COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2868 **Cir. Ct. No. 2010CV500**

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

WILLIAM J. DEBRUIN,

PETITIONER-APPELLANT,

V.

OFFICE OF THE COMMISSIONER OF INSURANCE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

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

¶1 SHERMAN, J. William DeBruin appeals an order of the circuit court affirming the decision by the Commissioner of Insurance, wherein the Commissioner determined that DeBruin had engaged in misleading and deceptive

sales practices in violation of WIS. STAT. § 628.34(1)(a) (2009-10),[1] and had violated WIS. ADMIN. CODE § INS 2.16(6) (Aug. 2010)[2] by recommending financial investments "without reasonable grounds to believe that the recommendation is not unsuitable to the applicant." We affirm.

[1] WISCONSIN STAT. § 628.34(1)(a) provides:

> **(**1) MISREPRESENTATION. (a) *Conduct forbidden.* No person who is or should be licensed under chs. 600 to 646, no employee or agent of any such person, no person whose primary interest is as a competitor of a person licensed under chs. 600 to 646, and no person on behalf of any of the foregoing persons may make or cause to be made any communication relating to an insurance contract, the insurance business, any insurer or any intermediary which contains false or misleading information, including information misleading because of incompleteness. Filing a report and, with intent to deceive a person examining it, making a false entry in a record or willfully refraining from making a proper entry, are "communications" within the meaning of this paragraph. No intermediary or insurer may use any business name, slogan, emblem or related device that is misleading or likely to cause the intermediary or insurer to be mistaken for another insurer or intermediary already in business.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] WISCONSIN ADMIN. CODE § INS 2.16(6) provides:

> (6) SUITABILITY OF POLICIES. No insurer or intermediary may recommend to a prospective buyer the purchase or replacement of any individual life insurance policy or annuity contract without reasonable grounds to believe that the recommendation is not unsuitable to the applicant. The insurer or intermediary shall make all necessary inquiries under the circumstances to determine that the purchase of the insurance is not unsuitable for the prospective buyer. This subsection does not apply to an individual policy issued on a group basis.

BACKGROUND

¶2 At all material time periods, DeBruin was a licensed Wisconsin intermediary agent with a Series 6 securities license, which allowed him to sell variable annuities if affiliated with a broker dealer.

¶3 In March 2009, the Office of the Commissioner of Insurance (OCI) initiated a chapter 227 administrative action against DeBruin. The OCI alleged that DeBruin had violated WIS. STAT. §§ 628.34 and 628.347,[3] and WIS. ADMIN. CODE § INS 2.16(6) in his sale of annuities and/or policies to the following individuals: Patricia Stacey, Patricia Van Schyndel, Donald Eichsteadt, Margaret and Sylvester Vanevenhoven, David Vandehey, and Marvin and Mary Grace Zwick (collectively, the complainants). Following a hearing before an administrative law judge (ALJ), the ALJ issued a proposed decision wherein the ALJ concluded that DeBruin had violated both § 628.34 and § INS 2.16(6) in his separate dealings with the complainants, and that he was "unqualified" to be an intermediary under the standards set forth in WIS. STAT. § 628.10(2)(b). The ALJ recommended in the proposed order that DeBruin's intermediary license be

[3] Like WIS. ADMIN. CODE. § INS 2.16(6), WIS. STAT. § 628.347 addresses the suitability of annuity sales. Section 628.347 provides in relevant part:

> (2) DUTIES OF INSURERS AND INSURANCE INTERMEDIARIES WITH REGARD TO RECOMMENDATIONS AND ISSUANCE OF ANNUITIES. (a) In recommending to a consumer the purchase of an annuity, or the exchange of an annuity that results in an insurance transaction or series of insurance transactions, an insurance intermediary, or insurer if no intermediary is involved, shall have reasonable grounds to believe that the recommendation is suitable for the consumer on the basis of facts disclosed by the consumer as to his or her investments, other insurance products, and financial situation and needs, including the consumer's suitability information, and that all of the following are true ….

revoked for two years, that he make restitution to Stacey, Van Schyndel, Eichsteadt, the Vanevenhovens, and Vandehey, and that he pay a forfeiture in the amount of $25,000.

