COURT OF APPEALS DECISION DATED AND RELEASED

June 11, 1996

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. 95-1709

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

LETRILLIAN'S, INC. and WANDA BILLUPS,

Plaintiffs-Appellants,

v.

PATRICK C. MILLER, A.N. ANSAY & ASSOCIATES, INC. and ALL LINES INSURANCE AGENCY, INC.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed*.

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

PER CURIAM. Letrillian's, Inc., and Wanda Billups (collectively, "Billups") appeal from a judgment granted in favor of Patrick C. Miller and

A.N. Ansay & Associates, Inc., as a result of an insurance dispute.[1] We conclude that the trial court properly granted summary judgment against Billups and we affirm.

In mid-1992, Wanda Billups bought a restaurant property. Shortly afterwards she asked Patrick Miller, an employee of A.N. Ansay & Associates, Inc., an insurance agency, to obtain replacement-cost insurance coverage for the property. Miller forwarded Billups's coverage application to All Lines, which placed the insurance with Capitol Indemnity Company. The policy, however, provided only for actual cash value coverage. All Lines forwarded the policy to Miller, who told Billups that he had obtained a policy that provided $600,000 replacement-cost coverage limits on the building and $150,000 replacement-cost coverage limits on the contents of the building.

The building was destroyed by fire on February 17, 1993. Billups submitted proofs of loss totaling $702,578.62, which listed actual cash values for the building and its contents at approximately $300,000. Billups subsequently learned, however, that the policy provided for actual cash value coverage instead of replacement-cost coverage. Prior to the initiation of this lawsuit, Billups settled with Capitol Indemnity for $304,000 based on actual cash values. Capitol refused to pay anything more than $304,000 because of its belief that Billups had deliberately set fire to the building. Billups never replaced or rebuilt the building and it was razed.

Billups sued Miller, Ansay and All Lines for breach of contract and for negligently failing to obtain replacement-cost coverage. The defendants moved for summary judgment, arguing that a Capitol replacement-cost policy would have provided that it would not pay on a replacement cost basis for any loss or damage "[u]ntil the lost or damaged property is actually repaired or replaced." The defendants argued that they were not liable because Billups had not repaired or replaced the property. The trial court granted summary judgment in favor of the defendants and dismissed Billups's complaint.

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[1] Billups also appealed from the May 31, 1995 judgment in favor of All Lines Insurance Agency, Inc. Pursuant to our order dated February 5, 1996, however, All Lines was voluntarily dismissed from this appeal.

Section 802.08, STATS., governs summary judgment methodology. That methodology for reviewing summary judgment motions has often been recited in many cases, *see, e.g.*, ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980), and need not be repeated here. Our review is *de novo*. ***Id.***

Billups argues that her action against Miller and Ansay for breach of contract and negligent failure to procure replacement-cost coverage is a separate action and not an action on the insurance contract. She contends, therefore, that her remedy or damages should be the "natural and probable" consequences of the breach, and thus that the policy language which would have required that she actually repair or rebuild in order to receive replacement-cost proceeds would be inapplicable. She also claims that whether the defendants breached a contract to procure replacement-cost coverage and whether the defendants negligently failed to obtain such coverage "involved genuine issues of material fact that required resolution by the court and jury." Billups, however, fails to indicate what factual uncertainties exist. Indeed, it is undisputed that the defendants improperly failed to obtain replacement-cost coverage for her. Thus this appeal presents purely a legal issue: does policy language requiring property to be repaired or replaced in order to receive replacement-cost coverage apply?

In ***Appleton Chinese Food Service, Inc. v. Murken Insurance, Inc.***, 185 Wis.2d 791, 519 N.W.2d 674 (Ct. App. 1994), the plaintiff sued an insurance agency for the negligent failure of one of its agents to procure replacement-cost coverage and for breach of contract. Although the court of appeals did not rule on the exact issue presently before this court, *see* ***id.*** at 811 n.10, 519 N.W.2d at 680 n.10, the court did rule that "[d]amages arising out of [an agent's or] a broker's failure to procure insurance are commonly determined by the terms of the policy the agent failed to procure." ***Id.***, 185 Wis.2d at 808, 519 N.W.2d at 679.

Here, it is undisputed that Billups never repaired or replaced the property. Thus, she failed to satisfy what would have been the contractual prerequisite for obtaining any proceeds other than actual cash value.

Billups also claims that if she had properly been issued replacement-cost coverage, she would have been able to obtain financing to

rebuild the restaurant. In support of her claim, however, Billups submitted affidavits that do not comply with the requirement of § 802.08(3), STATS., (affidavits in support of summary judgment motions must "set forth such evidentiary facts as would be admissible in evidence"). Thus Billups has failed to present evidence necessary to establish each element of her case in order to avoid a summary judgment against her. ***Transportation Ins. Co. v. Hunzinger Constr. Co., Inc.***, 179 Wis.2d 281, 290-292, 507 N.W.2d 136, 139-140 (Ct. App. 1993). According to her deposition testimony, Billups merely stated that if she could have obtained a liquor license and had been permitted to rebuild, she would have had the "wherewithal" to rebuild the restaurant. Her submissions offered no evidence that she applied for any loan or contacted contractors regarding credit for construction of any building.

Therefore, we conclude that the trial court correctly granted summary judgment to the defendants based on Billups's failure to satisfy the prerequisite of the policy language requiring that the property be repaired or replaced.

By the Court.—Judgment affirmed.

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