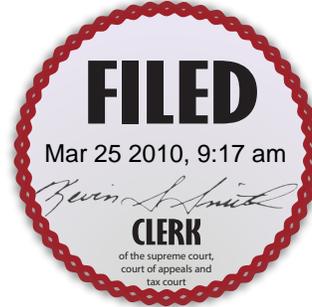


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN L. KILEY AGENCY, INC.,)
d/b/a ROCCHIO KILEY)
INSURANCE,)
)
Appellant-Defendant,)
)
vs.)
)
DAN N. RENFRO,)
)
Appellee-Plaintiff.)

No. 34A04-0907-CV-412

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0606-CT-544

March 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

John L. Kiley Agency, Inc., doing business as Rocchio Kiley Insurance (“Kiley”), appeals the trial court’s denial of its motion for summary judgment. Kiley raises one issue, which we revise and restate whether the trial court erred in denying its motion for summary judgment. We reverse and remand.

The relevant facts follow. In 1996, Dan N. Renfro (“Renfro”) purchased a new boat. At some point, Joe Kiley, who was the father of Renfro’s wife and a producer¹ with Kiley, procured an insurance policy for the boat.² Kiley originally procured an insurance policy for Renfro from Monroe Guaranty. Later, when Kiley “quit writing Monroe,” Kiley procured a Commercial Policy (the “Policy”) issued by Central Mutual Insurance Company (“Central”) to Renfro Marketing & Public Relations, Inc., under which Renfro was a third party beneficiary, with an effective date of June 15, 2000.

On June 15, 2000, while operating his boat on Lake Freeman in Indiana, Renfro was involved in a boating accident involving Mitchel Kobitz and Charlene Kobitz. After the accident, Central repaired Renfro’s boat and replaced the Kobitzes’ boat which had been damaged in the accident.

On June 6, 2002, Mitchel and Charlene Kobitz filed a complaint (the “Kobitz Complaint”) for damages against Renfro alleging that Renfro was negligent in the operation of his boat on June 15, 2000 which resulted in personal injury to both Mitchel Kobitz and Charlene Kobitz. In a letter to the attention of Renfro dated July 25, 2002, a

¹ A producer was a person who generated accounts and earned commissions.

² Renfro and his wife had obtained personal coverage for their home, automobiles, and other boats through Kiley as well.

claims representative for Central informed Renfro that the Policy did not include liability coverage. The letter stated: “In handling the claim, I made the mistake of applying the liability coverage to the claimant’s property damage loss involving their boat. Unfortunately, the [P]olicy does not provide liability coverage for your boat. I regret that we will be unable to handle the alleged injury claims.” Appellant’s Supplemental Appendix at 40, 90. On August 26, 2002, the attorney who had undertaken Renfro’s defense in the Kobitz lawsuit informed Renfro by letter that Central was denying coverage.³

On October 20, 2005, Renfro filed a third party complaint against Kiley alleging breach of contract, implied breach of contract and negligent procurement of insurance. Kiley filed a motion to dismiss Renfro’s third party complaint, and the trial court found that Renfro’s claims against Kiley were independent claims and granted Kiley’s motion on May 30, 2006.

On June 13, 2006, Renfro filed a complaint (the “Renfro Complaint”) against Kiley alleging breach of oral contract, breach of implied contract, and negligent procurement of insurance. On July 7, 2006, Kiley filed its answer. On April 15, 2008, Kiley filed an amended answer, which alleged that the statute of limitations bars Renfro’s claims.⁴

³ At his deposition, Renfro testified that the letter he received from the attorney was “the first time that [he] had heard” that Central “was denying coverage.” Appellant’s Supplemental Appendix at 19.