¶4 DeBruin objected to the proposed decision and requested a hearing under WIS. STAT. § 227.46(2) before the Commissioner. The Commissioner issued a decision, which is the final decision of the OCI. The Commissioner adopted the ALJ's proposed decision, including the proposed findings of fact, conclusions of law and order. In the opinion part of the decision, the Commissioner considered and rejected each of DeBruin's challenges to the ALJ's decision.

¶5 DeBruin filed a petition for judicial review of the OCI's decision in the circuit court, which affirmed. DeBruin appeals.

DISCUSSION

¶6 DeBruin challenges the Commissioner's decision on the following bases: (1) he contends that the Commissioner improperly relied on testimony that was contradicted by documentary evidence; (2) he contends the Commissioner's conclusion that he violated WIS. ADMIN. CODE § INS 2.16(6) is not supported by the evidence; and (3) he contends that the OCI failed to plead its claims relating to WIS. STAT. § 628.34 with sufficient specificity.

¶7 We address each argument in turn below. However, before we do so, we must address the standard of review in this case. "In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court." ***Bunker v. LIRC***, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 650 N.W.2d 864.

Whether DeBruin's conduct violated WIS. STAT. § 628.34 and WIS. ADMIN. CODE § INS 2.16(6) presents a mixed question of fact and law. The Commissioner's factual findings will be upheld if they are supported by substantial evidence. *See* ***Clean Wis., Inc. v. PSC***, 2005 WI 93, ¶46, 282 Wis. 2d 250, 700 N.W.2d 768. The Commissioner's interpretation and application of regulations and statutes, in contrast, present questions of law. ***Milwaukee Symphony Orchestra, Inc. v. Wisconsin DOR***, 2010 WI 33, ¶32, 324 Wis. 2d 68, 781 N.W.2d 674. "A reviewing court accords an interpretation of a statute by an administrative agency one of three levels of deference—great weight, due weight or no deference—based on the agency's expertise in the area of law at issue." ***Stoughton Trailers, Inc. v. LIRC***, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477.

¶8 DeBruin and the OCI dispute the amount of deference the Commissioner's conclusions of law relating to whether his actions violated WIS. STAT. § 628.34(1)(a) and WIS. ADMIN. CODE § INS 2.16(6) are entitled. DeBruin asserts that the Commissioner's conclusions of law are entitled to no deference because "the analysis of misrepresentations, omissions of material facts and [the] application of suitability standards are not matters requiring specialized knowledge and expertise." The OCI, in contrast, asserts that the Commissioner's conclusions are entitled to great weight deference because the legislature entrusted the OCI with the regulation of the marketing of insurance products to consumers. However, we do not need to decide the appropriate level of deference here because our resolution of the issues raised by DeBruin does not turn on the agency's interpretation of a statute.

A. Factual Findings Regarding WIS. STAT. § 628.34

¶9 DeBruin contends that the Commissioner acted "arbitrarily and capriciously" by relying on complainant testimony that he claims was contradicted by documentary evidence in determining that he violated WIS. STAT. § 628.34.

¶10 In its decision, which was adopted by the Commissioner, the ALJ stated that "the record clearly establishes that [DeBruin] did provide misleading information and that he made misrepresentations by omission." The ALJ stated "[w]hen asked about whether [DeBruin] discussed specific aspects of individual annuities many [complainants] indicated that he had not or that they did not remember him discussing those aspects of the contracts." The ALJ further stated that DeBruin's claim that he provided the complainants all the necessary information was undercut by the record, which showed that DeBruin's actions "did not lead to understanding by his customers." The ALJ explained:

