

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 5, 1995

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. 93-1857

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

DONN S. JACOBSON,

Plaintiff-Appellant,

v.

ALLIED CROP AGENCY, INC.,

Defendant-Respondent,

WILLIAM J. RAMECKER, TRUSTEE
FOR THE BANKRUPTCY ESTATE OF
WAYNE R. JACOBSON AND JANET JACOBSON,

Defendants.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Affirmed.*

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

GARTZKE, P.J. Donn S. Jacobson appeals from a summary judgment dismissing his complaint against Allied Crop Agency, Inc. The dispositive issue is whether, as the trial court held, Jacobson cannot recover because he has not shown that a contract of insurance exists between him and Allied or that he is the assignee of a party to such a contract. We agree with the trial court.¹ We affirm the judgment.

Summary judgment methodology is well established. It is described in many cases such as *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980). The court of appeals and the trial court apply the same methodology. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). Our review is *de novo* and we do not defer to the opinion of the trial court.

Jacobson's complaint alleges that in May 1989 about 100 acres of tobacco-based acreage was registered with the United States of America, ASCS, under his name. The majority of acreage was planted and cultivated during the 1989 crop year. In April 1989 Allied issued a policy of multi-peril crop insurance, covering the tobacco allotment acreage. He has held legal and equitable interest to the crop at all times pertinent to his complaint. On September 22, 1989, frost damaged the crop. He alleges that the loss is covered under the multi-peril crop insurance policy issued by Allied. Allied refused to pay the insurance proceeds to him. Liberally construed, the complaint states a claim.

Allied's answer denies that Jacobson is the real party in interest and has standing. The answer sufficiently raises the issue whether a contract exists between him and Allied. We therefore turn to Allied's motion.

To support its motion for summary judgment, Allied submitted Jacobson's deposition. Jacobson testified that he is not and never has been a stockholder in Whispering Pine Farm, Inc. He has never been a member of the board of directors. When Whispering Pine applied to Allied for crop insurance,

¹ We therefore do not reach the second issue, whether the one-year period of limitation in the policy and in § 631.83, STATS., apply and the action is time barred.

his parents owned the majority of shares in the corporation. He did not prepare the application. His mother signed it. Allied has not issued a policy to him insuring the 1989 tobacco crop. He did not pay and does not know the amount of the policy premium. Whispering Pine has not executed an assignment of its interest in the policy to him. Allied also submitted a copy of the application and the policy in support of its motion.

In his affidavit in opposition to Allied's motion, Jacobson states he "relied upon the conduct of Greater Insurance Agency and Allied Crop Agency, Inc., in assuring him that there was insurance coverage for his tobacco crop," but that statement is directed to issues regarding the statute of limitations.²

We conclude that Allied established a *prima facie* defense. Jacobson is not the named insured or its assignee. A person who is not the named insured and is not the assignee of the named insured cannot recover on a policy. See *Madgett v. Monroe County Mut. Tornado Ins. Co.*, 46 Wis.2d 708, 176 N.W.2d 314 (1970). The policy does not name a particular insured, but because the applicant for crop insurance was Whispering Pine Farm, Inc., and the policy issued on that application, the only reasonable inference is that Whispering Pine is the insured. Jacobson is a stranger to the policy. His opposing affidavit fails to raise a genuine issue of material fact regarding the existence of an insurance contract between him and Allied.

Jacobson relies on § 631.08, STATS., which provides:

- (1) Except as otherwise provided in chs. 600 to 646 and 655, general contract law applies to mistakes in insurance contracts.
- (2) Mistake in designating the person to whom the insurance is payable in a policy of property insurance does not void the policy nor constitute a defense for the insurer unless the mistake was due to

² In any event, estoppel cannot create a contract where none exists. *Madgett*, 46 Wis.2d at 711, 176 N.W.2d at 316.

misrepresentation or concealment by the owner of the property or someone representing the owner in procuring the policy, or unless the company would not have issued or continued the policy if it had known the truth.

Section 631.08(1), STATS., does not assist Jacobson. He has no right to reformation under general contract law to add him as a named insured. "Reformation may be granted at the request of any party to the contract, including an intended beneficiary, or of a party's successor in interest." RESTATEMENT (SECOND) OF CONTRACTS, § 155 cmt. e (1981). Jacobson is not a party to the insurance contract, an intended beneficiary or a party's successor in interest. Section 631.08(2) does not assist him. He has produced nothing tending to show that a mistake occurred when he was not made a named insured.

Jacobson refers us to 7 CFR ch. IV, § 435.6 which provides in part, "The contract shall cover the tobacco crop as provided in the policy" and, to 7 CFR ch. IV, § 435.7(a), which provides in part, "Application for insurance on a form prescribed by the Corporation (the Federal Corp Insurance Corporation) may be made by any person to cover such person's share in the tobacco crop as landlord, owner-operator, or tenant." The question here, however, is whether Jacobson is a party to a contract with Allied. He has shown nothing tending to establish that such is the case.

Jacobson erroneously relies on 7 CFR ch. IV, § 435.5.³ On its face, § 435.5 applies to an "insured person." Jacobson has not shown that he is an insured person.

³ **Section 435.5 Good faith reliance on misrepresentation.**

Notwithstanding any other provision of the tobacco insurance contract,
whenever

- (a) An insured person under a contract of crop insurance entered into under these regulations, as a result of a misrepresentation or other erroneous action or advice by an agent or employee of the Corporation (1) is indebted to the Corporation for

Jacobson has not shown that he is entitled to summary judgment or that a genuine issue of material fact exists which must be tried. The trial court properly concluded that Allied was entitled to summary judgment dismissing his complaint.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

(..continued)

additional premiums, or (2) has suffered a loss to a crop which is not insured or for which the insured person is not entitled to an indemnity because of failure to comply with the terms of the insurance contract, but which the insured person believed to be insured, or believed the term of the insurance contract to have been complied with or waived, and

- (b) The Board of Directors of the Corporation, or the Manager in cases involving not more than \$100,000.00, finds that: (1) An agent or employee of the Corporation did in fact make such misrepresentation or take other erroneous action or give, erroneous advice; (2) said insured person relied thereon in good faith; and (3) to required [sic.] the payment of the additional premiums or to deny such insured's entitlement to the indemnity would not be fair and equitable, such insured person shall be granted relief the same as if otherwise entitled thereto.

Application for relief under this section must be submitted to the Corporation in writing.