

The section quoted above deals with what is known as “tail insurance” or “tail coverage.” In short, such insurance provides malpractice coverage for a doctor for cases that could arise after the doctor leaves the employ of the Defendant.

In February 2000, well past the five-years of employment required for the receipt of tail coverage as specified in ¶4(e) of the Agreement, the Plaintiff retired. At that point, the Defendant provided the Plaintiff with tail coverage from PHICO Insurance Company. In August 2001, however, that tail coverage was terminated when PHICO entered into liquidation proceedings.

Following these events, the Plaintiff requested that the Defendant purchase new tail insurance, pursuant to the terms of ¶4(e). While the Defendant had purchased new tail coverage in the past for former physicians in situations similar to the Plaintiff’s, the Defendant refused to do so in this case.

Due to the Defendant’s denial, the Plaintiff has since received a quote for coverage in the amount of \$101,705.00. This is the amount that the Plaintiff will need to spend in order to acquire his own tail insurance.

I. Summary Judgment Standard

When ruling on motions for summary judgment, Rule 56 (C) of the Ohio Rules of Civil Procedure guides the Court. Rule 56(C) permits the Court to grant summary judgment when (1) there are no genuine issues of material fact; (2) reasonable minds can come to only one conclusion, and the conclusion adversely affects the non-moving party; and (3) the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 365 N.E.2d 46; see also Civ.R.

56(C); *Holliman v. All State Ins. Co.* (1998), 86 Ohio St.3d 414, 715 N.E.2d 532; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881.

Since summary judgment is such a drastic measure, cutting off a party's right to present its case at trial, courts should grant summary judgment motions sparingly. *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 120, 413 N.E.2d 1187; see also *Viock v. Stowe-Woodward Co.* (Erie App. 1983), 13 Ohio App.3d 7, 14-15, 467 N.E.2d 1378. By the same token, however, courts can, and should, grant summary judgment motions when the case has been fully developed by discovery and the record demonstrates that, construing all the facts and inferences in the non-movant's favor, the non-moving party would not be entitled to judgment as a matter of law. *Dupler*, 64 Ohio St.2d at 120.

In order for the Court to grant summary judgment, the moving party has the burden of demonstrating through the evidence detailed in Civ.R. 56(C) that the opposing party cannot establish any elements of its claims.¹ *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. If the movant fulfills its burden, the burden will then shift to the non-moving party to produce evidence to establish the elements of its claims. *Id.*, 75 Ohio St.3d at 282. If the non-movant fails to satisfy its burden, a court's granting of summary judgment is not only proper- it is mandated. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

¹ The evidence to be used includes the pleadings, depositions, interrogatory answers, admissions, affidavits, transcripts of evidence, and written fact stipulations. Civ.R. 56(C).

II. Defendant's Obligation Under the Agreement

The Plaintiff alleges that the Defendant has breached the Agreement by failing to purchase new tail coverage. The Defendant asserts that its obligation was limited to purchasing a singular endorsement, and that the Defendant fulfilled that obligation when it purchased the Plaintiff's tail insurance from PHICO.

When interpreting a contract, when the contract's terms are clear and unambiguous on the face of the contract, a court may grant summary judgment since interpreting the contract is a matter of law rather than an issue of fact. See *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576, 697 N.E.2d 208; *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271; *Stark v. Leonard Fuchs Irrevocable Gift Trust* (Cuyahoga 2001), 145 Ohio App.3d 699, 704, 764 N.E.2d 446.

In order to prevail on its breach of contract claim, the Plaintiff must show that a contract existed, the Plaintiff performed it, the Defendant breached it, and the Plaintiff suffered damage or loss. *Garofalo v. Chicago Title Ins. Co.* (Cuyahoga 1995), 104 Ohio App.3d 95, 108. In the case before the Court, it is undisputed that a contract existed between these two parties and that the Plaintiff performed as required.

With respect to the Defendant's alleged breach, under the terms of the Agreement, the Defendant had an obligation to "furnish continuing professional liability insurance under an endorsement providing additional reporting periods." Section 4(e) of the Agreement. The clear terms of the contract indicate that the Defendant was under a duty to provide continuing insurance. The insurance it selected is no longer continuing.

