COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP321 **Cir. Ct. No. 2010CV528**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

GO WIRELESS, LLC,

PLAINTIFF-APPELLANT,

V.

MARYLAND CASUALTY COMPANY,

DEFENDANT-RESPONDENT,

NORTHERN INSURANCE ASSOCIATES-BARTELS & BROWN, LLC AND UTICA MUTUAL INSURANCE COMPANY,

DEFENDANTS-CO-APPELLANTS.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. After a fire destroyed its warehouse, Go Wireless, LLC, sued its insurer, Maryland Casualty Company, for breach of contract and reformation. Go Wireless argued that Maryland had agreed to provide $2.5 million in business personal property coverage, but it subsequently asserted coverage was limited to $546,400. The circuit court granted summary judgment in favor of Maryland, concluding that Go Wireless's acceptance of $546,400 from Maryland constituted an accord and satisfaction. We agree, and we therefore affirm the dismissal of Go Wireless's claims against Maryland.

¶2 Go Wireless also sued its insurance agent, Northern Insurance Associates–Bartels & Brown, LLC, asserting that Northern failed to advise Go Wireless regarding the adequacy of its business personal property coverage. Northern filed a cross-claim against Maryland for contribution or indemnification, contending that Maryland breached a duty to advise Go Wireless about its insurance needs. The circuit court dismissed Northern's cross-claim, concluding the undisputed facts showed that Go Wireless relied exclusively on Northern for insurance advice and never sought advice from Maryland. We agree and, consequently, affirm the dismissal of Northern's cross-claim.

BACKGROUND

¶3 Go Wireless was co-owned by David Graves and Ned Bartels. From 2003 until November 2008, Go Wireless was an exclusive sales agent for U.S. Cellular. At its peak, Go Wireless had fifty-five stores in seven states.

¶4 Go Wireless purchased its business insurance through Northern, which served as its insurance agent for nine years. In addition, Northern routinely advised Go Wireless on insurance matters. Graves testified he and Bartels met with a representative from Northern on a quarterly basis "to discuss where we

were at, what we needed, and what he had coming on the horizon and … come up with a game plan[.]" Bartels testified he met with an agent from Northern periodically to "talk about where we're going, where we're at right now, and then discuss our insurance needs." He further stated Northern would "give us recommendations, whether it was changing our health insurance, changing companies … the recommendations were given on all our insurance needs."

¶5 Through Northern, Go Wireless purchased an insurance policy from Maryland that provided business personal property coverage. As of July 2008, Go Wireless had fifty store locations, and the Maryland policy provided about $50,000 in business personal property coverage for each location. The policy also provided "blanket" business personal property coverage in the amount of $2,577,601. That figure represented the total amount of business personal property coverage for all of Go Wireless's locations. The blanket coverage allowed Go Wireless to aggregate the policy limits for each of the insured locations in order to cover a single loss at any one location.

¶6 In fall of 2008, U.S. Cellular decided not to renew its contract with Go Wireless. As a result, Go Wireless sold the leases on all of its retail locations to U.S. Cellular and began winding up its business. On November 17, 2008, Kristen Vosters, Go Wireless's office manager, contacted Maryland through the "Zurich Small Business Customer Service Center."[1] Vosters informed Maryland that Go Wireless had sold its operations to U.S. Cellular, and, therefore, needed to remove all but two locations from its policy. The two remaining locations covered by the policy were: (1) Go Wireless's corporate headquarters, located at 740 Ford

[1] Maryland is a subsidiary of Zurich North America.

Street in Kimberly; and (2) a warehouse, located at 575 Timmers Lane in Appleton.

¶7 On March 16, 2009, Graves informed Northern that Go Wireless's operations at the Ford Street location had ceased, and he directed Northern to delete coverage for the Ford Street location. This left the Timmers Lane warehouse as the only location insured under the Maryland policy. Graves instructed Northern to increase the business personal property limit for the Timmers Lane warehouse from $50,000 to $546,400, which had been the business personal property limit for Go Wireless's previous primary location. Graves did not give Northern any instructions about Go Wireless's blanket coverage, and Northern did not inform him that removing the Ford Street location would affect the blanket coverage. About one week later, the Timmers Lane warehouse was destroyed in a fire.

