

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2377

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PASTORI M. BALELE,

PLAINTIFF-APPELLANT,

JEANETTE L. ARTHUR,

PLAINTIFF,

V.

ALLSTATE INSURANCE COMPANY

DEFENDANT-RESPONDENT,

OFFICE OF THE COMMISSIONER OF INSURANCE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County:
P. CHARLES JONES, Judge. *Affirmed.*

Before Vergeront and Roggensack, JJ., and William Eich, Reserve Judge.

¶1 PER CURIAM. Pastori Balele appeals from the trial court's judgment in favor of Allstate Insurance Company (Allstate). The issue is whether the trial court properly dismissed Balele's action against Allstate. We affirm.

¶2 Pastori Balele brought this action for compensation and damages against Allstate, his insurer, claiming that his claim for reimbursement of multiple small thefts was wrongly denied. Balele contended that he had been robbed numerous times and that the thieves had taken some boxer shorts, three gallons of milk, six boxes of cereal, ten CDs, several shirts, a Sony Discman worth \$60, and a cell phone worth \$80.¹ Allstate moved for summary judgment, asserting that Balele could not show how many thefts had occurred, and therefore failed to show that the loss exceeded his \$100 deductible for each theft. The trial court granted summary judgment in favor of Allstate and dismissed the case.

¶3 Summary judgment must be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (1997-98).² The trial court first looks to the complaint to determine whether it states a cause of action and, if so, whether the answer states a defense. *See Preloznik v. City of Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If the complaint states a cause of action and the

¹ Balele also claimed reimbursement for a computer owned by his partner, Jeanette Arthur. The trial court found that Arthur's claims were barred by the statute of limitations as well as the terms of the insurance contract. We previously dismissed Arthur's appeal of that order.

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

answer states a defense, the trial court looks to the moving party's affidavits to see if the evidentiary facts alleged state a prima facie claim for relief. *See id.* If they do, the trial court turns to the affidavits in opposition to the motion to see whether they raise material factual issues. *See id.* If no material factual issues are raised, the legal issues presented should be decided by summary judgment. *See Grams v. Boss*, 97 Wis. 2d 332, 337, 294 N.W.2d 473 (1980). On appeal we follow the same methodology as the trial court. *See Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App 107, ¶ 6, 235 Wis. 2d 103, 612 N.W.2d 332.

¶4 Balele contends that the trial court erred in concluding that he could not prove the number of times he was robbed, and therefore could not prove that his loss exceeded the \$100 deductible for each occurrence. The trial court stated:

Based upon the submissions that have been made, including the references to deposition testimony, the briefs of the parties, the court is prepared to grant summary judgment to Allstate on the basis that the testimony—the deposition testimony indicates, and I think Mr. Balele must concede, that he was unable under questioning to indicate in any manner the number of occurrences that took place, or what was taken on any particular occurrence.

I believe what Mr. Balele is claiming today is that once he and his family members saw what they believed to be some evidence of a forced entry, they then in [e]ffect inventoried all of the items that were missing from their household and concluded, therefore, that all of these missing items had been the result of numerous burglaries over the many occurrences and that the reference to one occurrence and what was missing on that particular occurrence is misplaced in that that is simply the result of what Mr. Balele and the household members determined was in fact the missing items in toto.

¶5 Deposition testimony supports the trial court's conclusion that Balele could not prove the number of thefts.

Q: How many times do you think the thieves got in to take all of these items?

[Balele]: I don't remember.

Q: You would be speculating on that?

[Balele]: I cannot speculate on that.

Q: You would be speculating to try to pick a number of occasions that the thieves came in?

[Balele]: Before that day I think they had come there. For me I think only that day, only the previous day, I would think so.

Q: Well, you said things were missing in September and October?

[Balele]: Yeah.

Q: And before November?

[Balele]: Yeah, but I cannot tell now when they came.

Q: You would be speculating to try to tell us when they came?

[Balele]: I cannot speculate right now really.

Q: But in order to suggest what days they were there you would be speculating?

[Balele]: I would be speculating, and I don't want to speculate.

...

Q: They could have been in there ten or twenty times I take it then?

[Balele]: That could be.

¶6 The trial court properly granted summary judgment because Allstate's motion stated a legal claim for relief and that claim was supported by the undisputed deposition testimony. Balele did not know how many times the thieves had been to his house. He gave vague and inconsistent testimony about

when the various losses that occurred.³ He conceded that the thief or thieves had visited his house on multiple occasions. Thus, he could not show that his loss for each theft exceeded the \$100 deductible in his insurance contract.

¶7 Balele also claims that the trial court should have awarded him bad faith and punitive damages. Because the underlying insurance claim itself was properly denied, the trial court properly denied the request for bad faith and punitive damages.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ For example, Balele claimed in the police report that the thief took several pairs of boxer shorts on November 19, 1999. In his deposition, however, he stated that he noticed that the boxer shorts began disappearing in September and October.

