**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 30, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1918** **Cir. Ct. No. 2004CV1087**

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

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**DAN SAMP AGENCY, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY AND AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 HIGGINBOTHAM, P.J. Daniel Samp, d/b/a Dan Samp Agency, Inc. ("Samp"), appeals a circuit court order granting American Family Mutual Insurance Company's motion for summary judgment and denying his cross-motion for summary judgment in Samp's unlawful termination and breach of

contract action arising out of American Family's termination of Samp's agency contract. Section 6.h.2. of the agency agreement requires American Family, "[a]fter two years from the Effective Date of [the] agreement," to provide written notice to an agent of any undesirable performance before terminating the agreement, except where the undesirable performance involves a violation of another section of the agreement or where the performance in question is "dishonest, disloyal or unlawful." Samp contends that American Family violated § 6.h.2. of the agency agreement. In his view, § 6.h.2. applies only to performance of an agent's obligations under the agency agreement. American Family argues that § 6.h.2. permits it to terminate an agency agreement for "all untoward behavior" by an agent, not just for conduct related to obligations under the agency agreement.

¶2 We conclude the term "performance" in § 6.h.2. is ambiguous. Therefore, applying the construe-against-the-drafter rule against American Family, we adopt Samp's construction of § 6.h.2. as limited to the performance of an agent's obligations under the agency agreement. Applying that construction to the summary judgment record, we also conclude that there are no genuine issues of material fact and that Samp did not engage in unlawful or dishonest conduct while performing his duties as an insurance agent.[1[1]] Accordingly, we reverse the circuit court's order granting American Family's motion for summary judgment and remand for the court to enter judgment in Samp's favor.

[1[1]] Samp also argues that American Family is estopped from enforcing the terms of § 6.h.2. of the agency agreement. Because we resolve this appeal in Samp's favor, we need not address this argument.

## BACKGROUND[2][2]

¶3 The following facts are not in dispute. Daniel Samp was an independent contractor working as an insurance agent through his agency, Daniel I. Samp Agency, Inc., for American Family Mutual Insurance Company, between 1983 and 1985 and between 1991 and 2003. Samp also worked for American Family in the intervening years as a manager.

¶4 In 2002, while Samp was an agent for American Family, he and his wife accepted an offer to purchase their home made by Despina Gerakis. Under the land contract, Gerakis was required to maintain an insurance policy containing "the standard clause in favor of the Vendor's [Samp's] interest." The land contract also required insurance proceeds for property damage to be applied to restoration or repair of the property unless Gerakis and Samp agreed otherwise in writing, provided that Samp deemed such restoration or repair economically feasible.

¶5 Pursuant to the land contract's requirements, Gerakis purchased a homeowner's insurance policy listing Samp as an additional insured; the policy was purchased from American Family. In addition to being one of the insured parties under the contract, Samp was also the agent of record for the policy until September 18, 2002, when Gerakis designated a different American Family agent.

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[2][2] Samp's brief contains many facts without corroborating citations in the record. Such a failure to cite to the record is a direct violation of WIS. STAT. RULE 809.19(1)(d) (2003-04) of the rules of appellate procedure, which requires parties to set out facts "relevant to the issues presented for review, with appropriate references to the record." An appellate court is improperly burdened where briefs fail to properly cite to the record. *See* ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 Several months later, Gerakis defaulted on her obligations under the contract. Samp sent her a notice of default on February 18, 2003. On or about April 24, 2003, Samp and Gerakis agreed in writing that Gerakis had vacated the property, and would quit claim the property back to Samp. The agreement provided that "neither party is waiving their rights arising from the August 12, 2002 Land Contract."

¶7 Before the quit claim deed was signed, Samp noticed a problem with the house's roof while he was showing the property to prospective buyers. Samp testified that, when he asked Gerakis to submit an insurance claim for property damage, as required by the land contract, she did not respond. Samp then contacted the American Family claims department himself, requesting that they send an adjuster to inspect the roof. At Samp's request, James Menzel, a property claims examiner for American Family, inspected the property. According to Samp's testimony, Menzel confirmed that there was damage to the roof, but told Samp that, until a claim was formally submitted, he could not send out an adjuster. Samp then submitted a claim himself, using his American Family agency computer. Menzel then returned with a representative of Van Rite Construction and Restoration, LLC, the customer repair vendor for American Family. Menzel and Van Rite confirmed there was roof damage that could be claimed, and told Gerakis about the damage and that a claim had been initiated.