¶8 Go Wireless subsequently submitted a claim to Maryland, alleging the fire had destroyed $1.2 million of business personal property. At the time, Bartels and Graves believed the Maryland policy provided $2.5 million of blanket business personal property coverage. Maryland, however, asserted that the policy no longer provided any blanket coverage. In a letter dated August 20, 2009, Maryland explained:

> Upon review of your policy, it was determined that this policy … did not have a floater on the Business Personal Property but rather the policy contained blanket coverage. This means the policy had specific coverage at each location, but that the sum of the coverage's [sic] could be used at any location as needed when products were moved around with in [sic] the company properties. When the other locations were removed from the policy, this effectively reduced the coverage to the amount specifically applied to that single location. In this case that coverage is $546,400.00. In reviewing the blanket coverage with

> underwriting they have stated it is not possible to place blanket coverage on a policy with only one single location.

The letter further advised Go Wireless that "your policy limit will remain at $546,000 [sic]. That is the most coverage that can be provided by this policy for your Business Personal Property coverage." Finally, the letter informed Go Wireless that Maryland "[did] not waive any of the terms, conditions or provisions of this insurance policy" and "retain[ed] all available defenses[.]"

¶9 Maryland subsequently tendered two checks to Go Wireless. The second check was sent on November 2, 2009, and the accompanying letter stated:

> Please find the enclosed payment in the amount of $196,400.00. This combined with the previous payment of $350,000 previously paid, brings the claims settlement amount to the [business personal property] policy limit of $546,400.00 thus exhausting the [business personal property] coverage for this loss. Please note that thrse [sic] is still an outstanding Replacement Cost coverage for the Building unit if the building is replaced with like kind and quality construction. Please advise me to the status of this portion of the claim so I may update my claims file.

Go Wireless deposited both of the checks it received from Maryland.

¶10 Go Wireless then filed the instant lawsuit, asserting breach of contract and negligence claims against Northern and breach of contract and reformation claims against Maryland. Northern filed a cross-claim against Maryland, seeking contribution or indemnification. Specifically, Northern argued that Maryland breached a duty to advise Go Wireless that removing locations from its policy would eliminate the blanket coverage and therefore result in inadequate business personal property coverage.

¶11 In support of its cross-claim, Northern noted that, beginning in 2007, Go Wireless was instructed to contact the "Zurich Small Business Customer

Service Center" directly when it needed to make changes to its policy. Northern also noted that, pursuant to a "producer agreement" between Maryland and Northern, the customer service center was supposed to provide insureds with "policyholder services." The term "policyholder services" included "[c]ommunicating with policyholders regarding insurance needs[.]" Thus, Northern contended the producer agreement obligated Maryland to advise Go Wireless about the adequacy of its coverage.

¶12 However, Ned Bartels testified that, despite the producer agreement, Go Wireless continued to rely exclusively on Northern for insurance advice. He stated:

> Bartels: We got all our insurance advice from [Northern]. We didn't get it from anybody at Zurich as far as policy changes or the major policy changes.
>
> Counsel: Or the sufficiency of coverages?
>
> Bartels: Right.
>
> Counsel: Or the amount of coverage provided?
>
> Bartels: Correct.
>
> Counsel: Or the types of coverage that potentially either should be provided or were needed by the company?
>
> Bartels: Correct.

Similarly, Vosters testified that, when she contacted the customer service center to make changes to the policy, she never had any substantive discussions about coverage and never asked for any advice or opinions.

¶13 Maryland moved for summary judgment on Go Wireless's claims and Northern's cross-claim. Following a hearing, the circuit court granted Maryland's motion. The court concluded Go Wireless's claims against Maryland

were barred because Go Wireless's acceptance of Maryland's payments constituted an accord and satisfaction. Regarding Northern's cross-claim, the court stated, "[I]t's clear from the facts that have been brought out through the legal pleadings and from the depositions that have been taken to date that all the coverage issues were dealt with from Northern Insurance agents and, in this court's opinion, not directly with Maryland Casualty[.]" Consequently, the court concluded Northern was not entitled to contribution or indemnification from Maryland, and it dismissed the cross-claim. The court subsequently denied Northern's motion for reconsideration. Go Wireless and Northern now appeal.

DISCUSSION

¶14 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2]

I. Go Wireless's claims against Maryland

¶15 The circuit court concluded Go Wireless's claims against Maryland were barred by the doctrine of accord and satisfaction. An accord and satisfaction is an agreement between parties to discharge an existing disputed claim. ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979). Under the doctrine of accord and satisfaction, if a creditor cashes a check from a debtor that

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

has been offered as full payment for a disputed claim, the creditor is deemed to have accepted the debtor's offer, notwithstanding any reservations by the creditor. ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis. 2d 95, 101, 341 N.W.2d 655 (1984).

¶16 An accord and satisfaction is a contract. *See* ***id.*** at 112. Where the facts are undisputed, the existence of a contract is a question of law that we review independently. ***Gustafson v. Physicians Ins. Co.***, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998). "Like other contracts, an accord and satisfaction requires an offer, an acceptance, and consideration." ***Flambeau***, 116 Wis. 2d at 112. We address each of these elements in turn.