> [w]hile it is credible that [DeBruin] reviewed product brochures, his depiction of the thoroughness of his presentation was repeatedly belied by the testimony of his customers which described a hurried and perfunctory review. [DeBruin] asserts that in every case the applicant signed a form indicating that he understood what was being purchased. None of the customers denied signing the form but they explained they had not read it because they trusted [DeBruin]. They had relied on [DeBruin] to recommend only something that would benefit them, they did not understand what they were buying, and were disappointed when they found out how the policies operated. The record contravenes [DeBruin's] claim that he reviewed each policy and on delivery of the polices went through the "dec" page and asked if the customer had any questions; the exhibits he prepared show that he frequently mailed policies with the delivery receipt to be signed by his customers.

¶11 DeBruin claims the ALJ erred in relying on statements made by some of the complainants that they did not recall receiving five years earlier their insurance policy applications, a brochure, and a policy for the annuities they purchased to support the Commissioner's conclusion that DeBruin violated WIS. STAT. § 628.34. DeBruin argues that the record shows that each of the customers signed documents showing they received those documents. Relying on cases wherein it has been stated that individuals who have signed insurance applications are held to have accepted the terms therein even if the individual has not read the terms. DeBruin argues that by signing those documents, the complainants are now charged with knowledge of the provisions contained therein, which overrules any contrary testimony. *See* ***Bradach v. New York Life Ins. Co.***, 260 Wis. 451, 455-56, 51 N.W.2d 13 (1952); and ***Novitsky v. American Consulting Eng'rs, LLC***, 196 F.3d 699, 702 (7th Cir. 1999).

¶12 As noted by the OCI, the issue here is not whether the complainants are bound by the terms of the insurance annuities they purchased. Rather, the issue here is whether DeBruin adequately explained the terms to the complainants so that they understood them. DeBruin has not pointed to any legal authority that the Commissioner was obligated to disregard the testimony offered by the complaints because it was contradicted by other evidence. To the contrary, on review of an administrative agency's decision, an appellate court cannot evaluate the credibility or weight of the evidence on any factual finding; instead, we must examine the record for substantial evidence that supports the agency's decision. *See* ***Ellis v. DOA***, 2011 WI App 67, ¶31 n.7, 333 Wis. 2d 228, 800 N.W.2d 6 ("'where two conflicting views may each be sustained by substantial evidence … it is for the agency to determine which view of the evidence it wishes to accept'").

¶13 Our review of the record reveals the following. Many of the complainants indicated that DeBruin had not discussed with them the specific aspects of the annuities he sold them, or that they did not remember him doing so. Some of the complainants described DeBruin's review of the product brochures as "hurried and perfunctory," and the complainants, while acknowledging they signed a form indicating that they understood what they were purchasing, claimed not to have read the form because they trusted and relied on DeBruin. Exhibits that DeBruin presented indicated that he frequently mailed the policies to the complainants, which was contrary to his claim that he went through the declarations page of the policies with the complainants and provided them an opportunity to ask any questions about the policy. Given this evidence, we conclude that the Commissioner's finding that DeBruin violated WIS. STAT. § 628.34 by providing misleading information and through omissions, was supported by credible and substantial evidence in the record.

B. WISCONSIN ADMIN. CODE § INS 2.16(6)

¶14 DeBruin contends the evidence does not support the Commissioner's determination that he violated WIS. ADMIN. CODE § INS 2.16(6).

¶15 WISCONSIN ADMIN. CODE § INS 2.16(6) provides that "[n]o insurer or intermediary may recommend to a prospective buyer the purchase or replacement of any individual life insurance policy or annuity contract *without reasonable grounds to believe* that the recommendation is not unsuitable to the applicant." (Emphasis added.)

