COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3347 **Cir. Ct. No. 98 CV 005493**

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

ESSEX INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

JAMES MANLEY, SELECT INSURANCE AGENCY, INC., AND UTICA MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and MEL FLANAGAN, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

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[1] The Honorable Charles F. Kahn presided over the motion for summary judgment; the Honorable Mel Flanagan entered the judgment.

¶1 PER CURIAM. James Manley, Select Insurance Agency, Inc., and their insurer, Utica Mutual Insurance Co., (collectively, "Manley") appeal from the circuit court judgment, following a court trial, awarding Essex Insurance Company $24,000 damages. Manley argues that the circuit court erred in denying his motion for summary judgment. He contends that Essex's summary judgment submissions presented no evidence establishing that it had relied on his misrepresentations when issuing insurance to his clients. We affirm.

I. BACKGROUND

¶2 Essex sued Manley, an intermediary insurance broker, claiming that he was negligent and that he had made negligent misrepresentations when he completed an application for insurance which he submitted on behalf of his clients, Lowell and Dorothy Davis. Essex alleged that Manley had failed to disclose that his clients' previous insurance policy on business properties had been non-renewed because of four recent claims resulting from fires and a firebombing. Essex also alleged that Manley erroneously and incompletely described the Davises' fire-loss history in his application for insurance with American X/S Underwriters, a wholesale agent of Essex. Essex claimed that, as a result of these misrepresentations, it issued a policy to the Davises and, shortly thereafter, paid a claim for $25,000 for a fire at one of their properties.

¶3 Following a court trial, Manley was found 96% at fault and, accordingly, was ordered to pay $24,000 in damages. Manley does not challenge the sufficiency of the trial evidence on appeal; rather, he challenges only the circuit court's denial of his motion for summary judgment.

II. ANALYSIS

¶4 In reviewing a grant or denial of summary judgment, we employ the same analysis as the trial court; hence, our review is de novo. ***Ollhoff v. Peck***, 177 Wis. 2d 719, 722, 503 N.W.2d 323 (Ct. App. 1993). Summary judgment is appropriate in cases where there is no genuine issue of material fact and the moving party has established entitlement to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984. It is well recognized, however, that "[t]he remedy of summary judgment does not lend itself to many types of cases, especially those which are basically factual and depend to a large extent upon oral testimony." ***Schandelmeier v. Brown***, 37 Wis. 2d 656, 658, 155 N.W.2d 659 (1968). Thus, when the summary judgment submissions "will either support or admit of an inference in support or in denial of a claim of either party, it is for the [fact-finder] to draw the proper inference and not for the court to determine which of two or more permissible inferences should prevail." ***Foryan v. Firemen's Fund Ins. Co.***, 27 Wis. 2d 133, 138, 133 N.W.2d 724 (1965) (citation omitted).

¶5 Manley contends that Essex's summary judgment submissions failed to establish that "someone at Essex's underwriting department read or heard the asserted misrepresentations and relied upon one or both of them when opting to issue coverage." In essence, he argues that the summary judgment submissions failed to establish: (1) the identity of the person who actually reviewed the application; (2) the policies governing whether an application would have been denied based on prior claims and non-renewal; and (3) the actual reliance on the inaccurate application. We reject his arguments. Although some of the evidence was circumstantial, given the insurance company's bureaucracy and levels of

review, the submissions were clearly sufficient to defeat Manley's motion for summary judgment.

¶6 Essex claimed that Manley had made negligent misrepresentations on the Davises' insurance application. Under this theory of liability, Essex had to establish: (1) that Manley made a factual representation; (2) that the representation was not true; (3) that Essex believed the representation to be true and relied on it to its detriment; and (4) that by making an untruthful representation, Manley breached his duty of care. *See* ***Ramsden v. Farm Credit Serv.***, 223 Wis. 2d 704, 721, 590 N.W.2d 1 (Ct. App. 1998).[2]

¶7 To establish the elements of negligent misrepresentation, Essex submitted several affidavits and depositions in which witnesses outlined the history of the Davises' insurance application. In one deposition, Melissa Bailey, Essex's Western Territory Manager, testified to the complex workings of the insurance industry and the multi-faceted, multi-tiered review of insurance applications. According to Bailey, Essex does not work directly with a retail agent, but works only with wholesalers, such as American X/S Underwriters, who, in turn, work with the retail insurance agents, such as Manley. Bailey explained that American X/S Underwriters, as a wholesale agent, helps to locate insurance for substandard risks—i.e., risks that do not fit into the usual "admitted market," due to past losses or other reasons. Bailey noted that American X/S did not have binding authority for these substandard risks and, therefore, only an authorized Essex underwriter could approve the application and issue an insurance policy.

