COURT OF APPEALS
DECISION
DATED AND RELEASED

January 9, 1997

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. 94-1685

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

DICK'S FIRESIDE, INC., KLOPCIC ENTERPRISES OF WISCONSIN, INC., LACOMEDIA ENTERPRISES, INC. and KLOPCIC ENTERPRISES OF OHIO, INC.,

Plaintiffs-Appellants,

v.

WILLIS CORROON CORPORATION OF WISCONSIN, INC.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Jefferson County: ARNOLD K. SCHUMANN, Judge. *Reversed and cause remanded*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. The appellants, collectively Klopcic Companies, appeal from a summary judgment dismissing their complaint against Willis Corroon Corporation of Wisconsin, Inc. Their numerous claims, in contract and tort, relate to a long business relationship between the parties. Because we

conclude that material factual disputes remain unresolved on their claims, we reverse and remand for further proceedings.

The Klopcic Companies operate two dinner theaters, one in Ohio and the Fireside Theater in Wisconsin. Corroon, an insurance broker, procured insurance for their operations between 1981 and 1991. Klopcic Companies alleged in their complaint that Corroon committed numerous errors and omissions during their relationship that substantially increased Klopcic Companies' cost of insurance. It is alleged that in certain years Corroon mistakenly overstated theater admissions in insurance applications. In other years, Corroon could have obtained cheaper insurance by applying for combined coverage of both premises. Klopcic Companies also alleged and offered proof that Corroon negligently failed to advise that insurance costs were increased by Klopcic Companies' accounting practice that arbitrarily classified part of their theater revenue as food revenue. In 1983 and 1984, Corroon allegedly knew about but failed to inform Klopcic Companies of comparable but cheaper insurance options that were available. Corroon also allegedly misrepresented the savings available had Klopcic Companies installed a sprinkler system in the Fireside Theater. Finally, it was alleged and proof offered that Corroon submitted insurance applications with inaccurate and damaging information as to the layout of one of the theaters.

Klopcic Companies sought recovery on each of these allegations under tort and contract. Misrepresentation and strict responsibility misrepresentation claims were advanced for the erroneous statements on the sprinkler system, and for the withholding of information on cheaper available insurance options in 1983 and 1984. The trial court dismissed all of the claims on Corroon's summary judgment motion, resulting in this appeal.

We decide motions for summary judgment in the same manner as the trial court and without deference to its decision. ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Summary judgment is not appropriate if material facts are in dispute or if the facts permit reasonable opposing inferences. ***Wagner v. Dissing***, 141 Wis.2d 931, 940, 416 N.S.2d 655, 658 (Ct. App. 1987).

An insurance agent has no duty to inform or advise the insured on coverage matters, absent special circumstances. ***Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc.***, 181 Wis.2d 565, 572, 511 N.W.2d 849, 852 (1994). However, Corroon is not an insurance agent but an insurance broker, and therefore assumes the duties of an agent to its principal, the insured. ***Master Plumbers Ltd. Mut. Liab. Co. v. Cormany & Bird, Inc.***, 79 Wis.2d 308, 313, 255 N.W.2d 533, 535 (1977). Those duties include the obligation to exercise reasonable skill and diligence in the transaction of the business entrusted to him or her. ***Id***. The insured may recover for the broker's wrongful act under either a tort or contract theory. *See* ***Olfe v. Gordon***, 93 Wis.2d 173, 183, 286 N.W.2d 573, 578 (1980) (attorney is agent to the client and may be sued for malpractice in tort or contract).