¶17 First, for a valid accord and satisfaction, the debtor must make an offer that contains expressions sufficient to make the creditor understand that performance is offered in full satisfaction of the creditor's claim. ***Hoffman***, 86 Wis. 2d at 453. In other words, "the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt[.]" ***Flambeau***, 116 Wis. 2d at 111. No "magic language" is required—"[t]he test, after all, is one of reason[.]" ***Myron Soik & Sons, Inc. v. Stokely USA, Inc.***, 175 Wis. 2d 456, 466, 498 N.W.2d 897 (Ct. App. 1993).

¶18 ***Myron Soik*** is instructive on the issue of what constitutes a valid offer for accord and satisfaction purposes. There, a group of farmers filed a class action lawsuit against Stokely, a vegetable canning company that had contracted to purchase corn from them in early 1990. ***Id.*** at 459. The suit alleged that Stokely had not paid enough under the contract for "passed acreage" corn—that is, corn that was fit for harvest that Stokely nevertheless declined to take. ***Id.*** at 459-60. After the 1990 harvest, Stokely sent the farmers a letter indicating that their passed

acreage payments for 1990 would be lower than expected. ***Id.*** at 460. A few days later, Stokely mailed the farmers their passed acreage checks, along with a letter stating that the checks constituted "your Stokely USA, Inc., 1990 Sweet Corn contract payment." ***Id.*** at 461. The second letter also explained how the reduced payments had been calculated. ***Id.*** Although the farmers had expected to receive larger amounts, "armed with the above information, they nevertheless decided to cash the checks." ***Id.*** at 466.

¶19 This court concluded that Stokely's letters preceding and accompanying the payments gave the farmers reasonable notice that the checks were intended as full payment for the passed acreage corn. ***Id.*** at 465. We noted that the first letter advised the farmers they would be receiving reduced payments. ***Id.*** at 466. The second letter explained how the reduced payments had been calculated and "plainly advised" the farmers that the enclosed checks constituted "your Stokely … 1990 Sweet Corn crop payment." ***Id.*** Under these circumstances, we stated it was immaterial that the checks did not contain the words "full payment" or other "magic language." ***Id.*** Instead, because the letters reasonably notified the farmers that the accompanying checks were offered as full payment under the contract, we determined Stokely had proved an accord and satisfaction. ***Id.*** at 466-67.

¶20 The letters Maryland sent Go Wireless mirror the letters in ***Myron Soik***. On August 20, 2009, Maryland sent Go Wireless a letter explaining that, when Go Wireless removed all but one insured location from its policy, it eliminated the policy's blanket business personal property coverage. The letter clarified that "it is not possible to place blanket coverage on a policy with only one single location." It explained that, as a result, Go Wireless's business personal property coverage was "effectively reduced" to $546,400, which was the coverage

limit for the only remaining location. The letter therefore concluded, "[Y]our policy limit will remain at $546,000 [sic]." Thus, like the letters in ***Myron Soik***, Maryland's first letter informed Go Wireless that it would be receiving less money than anticipated under the contract, and it also explained the basis for that conclusion.

¶21 Then, on November 2, 2009, Maryland sent Go Wireless a second letter that enclosed a check comprising the remainder of the $546,400 policy limits. The November 2 letter expressly stated that, together with a previous payment of $350,000, the second payment "brings the claim settlement amount to the [business personal property] policy limit of $546,400.00, thus exhausting the [business personal property] coverage for this loss." This mirrors the second letter in ***Myron Soik***, which informed the farmers that the enclosed checks constituted their payments under the 1990 contract. ***Id.*** at 461. In both cases, the letters informed the creditors that the enclosed payments comprised the entire sums to which the creditors were entitled. As in ***Myron Soik***, we conclude it is not dispositive that Maryland's letters failed to state that the checks were offered in "full payment" of Go Wireless's business personal property claim.[3] *See* ***id.*** at 466. Instead, like the letters in ***Myron Soik***, Maryland's letters gave Go Wireless reasonable notice that the payments were offered as a full settlement of its claim.