¶8 Van Rite repaired the roof, completing the work on or about July 22, 2003. Samp testified in deposition as follows: Before Menzel sent him the insurance claims check they had a discussion about how to handle the check. Samp told Menzel not to send the check to him, but to send it instead to Gerakis because Samp believed he would not be able to find Gerakis and that he was not responsible for finding her. However, as Menzel later explained to Samp, he

could not find Gerakis either. As a result, Menzel told Samp, he would have to make the check payable to Gerakis, Samp and Van Rite, and send it to Samp. Menzel then mailed a $15,263.73 claims check to Samp, made out to Gerakis, Samp and Van Rite.

¶9 Samp testified that, upon receiving the check, he called Menzel and expressed unhappiness at having received the check. He further testified that he told Menzel he would write "For Gerakis" on the check, sign his name, and forward the check to Van Rite. Although he testified that he was not trying to endorse Gerakis's name, he also testified that he did not have any agreement from Gerakis allowing him to write "For Gerakis" on the check. Menzel did not suggest that Samp should not proceed in that manner. Samp then endorsed the check as described—with the words "For Gerakis" signed by Samp and his own name signed underneath—and Van Rite deposited the check.

¶10 Upon finding out that the claim had been processed with Samp's signature on her behalf, Gerakis filed a complaint with the police alleging that Samp had forged her signature. On a later date, she also filed a complaint with the State of Wisconsin Office of the Commissioner of Insurance alleging that Samp signed her name on the insurance proceeds check.

¶11 In a letter dated September 3, 2003, Samp was told that his contract with American Family was terminated. A subsequent letter from Al Meyer, American Family's vice president of marketing, informed Samp that his agency was initially terminated because of his conduct regarding the Gerakis roof repair, and that more recently American Family had discovered a number of situations in which Samp had mishandled money of some of his former policyholders.

¶12 Samp filed suit alleging unlawful termination and breach of contract. After the parties filed cross-motions for summary judgment, the circuit court denied Samp's motion and granted American Family's motion for summary judgment. The court concluded that there were no issues of disputed fact, the contract was unambiguous, and that American Family had acted within the bounds of the agreement in terminating Samp's agency without notice, due to undesirable performance. Samp appeals.

## DISCUSSION

### *Standard of Review*

¶13 Summary judgment is appropriate when there are no material factual disputes and a party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); *see also* ***Germanotta v. National Indem. Co***., 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). We review decisions to grant or deny summary judgment de novo, applying the same standard as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The methodology employed in summary judgment review is well established, *see* ***id***. at 314-15, and need not be repeated here.

¶14 This case requires us to interpret certain provisions of a contract. Our objective in interpreting contracts is to ascertain the intent of the parties. *See* ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, ¶21, 577 N.W.2d 617 (1998). We construe the contract according to its plain language where the terms of a contract are clear and unambiguous. ***Id.*** However, where the terms of a contract are ambiguous, we construe the ambiguous language in a contract against the drafter. ***Id.***; *see also* ***Dieter v. Chrysler Corp***., 2000 WI 45, ¶15, 234 Wis. 2d

670, 610 N.W.2d 832; ***Converting/Biophile Labs., Inc. v. Ludlow Composities Corp.***, 2006 WI App 187, ¶23, 296 Wis. 2d 273, 722 N.W.2d 633.

*Section 6.h.2. of the Agency Agreement*

¶15 This dispute centers on language contained in § 6.h.2. of Samp's agency agreement with American Family. Section 6.h.2. gives American Family the right to terminate an agency agreement without notice in the event of an agent's undesirable performance. Section 6.h.2. of the contract states that:

> In no case shall notice of undesirable performance be required prior to termination if the performance in question involves a violation of Sec. 4.i. or any other dishonest, disloyal or unlawful conduct by the Agent or any Shareholder, officer or licensed sales representative of the Agent ….

Section 4.i. of the agency contract requires an agent

> [t]o maintain a good reputation in the Agent's community and to direct Agent's efforts toward advancing the interests and business of the Company to the best of Agent's ability, to refrain from any practices competitive with or prejudicial to the Company and to abide by and comply with all applicable insurance laws and regulations.

¶16 According to the summary judgment materials, American Family terminated Samp's agency agreement because he "mishandled" a claim. American Family asserts that Samp filed the claim for damages to the roof of the house Gerakis was purchasing under land contract "without the awareness of both the agent of record and the insured." But the focus of American Family's argument is on its assertion that Samp improperly endorsed the claim check on behalf of the insured contrary to the advice of the Claims Division. In short, American Family contends that Samp was terminated because of "undesirable performance" because American Family determined he engaged in dishonest and

unlawful conduct, and, by doing so, he prejudiced the company and harmed its reputation.[3][3]

¶17 The first issue we must address is whether the terms of § 6.h.2. apply only to "performance" of an agent's duties and obligations under the agency agreement related to the sale of insurance, or also applies to conduct that falls outside of an agent's duties and obligations under the agency agreement. Samp reads the term "performance" narrowly, as referring only to the "performance of the agent's obligations under the contract." In contrast, American Family argues that the term "performance" is not limited to performance under the contract, but also refers to conduct that falls outside the obligations of an agent to sell insurance. We conclude that the term "performance" is ambiguous in the context of § 6.h.2.