Klopcic Companies seek damages because Corroon's alleged errors, omissions and misrepresentations caused it to pay higher insurance premiums than it otherwise would have. Corroon contends that it is not liable for those damages because, as a matter of law, it did not have a duty to reduce Klopcic Companies' costs by obtaining lower priced insurance. We disagree. Corroon focuses on the affidavit of Klopcic Companies' owner stating that Corroon's representative agreed to obtain the cheapest insurance possible, and correctly contends that such an agreement would be incapable of enforcement. However, there is no dispute that a contract to procure insurance existed, and that Corroon's representative knew that cost was of substantial concern to Klopcic Companies. Corroon cannot reasonably argue, under that circumstance, that it had no duty to disclose less costly insurance options, and to use reasonable diligence to reduce insurance costs where feasible. An agent has the duty to obey all reasonable directions as to its manner of performing the service it has agreed to perform. RESTATEMENT (SECOND) OF AGENCY § 385 (1958). An agent also has the duty to give its principal relevant information that it has notice the principal wishes to have. ***Id***. at § 381. The trial court must therefore allow Klopcic Companies an opportunity, at trial, to prove that Corroon failed to disclose relevant cost information and to use reasonable diligence in carrying out its procurement duties.

Corroon also contends that it had no duty to advise Klopcic Companies to change its accounting practices or package its applications differently, or whether to install a sprinkler system. However, that contention also remains in dispute. In their summary judgment submissions, Klopcic Companies offered evidence that Corroon agreed to advise on cost-saving

practices, and Corroon also stated that it offered such advice on occasion. Klopcic Companies also offered an expert's opinion that failure to advise in these particular matters showed a lack of reasonable diligence by Corroon. We therefore cannot say as a matter of law that Corroon did not agree to or assume a duty to advise on cost-saving, or that the duty did not extend to the matters in dispute.

Klopcic Companies may also proceed on their misrepresentations claims. To prove a negligent misrepresentation, the plaintiff must establish that it relied on a negligently made, untrue statement of fact. WIS J I—CIVIL 2403. To prove a misrepresentation for which there is strict responsibility, the plaintiff must prove that it relied on an untrue statement of fact, made by a defendant based on personal knowledge or in circumstances in which the defendant should have known the statement was false, where the defendant had an economic interest in the transaction. WIS J I—CIVIL 2402.

On summary judgment Klopcic Companies introduced evidence that Corroon knew for years, but never told Klopcic Companies, that a major insurance company refused to bid on insurance for the Fireside Theater because the theater lacked sprinklers. Later, Corroon wrongly advised Klopcic Companies that a system would only save $3,000-$4,000 per year in insurance costs, whereas the actual savings undisputedly would have been $15,000 per year. Klopcic Companies averred that they relied on Corroon's advice and information and did not install sprinklers because a savings of $3,000-$4,000 per year would not justify the cost. Had they known the true savings, they could have profitably installed the system sooner. If used at trial, and believed, this evidence would establish claims for negligent misrepresentations and for strict responsibility misrepresentation. Although Corroon's submissions on summary judgment indicated other reasons for not installing a sprinkler system sooner and also allowed the inference that Klopcic Companies did not rely on Corroon's advice on this matter, determining the weight and credibility to be assigned to the conflicting evidence is a question for the trier of fact. ***Peterson v. Maul***, 32 Wis.2d 374, 377, 145 N.W.2d 699, 702 (1966). It is not a question that can be resolved on summary judgment. The same may be said for the alleged misrepresentation that cheaper insurance was unavailable in 1983 and 1984, which is essentially an issue of credibility.

Corroon argues that most of the negligence and misrepresentation claims are also barred by the statute of limitations because the Klopcic Companies, through their own reasonable diligence, should have discovered the truth about its alleged errors more than six years before this lawsuit was commenced in March 1993. Klopcic Companies' affidavits offer evidence, however, that they reasonably relied on Corroon for all insurance-related advice until 1991 and that the information needed to discover Corroon's errors and omissions remained in Corroon's possession until then. Those affidavits raise disputed issues of material fact that must also be resolved at trial. Additionally, certain of the errors and omissions occurred after March 1987 and are therefore within the six-year statute of limitations without application of the discovery rule.

As for the contract claims, Klopcic Companies does not dispute that they cannot recover on any breaches that occurred before March 1987. They may, however, pursue a remedy for any of the alleged breaches that occurred after that time, whether first-time breaches of the contract, or separate breaches of a continuing duty to perform. ***Segall v. Hurwitz***, 114 Wis.2d 471, 491, 339 N.W.2d 333, 343 (Ct. App. 1983).

By the Court.—Judgment reversed and cause remanded.

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