¶16 DeBruin's argument challenging the Commissioner's conclusion that he violated WIS. ADMIN. CODE § INS 2.16(6) is rambling and disjointed. We read DeBruin's brief as arguing that the inquiry as to whether "reasonable grounds

to believe" existed examines the intermediary's subjective belief and that the OCI did not show that DeBruin subjectively believed that he "did not have reasonable grounds to believe" that the annuities he recommended to the complainants were not suitable. DeBruin has not cited any legal authority to support this argument, and we deem this argument to be undeveloped. We therefore decline to address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments unsupported by citation to legal authority); ***League of Women Voters v. Madison Cmty. Found.***, 2005 WI App 239, ¶19, 288 Wis. 2d 128, 707 N.W.2d 285 (we do not decide undeveloped arguments).

¶17 DeBruin also appears to be arguing that a transaction cannot be found to be unsuitable if there is evidence that the consumer understood the transaction. DeBruin has also provided no legal authority for this argument, and we need not address it further. *See* ***id.*** We observe, however, that WIS. ADMIN. CODE § INS 2.16(6) concerns whether a specific investment is suitable for a specific consumer. It does not concern whether the consumer understood, or is deemed to have understood, the transaction. Accordingly, this argument is rejected.

¶18 Finally, to the extent that we have not addressed other arguments made by DeBruin regarding the Commissioner's conclusion regarding WIS. ADMIN. CODE § INS 2.16(6), we consider those arguments to be undeveloped and inadequate, and therefore rejected. *See* ***League of Women Voters***, 288 Wis. 2d 128, ¶19 (we need not decide undeveloped arguments); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we need not decide inadequately briefed arguments).

C. Failure to Plead Fraud Claim with Specificity

¶19 DeBruin contends that the OCI failed to plead its claims relating to violations of WIS. STAT. § 628.34—unfair marketing practices—with the required specificity. DeBruin appears to be arguing that the OCI's claims that he violated § 628.34 is essentially a claim for fraud and therefore, under WIS. STAT. § 802.03(2),[4] the OCI was required to set forth its averments "with particularity." However, WIS. STAT. § 802.02 "has no application to the administrative proceedings conducted here because [WIS. STAT.] § 801.01(2) [] provides in relevant part: 'Chapters 801 to 847 govern procedure and practice in *circuit courts* of this state,'" not proceedings before an administrative agency. ***Johnson v. LIRC***, 200 Wis. 2d 715, 722, 547 N.W.2d 783 (Ct. App. 1996).

¶20 The procedure for setting forth a claim in an administrative proceeding is set forth in WIS. STAT. § 227.44. That statute, which governs the notice that must be provided to a defendant prior to a hearing in a contested case of an administrative proceeding, provides in relevant part:

> (1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Except in the case of an emergency, reasonable notice shall consist of mailing notice to known interested parties at least 10 days prior to the hearing.
>
> (2) The notice shall include:
>
> (a) A statement of the time, place, and nature of the hearing, including whether the case is a class 1, 2 or 3 proceeding.

[4] WISCONSIN STAT. § 802.03(2) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

> (b) A statement of the legal authority and jurisdiction under which the hearing is to be held, and, in the case of a class 2 proceeding, a reference to the particular statutes and rules involved.
>
> (c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice may be limited to a statement of the issues involved.

¶21 DeBruin does not challenge the OCI's assertion that the OCI's pleadings in this case "more than adequately" met the notice requirement of WIS. STAT. § 227.44. Where an appellant has not disputed an assertion by an opposing party, that argument may be taken as admitted. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 (argument asserted by the respondent and not disputed by the appellant in the reply brief may be taken as admitted).

¶22 Even if we did not deem DeBruin to have conceded the matter, we would conclude that the notice in this case was sufficient under § 227.44. The notice set forth the date, time and place of the hearing, and specified that the case was a class 2 proceeding. The notice set forth the OCI's authority and jurisdiction, including the statutes and rules involved. Finally, the notice set forth in detail the facts giving rise to the OCI's claims against him with respect to each of the complainants, including the claims that he violated WIS. STAT. § 628.34. Accordingly, we reject DeBruin's contention that the OCI failed to set forth its claims with sufficient specificity.

CONCLUSION

¶23 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.