⁴ According to the chronological case summary (the “CCS”), Renfro filed an objection to Kiley’s motion for leave to file amended answer, and the CCS indicates that the objection was “moot” because Renfro “did not object in the period of time designated by the Court.” Appellant’s Appendix at 2. Renfro

On August 25, 2008, Kiley filed a motion for summary judgment, a brief in support of its motion for summary judgment, and a designation of evidence in support of its motion for summary judgment. In its brief in support of its motion for summary judgment, Kiley argued that “[a]lthough [Renfro] has specifically asserted breach of contract, breach of implied contract and negligence claims in the Complaint, a look beyond the form of the pleadings shows [Renfro’s] alleged harm stems from Kiley’s alleged negligence in failing to procure liability coverage for [Renfro’s] boat.” Id. at 6. Kiley argued that “negligence is the substance of [Renfro’s] cause of action against Kiley.” Id. Kiley also argued that, under either the statute of limitations governing a tort action⁵ or the statute of limitations governing an action based upon professional services rendered,⁶ Renfro “had two years” to file a complaint against Kiley and failed to do so. Id. at 7.

On September 25, 2008, Renfro filed a brief in opposition to Kiley’s motion for summary judgment and designated evidence in support of its opposition. In his brief in opposition to Kiley’s motion for summary judgment, Renfro argued that “there was an oral agreement” between Renfro and Kiley whereby Kiley agreed to procure insurance coverage for the boat, “includ[ing] liability coverage.” Id. at 52. Renfro further argued that Kiley’s “actions were not tortious but a contractual breach.” Id. at 53. Renfro also argued that “[i]rrespective of the date [Renfro’s] contract claims accrued, July 25, 2002

also filed a motion to correct error, which the trial court denied.

⁵ See Ind. Code § 34-11-2-4 (2004).

⁶ See Ind. Code § 34-11-2-3 (2004).

or August 26, 2002 they were filed on June 13, [2006]^[7] prior to the expiration of the applicable six year statute of limitations, Indiana Code § 34-11-2-7.”⁸ Id. at 54. Renfro concluded by arguing that his “claims for breach of contract and breach of an implied contract are not in nature and substance negligence claims[,] they are founded in contract.” Id. at 54.

On June 3, 2009, the trial court denied Kiley’s motion for summary judgment. Kiley filed a motion with the trial court to certify the court’s order for interlocutory appeal, which the trial court granted. We accepted the interlocutory appeal on August 25, 2009.

The sole issue is whether the trial court erred in denying Kiley’s motion for summary judgment. Our standard of review for a trial court’s denial of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Mangold ex rel. Mangold v. Ind. Dep’t of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Id. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id.

Before addressing Kiley’s arguments, we note that Renfro did not file an appellee’s brief. When an appellee fails to submit a brief, we do not undertake the

⁷ In his brief, Renfro argued that he filed his complaint in “1996.” Appellant’s Supplemental Appendix at 54.

⁸ Ind. Code § 34-11-2-7 (2004) applies to “actions on . . . contracts not in writing” among other types of actions.

burden of developing the appellee's arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. Zoller v. Zoller, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. Wright v. Wright, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002). However, we review *de novo* questions of law, regardless of the appellee's failure to submit a brief. McClure v. Cooper, 893 N.E.2d 337, 339 (Ind. Ct. App. 2008).

Kiley argues that the trial court erred by denying its motion for summary judgment because Renfro's claim "is governed by the two year statute applicable to actions for recovery for damages to personal property." Appellant's Brief at 5. We agree.

"In Indiana, statutes of limitation are favored because they afford security against stale claims and promote the peace and welfare of society." Shaum v. McClure, 902 N.E.2d 853, 855 (Ind. Ct. App. 2009) (quoting Morgan v. Benner, 712 N.E.2d 500, 502 (Ind. Ct. App. 1999), reh'g denied, trans. denied), trans. denied. "They are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it." Id. "The defense of a statute of limitation is peculiarly suitable as a basis for summary judgment." Id. "The nature or substance of the cause of action, rather than the form of the action, determines the applicable statute of limitations." Id.; Butler v. Williams, 527 N.E.2d 231, 233 (Ind. Ct. App. 1988) (citing Whitehouse v. Quinn, 477 N.E.2d 270, 273 (Ind. 1985); Shideler v. Dwyer, 275 Ind. 270, 276, 417 N.E.2d 281, 285 (1981)).