In the absence of case law to the contrary, the Court agrees with the precedent established and the reasoning found in *Siatis v. Shaw* (Montgomery 2003), 2003-Ohio-616. In that case, the appellate court held that Enterprise was under a duty to procure insurance for Shaw. Enterprise, however, failed to obtain that insurance. The *Siatis* court reached this conclusion on account of the fact that Shaw wanted to purchase liability insurance for the rental car he was using from Enterprise, and that based on the Enterprise's agents actions in dealing with Shaw², the intent of the parties was that Shaw had purchased insurance to cover him in all situations. *Id.*, 2003-Ohio-616 at ¶33, 35.

In this case before the Court, the Agreement calls for “continuing professional liability insurance.” Now that PHICO is insolvent, the Plaintiff is no longer covered under any insurance. The fact that the term “continuing” is used in describing the type of insurance the Defendant was to provide for the Plaintiff upon retirement is quite telling. The very import of the phrase means that the insurance the Defendant was obligated to furnish should “go on...in a particular condition; persist;...last.”³ *The American Heritage Dictionary*, 4th Edition, Houghton Mifflin Co., 2000.

Quite simply, the professional liability insurance that the Defendant has to provide needs to persist or last. Now that the PHICO insurance has lapsed, and Defendant has failed to furnish continuing professional insurance, the Plaintiff currently is not in receipt of what he bargained for.

² For example, the Enterprise agent told Shaw that the choice Shaw chose would cover anything that might occur, and the agent circled the box that Shaw chose, telling Shaw that he would “be good to go.” Furthermore, the agent did not explain the other options at Shaw's disposal.

³ Similarly, if the Court were to use the actual adjective *continuous*, the definition of which is “uninterrupted in time, sequence, substance, or extent,” the result is the same. The phraseology employed clearly indicates that the insurance was to continue. *The American Heritage Dictionary*, 4th Edition, Houghton Mifflin Co., 2000. PHICO's liquidation and insolvency means that the insurance is no longer continuing.

The fact that the Plaintiff did sign the Agreement with the intent that he would be covered under the tail coverage upon retirement (or leaving the company) cannot be overlooked. While the language utilized in the Agreement is clear as to its terms, the intent of the parties also guides the Court in this instance, and the evidence is manifest that the provision of continuing professional liability insurance was a central bargaining point.

The Doyle Affidavit submitted with the Plaintiff's Motion for Summary Judgment demonstrates that the Plaintiff believed that he "would be covered by tail insurance at all time after [his] retirement, at Defendant's expense" and that the "coverage was part of the consideration given for the services [Plaintiff] provided to Defendant." Doyle Affidavit, ¶6. This statement does not stand alone either, but, rather, it is corroborated by the deposition testimony of the Defendant's risk manager, Janice Blakely, and the chief administrative officer, John Gilliland. Both of these deponents stated that the inclusion of the tail coverage was a significant benefit to the Defendant's physicians. If the Plaintiff knew that he could lose tail coverage, then the Plaintiff would not have been induced to sign the Agreement, and there is a lack of evidence rebutting this conclusion.

The Defendant is correct that it fulfilled its obligation. The duty, however, to provide continuing insurance is an ongoing duty instead of a singular, one-time obligation.

III. Plaintiff's Claims of Bad Faith

In its cross-motion for summary judgment, the Defendant argues that it should be granted judgment as a matter of law on the Plaintiff's bad faith claims. In actuality,

there are two causes of action in the Plaintiff's complaint alleging bad faith. The first is with respect to the Defendant's refusal to purchase new tail coverage. The second is in regards to the Defendant's initial selection of PHICO.

There are material issues of fact that preclude the Court granting summary judgment as to the Defendant's actions in not providing continuing insurance once PHICO declared bankruptcy. This is on account of the Defendant's past actions in similar situations. In one previous instance, the Defendant did provide former employees with insurance coverage when the insurer the Defendant selected, PIE Mutual Insurance Company, entered into liquidation proceedings. The fact that the Defendant performed in that situation as the Plaintiff now requests is evidence that there is a genuine issue of material fact as to the Defendant's good faith in dealing with the Plaintiff.⁴

With respect to the Defendant's selection of PHICO as the Plaintiff's tail insurer, the Court utilizes the business judgment rule to analyze this claim. The rule is based on the presumption that directors, employers, etc., are better equipped than courts to make business judgments and that those making the decisions act without a personal interest and have exercised reasonable diligence and acted in good faith. *Gries Sports Enterprises, Inc. v. Cleveland Browns Football Co., Inc.* (1986), 26 Ohio St.3d 15, 20. The party challenging the decision has the burden of rebutting this presumption. *Id.*, 26 Ohio St.3d at 20.