¶18 We first note that the term "performance" is not defined in the agency agreement. We thus turn to the context within which the term is used. We observe that the term "performance" in § 6.h.2. refers to "undesirable performance." The type of "undesirable performance" that gives American Family the right to terminate an agent without notice involves performance that violates § 4.i. of the agency agreement or "any other dishonest, disloyal or unlawful conduct by the Agent." The question we must answer, then, is what is meant by "performance?"

¶19 A common understanding of the term in the context of a contract is performance of a contract or performance of some obligation under a contract.

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[3][3] American Family provided additional reasons for terminating Samp's agency, which, according to American Family, it discovered after "the servicing of [his] policyholders [had] been transferred to other agents in the district …." We address these additional reasons later in this opinion.

BLACK'S LAW DICTIONARY defines performance as "[t]he successful completion of a contractual duty, usu. resulting in the performer's release from any past or future liability," and, alternately, as "[t]he equitable doctrine by which acts consistent with an intention to fulfill an obligation are construed to be in fulfillment of that obligation, even if the party was silent on the point." BLACK'S LAW DICTIONARY 1173-74 (8th ed. 2004). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "performance" variously as: "the act or process of carrying out something: the execution of an action"; "something accomplished or carried out"; "the fulfillment of a claim, promise, or request"; "the manner of reacting to various stimuli." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1678 (1993). In the context of employment, the term "performance" commonly refers to the work of an employee, as in "job performance." These definitions support Samp's construction of the term "performance" as being limited to how an agent performs his or her duties within the scope of the agent's employment

¶20 However, when we turn to the class of individuals who, by their "undesirable performance," could cause the termination of the agency agreement without notice, the ambiguous nature of the term "performance" is revealed. Specifically, § 6.h.2. authorizes American Family to terminate the agency agreement for "undesirable performance … by the Agent or any Shareholder, officer or licensed sales representative of the Agent." This language appears to give American Family the right to terminate an agency agreement based on the "performance" of individuals other than an agent who have an interest in the agency itself. In general, a shareholder and an officer of an agency are not subject to the same rules governing an agent's performance as an insurance agent. Including shareholders and officers within the ambit of § 6.h.2. appears to support

American Family's argument that the term "performance" is not restricted to performance under the contract. Indeed, as American Family points out, the contract does not contemplate shareholders and officers will be "selling insurance."

¶21 At bottom, the plain meaning of the term "performance" is not apparent, standing alone or within the context of the rest of the text of § 6.h.2. of the agency agreement. Accordingly, we conclude that § 6.h.2. is ambiguous as to whether it applies only to performance by an agent in fulfilling his or her obligations under the agency agreement. Consequently, because we conclude that § 6.h.2. is ambiguous and because American Family drafted the agency agreement, we construe § 6.h.2. against American Family. *See* ***Dieter v. Chrysler Corp.***, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832. By doing so, we accept Samp's construction of § 6.h.2. and conclude that the term "performance" refers only to conduct that falls within the scope of an agent's duties and obligations as an insurance agent.

¶22 Having concluded that § 6.h.2. permits American Family to terminate without notice an agent's agency agreement only for "undesirable performance" related to the performance of the agency agreement, we turn to the question of whether there are genuine issues of material fact that prevent the entry of summary judgment in favor of Samp. We conclude that there are not.

¶23 American Family argues that Samp engaged in unlawful and dishonest conduct. Accepting for argument's sake the notion that Samp's endorsement of the claims check was unlawful and dishonest, there is still the question of whether Samp engaged in this conduct in his capacity as an insurance agent. Samp argues that there is no dispute that he filed the claim in his capacity

as the land contract vendor and additional insured under the policy, not as an American Family insurance agent. We agree.

¶24 It is undisputed that American Family terminated Samp's agency because he, in its view, improperly endorsed the claims check. Viewing the summary judgment materials in the light most favorable to Samp, we conclude that the only reasonable inference from the evidence is that Samp endorsed the claims check in his capacity as an additional insured.

¶25 American Family argues that the undisputed facts do not support Samp's assertion that he acted solely in his capacity as a lien holder "throughout this transaction." Specifically, American Family points to Samp's use of his agency computer to file the insurance claim and the fact that Samp did not file the claim through Gerakis's agent, as demonstrating that Samp used his agency "to advance his agenda."