[2] Although Manley does not admit to having made the alleged misrepresentations, on appeal, he does not challenge the sufficiency of Essex's evidence on this element.

Bailey added that in this case, Renee Franz was the underwriter for the Davises' application and, in accordance with Essex's guidelines, she alone had the authority to approve the application.

¶8 In her affidavit, Renee Franz confirmed that she was the underwriter on the Davises' file and that she had the final authority to accept or deny the application. Franz explained that "the acceptance and denial of applications[] was based upon the judgment of the underwriter, considering the totality of the application." Franz stated that the application failed to disclose that the Davises' prior insurance policy had been non-renewed, and that the application indicated "that there was only one loss, and that was for a property no longer owned by the applicant at the time the application was submitted." Franz also noted that she had relied on these statements in assessing the application and, further, that had she known the Davises' actual loss history, she "would have denied the application and a policy would not have been issued."

¶9 In her deposition, which was taken after the submission of her affidavit, Franz confirmed much of what she stated in her affidavit. Although admittedly uncertain about some of the specifics concerning the evaluation of the Davises' application, Franz in no way contradicted the statements in her affidavit.

¶10 Manley contends otherwise, however, arguing that the circuit court erred in relying on Franz's affidavit in its consideration of the summary judgment submissions. He contends that Franz's deposition contradicts her affidavit, rendering her affidavit a "sham affidavit" under ***Yahnke v. Carson***, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102. Therefore, he claims, the court should have disregarded it. We disagree.

¶11 In ***Yahnke***, the supreme court adopted the "'sham affidavit' rule, [which precludes] the creation of genuine issues of fact on summary judgment by the submission of an affidavit that directly contradicts earlier deposition testimony." ***Yahnke***, 2000 WI 74 at ¶¶15, 23. In ***Yahnke***, a plaintiff's medical expert testified during depositions that he was not able "to state that any of the [defendant-doctors] had breached the standard of care owed to [plaintiff] Yahnke." ***Id.*** at ¶4. When specifically asked whether it was accurate to say that he did not have any criticism of the standard of care utilized by the defendant-surgeon in his care and treatment of the plaintiff, the expert replied, "That's correct." ***Id.*** Thus, the defendants moved for summary judgment, arguing that the plaintiff's expert witness had failed to establish negligence in connection with the plaintiff's surgery. ***Id.*** at ¶¶4-5.

¶12 In response, the plaintiff changed counsel and subsequently produced affidavits from the same expert that explicitly stated that the plaintiff's injuries were caused by the surgery and, in contrast to his prior statement, added that this injury would not normally occur if the defendant-surgeon had "performed his work within the ordinary standard of care." ***Id.*** at ¶6 The circuit court, noting that the expert's post-deposition affidavit contradicted his deposition testimony, rejected the affidavit and granted summary judgment for the defendants. ***Id*** at ¶8. The supreme court agreed, concluding that "because the plaintiff['s] expert[-]witness affidavit directly contradicted the expert's deposition testimony without adequate explanation [for the difference of opinion]," the affidavit should have been rejected and, therefore, summary judgment in favor of the defendant-doctors was appropriate. ***Id.*** at ¶23.

¶13 Here, however, Franz's affidavit in no way contradicts her deposition testimony. While Manley repeatedly argues that the affidavit

contradicts the deposition testimony, he fails to specifically cite any alleged contradictions. By contrast, Essex provides a detailed comparison between the two documents, establishing their basic consistency and sufficiency. Manley fails to counter Essex's response. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶14 Moreover, our independent review of the submissions reveals no basis for Manley's "sham affidavit" claim. Franz's affidavit states:

> 6. The [Davises'] application asks whether any policy has been non-renewed in the preceding three years. The submitted application answered the question "no." It further asks for a loss history for the preceding five years. The submitted application indicates that there was only one loss, and that was for a property no longer owned by the applicant at the time the application was submitted.
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> 7. I relied upon the representations in the preceding paragraph in evaluating and underwriting the submitted application.

Nothing in Franz's deposition testimony contradicts these statements. Her deposition testimony confirms that American X/S was required to submit the Davises' application to Essex's underwriting, and that only Essex's underwriting department had the authority to approve or deny the application. Thus, according to Essex's business procedure, Franz would have considered the application and, prior to approving it, would have relied on its representations.

¶15 Therefore, we agree with the circuit court that a question of fact existed regarding whether Franz relied on the misrepresentations and whether they affected her decision to approve the Davises' application for insurance. Accordingly, we conclude that the court did not err in denying Manley's motion for summary judgment.

By the Court.—Judgment affirmed.

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