In the case before the Court, the evidence is substantial that the Defendant exercised sound judgment in selecting PHICO in 1998. The Defendant's supplied

⁴ A claim for bad faith may exist as a consequence of a breach of a contractual relationship. See e.g., *Bullet Trucking, Inc. v. Glen Falls Ins. Co.* (2nd Dist. 1992), 84 Ohio App.3d 327 (where an insurer failed to pay an insured pursuant to an insurance policy).

affidavit and the Plaintiff's own deposition testimony indicate that the selection of PHICO was not imprudent. As so far as the Plaintiff has not provided any facts or evidence in his brief in opposition relating to this cause of action, the Plaintiff has failed to meet his burden and there are no general issues of material fact with respect to the Plaintiff's claim of bad faith in the selection of PHICO as the tail insurer.

IV. The Unjust Enrichment Claim

The Plaintiff also brings forth a claim of unjust enrichment. In so much as there exists an express written contract which the Defendant has breached, this cause of action is now moot. "Where there is an express contract, between the parties, none can be implied." *Kleinhaus v. The American Gauge Co.* (1948), 83 Ohio App. 453, 459, citing *Creighton v. City of Toledo* (1869), 18 Ohio St. 447, 452.

V. Plaintiff's Request for Indemnification

In his sixth cause of action, the Plaintiff asks the Court for an affirmative order that the Defendant and its shareholders or officers have a duty to indemnify the Plaintiff for any claims that may arise against the Plaintiff for the time period within which he was covered under PHICO. The Defendant has since moved for summary judgment on this cause, relying on the fact that the Plaintiff has not pierced the corporate veil.

The Plaintiff, however, since he has premised the claim on the tort of bad faith (as well as the Defendant's breach of contract), does not have the burden of piercing the corporate veil. "Ohio law provides that a corporate officer can be held personally liable for a tort committed while acting within the scope of his employment." *Atram v. Star Tool & Die Corp.* (8th Dist. 1989), 64 Ohio App.3d 388, 393, citing *Bowes v. Cincinnati Riverfront Coliseum* (1983), 12 Ohio App.3d 12, 18. Furthermore, "Directors and

corporate officers generally may be personally liable for fraud even though the corporation may be liable also." *Centennial Ins. Co. of N.Y. v. Vic Tanny Internatl. of Toledo, Inc.* (1975), 46 Ohio App.2d 137, 141.

As a result, since there are issues of material fact relating to the Plaintiff's claim for bad faith, and since the Plaintiff does not have the burden of piercing the corporate veil, the Plaintiff's sixth cause of action remains pending.

VI. Conclusion

It is, therefore, ORDERED, ADJUDGED, and DECREED:

For the reasons previously stated, the Plaintiff's Motion for Summary Judgment is well taken. The Court grants the Plaintiff's Motion for Summary Judgment for good cause shown.

For the reasons previously stated, the Defendant's Motion for Summary Judgment is granted in part and denied in part.

The Court grants the Plaintiff's Motion for Summary Judgment with respect to the first and second causes of action in the Plaintiff's Complaint. The Defendant has breached the Agreement and the Plaintiff is entitled to have the Defendant continue to provide adequate continuing professional liability coverage pursuant to the terms and conditions of the Agreement entered into between the Plaintiff and the Defendant.

The Defendant's Motion for Summary Judgment is granted in part with respect to the Plaintiff's fifth cause of action, relating to the Defendant's business judgment.

The Court denies in part the Defendant's Motion for Summary Judgment, and the case is continued with respect to Plaintiff's fourth and sixth causes of action.

The Plaintiff's third cause of action, for unjust enrichment, is hereby deemed moot.

PARTIAL.

DATE: September ____, 2003

KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via regular U.S.

mail and facsimile on this _____ day of September, 2003, to the following:

Attorneys for Plaintiff

John P. Susany
Ronald K. Starkey
Carrie M. Roush
76 S. Main Street
Suite 1512
Akron, OH 44308
Fax No.: (330)376-6237

Attorney for Defendant

Paul M. Greenberger
Berns, Ockner & Greenberger, LLC
3733 Park East Drive, Suite 200
Beachwood, OH 44122
Fax No.: (216)464-4489