¶26 It is true that the record shows that Samp used his agency computer to file the insurance claim and that Samp did not go through Gerakis's agent to file the claim. However, we fail to see how this evidence demonstrates that Samp was acting as an insurance agent *when he endorsed the claims check*. The undisputed evidence shows that Samp endorsed the claims check to facilitate payment for roof repairs on a house that he had an interest in as a lien holder. To the extent that Samp may have used his position as an agent to *file* the claim, American Family has not developed an argument showing that this act was improper or in anyway significant. To repeat, the focus of American Family's argument is that it could properly terminate Samp because he unlawfully and dishonestly endorsed the check. Furthermore, Menzel insisted that Samp submit a claim so that a claims

adjuster could inspect the roof. Otherwise, Menzel could not process the claim and have the roof repaired.

¶27 In sum, the undisputed evidence does not show that Samp engaged in "undesirable performance" in his capacity as an insurance agent.[4][4]

*After-Acquired Evidence*

¶28 We next turn to the issue of whether American Family may rely on after-acquired evidence as a basis for terminating the agency agreement. We conclude that American Family may not rely on after-acquired evidence to terminate the agency agreement with Samp.

¶29 American Family points to other "undesirable performance" it discovered shortly after it terminated Samp's agency, which American Family asserts supports its contention that it had the right to terminate Samp without notice under § 6.h.2. of the agency agreement.[5][5] American Family explains that it had sent a letter to Samp in October 1999 informing him of several deficiencies in performance, including serious money management problems, inadequate staff training and a net loss of insureds. American Family relies on this letter as serving

[4][4] American Family separately argues that its reputation was harmed and that it was prejudiced because Gerakis filed a complaint against Samp with the Wisconsin Insurance Commissioner. This argument is made under § 4.i. of the agency agreement, which requires an agent to maintain a good reputation in his or her community and to refrain from practices that would prejudice American Family. American Family points to no facts in the summary judgment materials showing that the mere filing of the complaint with the insurance commissioner harmed its reputation. In addition, Gerakis filed the complaint on November 11, 2003, more than a month after Samp's agency was terminated. We find nothing in the record showing that Samp's actions harmed American Family's reputation.

[5][5] American Family also asserts that Samp violated WIS. ADMIN. CODE § INS 6.60(c) and (d), which prohibits an agent from affecting a personal financial transaction with a customer. Because American Family does not sufficiently develop this argument, we do not consider it. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

notice under the agency agreement of "undesirable performance." According to American Family, Samp failed to remedy the problems outlined in the October 1999 letter within six months, thereby breaching the contract. Relying on ***Loos v. Geo. Walter Brewing Co.***, 145 Wis. 1, 6, 129 N.W. 645 (1911),[6[6]] American Family argues that, because Samp's other undesirable alleged conduct amounts to a breach of contract and because it existed at the time of Samp's termination, this other undesirable conduct justifies termination whether or not American Family knew of the conduct at the time of the termination. We are not persuaded.

¶30 We agree that, under ***Loos***, an employer may consider after-acquired evidence to justify termination of an employment contract. *See* ***Loos***, 157 Wis. at 6. However, in this case, Samp argues persuasively that, under § 6.i. of the agency agreement, he is entitled to a review of the termination decision "in accordance with the Termination Review Procedure then in effect." Samp points out that to permit American Family to rely on after-acquired reasons for terminating him would render the Termination Review Procedure meaningless. We agree with Samp.

¶31 Samp plainly has a right to a review of the termination decision under § 6.i. of the agency agreement. For that procedure to be meaningful under the contract, however, Samp is entitled to notice of the reasons for his termination. By the terms of the contract, American Family agreed to this procedure. In addition, American Family's reliance on ***Loos*** is misplaced. ***Loos*** did not involve

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[6[6]] American Family also relies on ***Kerns, Inc. v. The Wella Corp.***, 114 F.3d 566, 570 (6th Cir. 1997), for the same legal proposition that it cites ***Loos v. Geo. Walter Brewing Co.***, 145 Wis. 1, 6, 129 N.W. 645 (1911). Because ***Kerns*** is not a decision interpreting Wisconsin law, we do not consider it.

an employment contract that provided a specific procedure for reviewing a decision to terminate the contract, as does the agency agreement here.

## CONCLUSION

¶32 We conclude that § 6.h.2. of the agency agreement between American Family and Samp is ambiguous. Therefore, applying the construe-against-the-drafter rule against American Family, we read § 6.h.2. as giving American Family the right to terminate an agent without notice for "undesirable performance" only when such "performance" occurs while performing the duties and obligations under the agency agreement. Applying this construction to the facts of record, we conclude that Samp did not engage in "undesirable performance" while performing his duties and obligations under the agency agreement. We further conclude that American Family may not present any after-acquired evidence in support of its contention that Samp breached the agency agreement. Accordingly, we reverse and remand with directions to the circuit court to enter judgment in Samp's favor.

*By the Court.*—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.