IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEBORAH J. WINDOM, as next friend BRANDON WINDOM, a minor, Plaintiff, v. CAPITAL TRAIL JR. FOOTBALL LEAGUE, INC. t/a NCCFL, a Delaware corporation; WILLIAM C. UNGERER, W.C. UNGERER INSURANCE AGENCY, MICHAEL T. ALPAUGH, MICHAEL T. ALPAUGH INSURANCE AGENCY; and PAWTUCKET MUTUAL INSURANCE COMPANY, a foreign corporation, Defendants.	)	C.A. No. 01C-10-196 MMJ NON ARBITRATION CASE JURY TRIAL DEMANDED

ORDER

Submitted: June 28, 2004
Decided: July 22, 2004

Motion for Summary Judgment of
Defendants William C. Ungerer and W. C. Ungerer Insurance
GRANTED

Motion for Summary Judgment of
Defendants Michael T. Alpaugh and Michael T. Alpaugh Insurance Agency
GRANTED

The following is the Court's decision concerning the Motions for Summary Judgment brought by Defendants William C. Ungerer,W. C. Ungerer Insurance Agency, Michael T. Alpaugh and Michael T. Alpaugh Insurance Agency. The initial complaint was filed on October 22, 2001, by Plaintiff Deborah J. Windom, as next friend of Brandon Windom, a minor, for damages allegedly resulting from the negligence of Defendants Capital Trail Jr. Football League, Inc., t/a NCCFL, a Delaware corporation ("NCCFL"); William C. Ungerer ("Ungerer") and W.C. Ungerer Insurance Agency ("Ungerer IA"); Michael T. Alpaugh ("Alpaugh") and Michael T. Alpaugh Insurance Agency ("Agency IA"); and Pawtucket Mutual Insurance Company, a foreign corporation ("Pawtucket"). Defendant NCCFL failed to appear, plead or otherwise defend. On December 12, 2002, Plaintiff's Motion for Default Judgment against NCCFL was granted.

NCCFL subsequently assigned all of its rights in this litigation to Plaintiff. For purposes of this motion, the Court assumes that the assignment from NCCFL to the Plaintiff is valid and enforceable.

FACTUAL SUMMARY

From 1986 and through August of 1999, NCCFL procured insurance coverage through Alpaugh, an exclusive agent for Nationwide Insurance Company. After issuance of a general liability insurance policy to NCCFL for the policy

period through September 1, 1999, Nationwide determined that it would not renew the policy upon its expiration on September 1, 1999.

By correspondence dated May 25, 1999, NCCFL received the notice of non-renewal from Nationwide. Alpaugh learned of the non-renewal on September 14, 1999 and explained to the president of NCCFL, that as an exclusive agent for Nationwide, Alpaugh could not seek coverage for NCCFL from other carriers. Alpaugh provided Verucci with the names of three other insurance companies from whom NCCFL could seek general liability insurance coverage.

Subsequently, Alpaugh asked Ungerer, an acquaintance and insurance agent, whether Ungerer represented any insurance companies that might be able to provide general liability insurance coverage for NCCFL. Acting on this conversation, Ungerer IA contacted Pawtucket with a proposal for insurance coverage for NCCFL. On September 27, 1999, Alpaugh received from Ungerer a proposal for insurance coverage. NCCFL accepted the proposal and provided the necessary information to Alpaugh, and included a check in the amount of $600 for the initial insurance premium. Alpaugh passed the information to Ungerer and Ungerer prepared the application. Alpaugh sent NCCFL a Certificate of Liability Insurance dated September 29, 1999.

Ungerer received a fax from Pawtucket on October 7, 1999, stating that Pawtucket determined not to provide insurance to NCCFL. Upon learning of Pawtucket's decision to decline coverage to NCCFL, Ungerer sent a letter to the NCCFL at the street address on the Certificate of Insurance and enclosed the application check, advising NCCFL of Pawtucket's decision to decline coverage. Although the letter was never returned and the application check had never been cashed, NCCFL asserts that it did not receive notice from Pawtucket of its decision to decline their insurance application until several months later. NCCFL stated that it has no system for checking for mail sent to the street address. Instead, correspondence with NCCFL ordinarily is sent to its post office box, the mailing address on the insurance application. Alpaugh did not receive Pawtucket's notice that Pawtucket was declining coverage and Alpaugh was not copied on Ungerer's fax to NCCFL.

