd does not dispute that the actual information Klein gave to Bubeck was accurate. It argues instead that Klein committed misrepresentation by omitting information about the dangers of Ferrux, and that Klein had a “duty to disclose” the information even though Bubeck did not specifically ask for it during their conversation. In making this argument, Calandra-Ladd relies on two cases: *Ollerman v. O’Rourke Co., Inc.*, 94 Wis. 2d 17, 288 N.W.2d 95 (1980), and *Ramsden v. Farm Credit Services of North Central Wisconsin ACA*, 223 Wis. 2d 704, 590 N.W.2d 1 (Ct. App. 1998). We conclude, however, that these cases are distinguishable, and that Klein did not have a duty to disclose under the circumstances that existed here.

¶8 “The general rule is that silence, a failure to disclose a fact, is not an intentional misrepresentation unless the seller has a duty to disclose.” *Ollerman*, 94 Wis. 2d at 26. In *Ollerman*, the court held that the seller of real estate has a duty “to a ‘non-commercial’ purchaser to disclose facts which are known to the vendor, which are material to the transaction, and which are not readily discernible to the purchaser.” *Id.* at 42. And in *Ramsden*, this court held that once a seller’s agent made factual statements about property being sold, he assumed a duty to

make truthful statements, and he could not omit material facts about the condition of the property when those omitted facts would have affected the purchaser's decision to buy. *Ramsden*, 223 Wis. 2d at 721-22. Both cases involved a seller's liability for failing to disclose material facts about the condition of the property being sold.

¶9 This case, however, is markedly different. Klein was not selling anything to Calandra-Ladd, but rather was a potential customer. When Klein called Calandra-Ladd, he was seeking general information about insurance coverage for A & B's operations. Any duty in this situation lies with the potential insurer, or the insurer's agent, to conduct an appropriate investigation. Klein answered all of Bubeck's questions accurately, including his description of the sand-bagging nature of the operations. Calandra-Ladd does not dispute that his answers were accurate. It is Bubeck who apparently did not ask all of the appropriate questions.

¶10 Further, Klein offered Bubeck the opportunity to further investigate the business. Klein suggested that Bubeck inspect both the premises and the Material Safety Data Sheets. Bubeck chose not to. Calandra-Ladd now argues that Klein should have independently faxed the Data Sheets to Calandra-Ladd. We disagree. If Calandra-Ladd had reservations about Klein's answers to the questions posed, it should have investigated further. Even if it did not have reservations, given the unique nature of the business, it should have accepted Klein's invitation to investigate further. Klein, however, is not responsible for

Calandra-Ladd's decision. Consequently, we conclude that the circuit court properly granted summary judgment to Klein on these claims.⁴

By the Court.—Judgment and order affirmed.

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

⁴ Klein also argues that Calandra-Ladd did not plead the claims with sufficient specificity. Because we have decided the appeal on the merits, we do not address this issue.