Here, Kiley argued in its brief in support of its motion for summary judgment that the statute of limitations found at Ind. Code § 34-11-2-4 is applicable. Ind. Code § 34-11-2-4 provides for a two-year statute of limitations as follows: “An action for . . . (2) injury to personal property . . . must be commenced within two (2) years after the cause of action accrues.” Renfro did not contest that, if the two-year statute of limitations is applicable, his action against Kiley is untimely. Rather, Renfro argued in his brief in opposition to Kiley’s motion for summary judgment that Ind. Code § 34-11-2-7, which provides for a six-year statute of limitations, should be applied. If the six-year statute of limitations applies, then Renfro’s action against Kiley was timely.⁹

In Shideler, 275 Ind. at 272-276, 417 N.E.2d at 284-285, the plaintiff brought a claim against attorneys alleging that the attorneys failed to properly draft a will. The plaintiff in Shideler sued the attorneys under various theories of recovery, including breach of contract, negligence, fraud, constructive fraud, and breach of fiduciary duty. Shideler, 275 Ind. at 276, 417 N.E.2d at 285. The defendant attorneys moved for summary judgment on the basis that the plaintiff’s action was not filed within the applicable statute of limitations, and the trial court denied the motion. 275 Ind. at 273-

⁹ The parties appear to agree that Renfro’s action accrued, at the latest, on July 25, 2002 or August 26, 2002. However, we note that the Indiana Supreme Court has held that “the correct inquiry to resolve the limitations period for a claim of negligent failure to procure the proper coverage” is the date when the insured “discovered, or reasonably should have discovered” the negligent failure to procure the insurance coverage desired. Filip v. Block, 879 N.E.2d 1076, 1083 (Ind. 2008), reh’g denied. See also Page v. Hines, 594 N.E.2d 485, 487 (Ind. Ct. App. 1992) (“The question to be resolved is when the Pages discovered, or reasonably should have discovered, Hines’s negligent failure to procure the insurance coverage they desired.”). In any event, we need not determine the exact date that Renfro’s cause of action accrued. At the earliest, Renfro’s claim accrued on June 15, 2000 (the effective date of the Policy), and at the latest, the claim accrued on August 26, 2002 (the date Renfro testified that his attorney informed him that there was no liability coverage under the Policy). If the two-year statute of limitation applies, then even assuming the limitations period began to run as of August 2002, Renfro’s action against Kiley was untimely as he failed to bring it within two years of any of the possible accrual dates.

275, 417 N.E.2d at 284. On appeal, the Indiana Supreme Court noted that the “[t]he general rule is that . . . it is the nature or substance of the cause of action, rather than the form of the action, which determines the applicability of the statute of limitations,” id. (quotation marks and citation omitted), and held that the case was a malpractice case and that thus the two-year statute of limitations applied. As a result, the Court reversed the judgment of the trial court and directed that the defendant attorneys’ motion for summary judgment be granted. 275 Ind. at 276-291, 417 N.E.2d at 285-294.

The holding of Shideler was applied in Butler, 527 N.E.2d 231. In Butler, the plaintiffs brought a claim against an insurance agent who had procured an insurance policy for a tavern, but the policy expressly excluded coverage for liability incurred as a result of serving alcoholic beverages. 527 N.E.2d at 232-233. Although the appellees alleged the insurance agent breached the contract with the appellees, the court observed that the appellees had failed to provide any details about the nature of the contract they claimed was breached by the insurance agent. Id. Further, the court concluded that “[t]he nature or substance of the cause of action is negligence in failing to obtain a particular type of insurance coverage” and held that “the two (2) year statute of limitations applies.” Id. at 233-234.