ANALYSIS

The law in Delaware is clear that summary judgment shall be granted if the pleadings, depositions, admissions, and affidavits demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. "Ordinarily, the question of negligence and its causal relationship to an alleged injury are issues of fact for the jury. However, when undisputed facts

compel only one conclusion, the Court has a duty to enter a judgment consistent therewith."[1]

The Alpaugh Defendants

NCCFL claims that Alpaugh's actions to help NCCFL procure substitute general liability insurance constituted the actions of a professional insurance broker or agent, engaged in transacting the business of insurance. Acting as a professional broker or agent, NCCFL claims that Alpaugh and Alpaugh IA owed a legal duty to NCCFL to notify them of Pawtucket's decision to decline coverage.

The Court assumes without deciding, for purposes of this argument, that Defendant Alpaugh acted as a broker with respect to NCCFL. Section 1702(5) of title 18 of the Delaware Code defines an insurance "Broker" as a "licensee of the Department, who, for compensation, negotiates on behalf of others contracts for insurance from companies to whom he or she is not appointed." Even assuming that Alpaugh acted as a broker with respect to NCCFL, the course of dealing between Alpaugh IA and NCCFL did not create an affirmative legal duty requiring Alpaugh to notify NCCFL that its insurance application had been denied by Pawtucket. Alpaugh was not contacted by Pawtucket regarding the decision to

[1]*Jones v. Diamond Ice & Fuel Co.,* Del. Super., C.A. No, 79C-OC-60, Bifferato, J. (September 17, 1981)(*citing Faircloth v. Rash,* 317 A.2d 871 (1974)).

decline coverage. Ungerer did not inform Alpaugh of Pawtucket's decision. There is no statute or case law that would demonstrate that Alpaugh had an affirmative legal duty under the specific circumstances presented to inform NCCFL of Pawtucket's decision.

There is nothing in the record that forms the basis for a *prima facie* case of negligence by Alpaugh. Alpaugh has adequately met his burden of providing evidence to show that the facts are not in dispute and that from those facts only one conclusion can be drawn. As a matter of law, there is no evidence of negligent conduct by Alpaugh.

THEREFORE, Alpaugh is entitled to judgment as a matter of law and Defendants Michael T. Alpaugh's and Michael T. Alpaugh Insurance Agency's Motion for Summary Judgment is hereby **GRANTED.** The case against Michael T. Alpaugh and Michael T. Alpaugh Insurance Agency is dismissed with prejudice.

The Ungerer Defendants

With regard to Defendants William C. Ungerer and W. C. Ungerer Insurance Agency's Motion for Summary Judgment, the Court finds that Ungerer IA gave NCCFL appropriate notice of its decision to decline NCCFL's insurance application. In contrast to a decision to terminate coverage, there is no statutory requirement that a decision to decline an insurance application be sent by certified

mail. While it may have been a better business practice for Ungerer to have telephoned NCCFL to notify NCCFL that the insurance application had been denied by Pawtucket, there is no statutory or common law duty to do so.

The Court finds that it was not unreasonable for Ungerer to use NCCFL's property address instead of NCCFL's P.O. Box mailing address. It was entirely within the control of NCCFL whether it chose to check its offices for mail delivery. NCCFL's property address was the one listed on the Certificate of Insurance. A letter properly addressed with a pre-paid postage, and not returned, is presumed to be duly received by the addressee.[2] The letter was never returned to Ungerer and Ungerer had no way of knowing that NCCFL did not check the mailbox located on their property.

THEREFORE, Ungerer is entitled to judgment as a matter of law and Defendants William C. Ungerer's and W. C. Ungerer Insurance Agency's Motion

[2]*Graham v. Commercial Credit Co.,* 194 A.2d 863, 865 (Del. 1963), *aff'd,* 200 A.2d 828 (Del. 1964)

for Summary Judgment is hereby **GRANTED.** The case against William C. Ungerer and W. C. Ungerer Insurance Agency is dismissed with prejudice.[3]

IT IS SO ORDERED.

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Judge Mary M. Johnston

[3]At this juncture, the Court need not to resolve whether NCCFL had implied insurance during the period between the date Pawtucket accepted NCCFL's application and deposit, and the date NCCFL received notice that Pawtucket decided to decline NCCFL's insurance application. No motion was filed by Pawtucket in this matter, therefore, there is nothing before the Court to decide with regard to Pawtucket at this time.