The holding of Butler was applied in Page v. Hines, 594 N.E.2d 485, 486 (Ind. Ct. App. 1992). In Page, the evidence showed that the Pages had informed their insurance agent that they desired a policy with the same coverage as their prior policy. 594 N.E.2d at 486. However, the Pages later discovered that the policy failed to provide employer liability coverage. Id. The Pages filed an action against their insurance agent alleging

negligence and breach of contract for the insurance agent's failure to procure proper insurance. Id. The trial court applied a two-year statute of limitations¹⁰ applicable to causes of action for injuries to personal property. Id.

On appeal, the Pages argued that the two-year statute of limitations was inapplicable because they had alleged breach of contract and argued that the ten-year statute of limitations for claims involving written contracts governed their claim. Id. at 486-487. This court noted that the Pages did not present any writing reflecting a contract and that "it is the nature or substance of action which determines the applicability of the statute of limitations." Id. at 487 (citing Butler, 527 N.E.2d at 233). The court held that "[t]he nature of the case" was the insurance agent's "negligence in failing to procure a particular type of insurance coverage." Id. (citing Medtech Corp. v. Ind. Ins. Co., 555 N.E.2d 844, 849 (Ind. Ct. App. 1990) (noting that accompanying an undertaking to procure insurance is a duty to exercise reasonable skill, care, and diligence), trans. denied). The court thus concluded that the two-year statute of limitations applied. Id. (citing Butler, 527 N.E.2d at 233).

The cases above instruct that Indiana courts do not apply the limitations periods for contract actions to a count in a complaint simply because the count is denominated as a breach of contract. See Lift-A-Loft Corp. v. Rodes-Roper-Love Ins. Agency, 975 F.2d 1305, 1310 (7th Cir. 1992) (noting "[t]he Shideler and Butler cases instruct . . . that courts in Indiana will not apply the six-year limitations period to a count in a complaint

¹⁰ The trial court in Page applied Ind. Code § 34-1-2-2(1), which was a former codification of Ind. Code § 34-11-2-4.

simply because the count is denominated a count for breach of contract or fraud”), reh’g denied.

Based upon our review of the allegations contained in the Renfro Complaint and the facts set forth in the designated evidence, we conclude that the nature or substance of Renfro’s claim was the negligence of Kiley as his insurance agent in failing to recommend or procure a particular type of insurance coverage. As a result, Renfro’s action is governed by the two-year statute of limitations found at Indiana Code § 34-11-2-4. See Page, 594 N.E.2d at 486-487 (holding that the nature of the case was the insurance agent’s negligence in failing to procure a particular type of insurance coverage and that the two-year statute of limitations applied where the plaintiff claimed breach of written contract); Butler, 527 N.E.2d at 232-234 (observing that the appellees failed to provide any details about the nature of the contract they claimed was breached by the insurance agent and concluding that “[t]he nature or substance of the cause of action is negligence in failing to obtain a particular type of insurance coverage” and that the two-year statute of limitations applied”); see also Lift-A-Loft Corp., 975 F.2d at 1309 (observing that “a review of the record reveals that the allegations” of the plaintiff’s breach of contract count “are vague at best and simply restate [the plaintiff’s] claim for negligence” and holding that Indiana’s two-year statute of limitations applied even though the plaintiff alleged breach of contract because the injury resulting to the plaintiff’s interest was harm to plaintiff’s personal property interest); Whitehouse, 477 N.E.2d at 273-274 (noting that “[t]he applicable statute of limitations should be ascertained by the nature of the harm alleged” and holding that the conduct of the

defendant, “whether a breach of common law duty or a breach of contractual duty, resulted in injury to [the plaintiff’s] personal property interest and in his action to recover damages for this injury”). Because Renfro filed this action against Kiley more than two years after his cause of action accrued, summary judgment in favor of Kiley was proper, and we reverse the trial court’s order denying Kiley’s motion for summary judgment and remand with instructions for the trial court to grant summary judgment to Kiley.

Reversed and remanded.

MATHIAS, J., and BARNES, J., concur.