¶22 Go Wireless nevertheless contends the letters did not constitute a valid offer because the first letter stated that Maryland "[did] not waive any of the

[3] We also reject Go Wireless's argument that the letters did not constitute a valid offer because they lacked the words "settlement," "accord and satisfaction," and "full and final resolution." Again, no "magic language" is required, and the offer need only give the offeree "reasonable notice" that the payment is offered in full settlement of his or her claim. *See* ***Myron Soik & Sons, Inc. v. Stokely USA, Inc.***, 175 Wis. 2d 456, 466, 498 N.W.2d 897 (Ct. App. 1993).

terms, conditions or provisions of this insurance policy" and "retain[ed] all available defenses[.]" According to Go Wireless, this language suggests that Maryland anticipated further "controversy, debate and litigation" and, therefore, did not intend to settle Go Wireless's claim. However, we conclude it is immaterial that Maryland's first letter included a boilerplate reservation of rights. When read together and in their entirety, the two letters clearly informed Go Wireless: (1) that Maryland believed Go Wireless's business personal property coverage was limited to $546,400; and (2) that, in Maryland's view, the payment enclosed with the second letter extinguished Maryland's obligation to provide business personal property coverage. Thus, the letters gave Go Wireless the reasonable notice required for an accord and satisfaction.

¶23 We are similarly unpersuaded by Go Wireless's argument that the second letter's reference to an outstanding building replacement cost claim rendered Maryland's offer invalid. The second letter merely noted that, in addition to its business personal property claim, Go Wireless could also assert a claim for the replacement cost of the Timmers Lane warehouse, in the event it decided to rebuild. We fail to see how this reference to a separate claim made it unclear that Maryland was offering the enclosed check as a full settlement of Go Wireless's business personal property claim. Consequently, we conclude the letters Maryland sent Go Wireless constituted a valid offer for accord and satisfaction purposes.

¶24 An accord and satisfaction also requires an acceptance. ***Flambeau***, 116 Wis. 2d at 112. However, where accord and satisfaction is concerned,

acceptance does not require mental assent or a meeting of the minds.[4] ***Hoffman***, 86 Wis. 2d at 454. Instead, the question is whether the creditor manifested an intent to accept the debtor's offer. ***Id.*** The requisite intent can be manifested either by actions or words, and actions can constitute acceptance even when accompanying words express a contrary intent. ***Id.*** For instance, in ***Flambeau***, our supreme court held that a creditor accepted a debtor's offer by cashing a check offered in full settlement of the creditor's claim, even though the creditor notified the debtor that the check was not accepted as payment in full. ***Flambeau***, 116 Wis. 2d at 99, 119. Here, Go Wireless deposited Maryland's checks, and it gave no indication that the checks were not accepted as payment in full. Thus, Go Wireless manifested its intent to accept Maryland's offer. Because mental assent is not required for an accord and satisfaction, whether Go Wireless actually intended to accept Maryland's offer is irrelevant.

¶25 Lastly, an accord and satisfaction requires consideration. ***Flambeau***, 116 Wis. 2d at 112. Go Wireless argues there was no consideration here because Maryland simply paid what it believed to be the policy limits, which it was already obligated to do under the policy. Go Wireless notes that "[a] promise to do something the promisor is already legally bound to do … does not constitute sufficient consideration for a contract." *See* ***Bartley v. Thompson***, 198 Wis. 2d

[4] Go Wireless cites ***American National Property & Casualty Co. v. Nersesian***, 2004 WI App 215, 277 Wis. 2d 430, 689 N.W.2d 922, for the proposition that an accord and satisfaction requires a meeting of the minds. However, ***Nersesian*** actually states that a meeting of the minds is required for a valid *settlement agreement*, not an accord and satisfaction. ***Id.***, ¶16. The ***Nersesian*** court addressed two separate issues: whether the parties reached a valid settlement agreement, and whether one party's retention of a settlement check for seven months constituted an accord and satisfaction. ***Id.***, ¶¶17, 20. The court referred to a meeting of the minds only when discussing the validity of the settlement agreement. *See* ***id.***, ¶16. Nowhere in its discussion of the accord and satisfaction issue did the court indicate that a meeting of the minds is required for an accord and satisfaction. *See* ***id.***, ¶¶20-22.

323, 333, 542 N.W.2d 227 (Ct. App. 1995). However, we have previously stated that the resolution of a controversy "involving something of monetary value and of interest to the parties" is sufficient consideration to support an accord and satisfaction. *See* ***Tower Ins. Co. v. Carpenter***, 205 Wis. 2d 365, 371, 556 N.W.2d 384 (Ct. App. 1996). In this case, the amount of business personal property coverage is something of monetary value, and it was clearly in controversy following the fire. The resolution of the parties' dispute over the amount of coverage therefore provided sufficient consideration for an accord and satisfaction.

¶26 Consequently, the undisputed facts establish that Go Wireless's acceptance of Maryland's checks constituted an accord and satisfaction. Nevertheless, Go Wireless argues that a valid accord and satisfaction did not occur because Maryland never sent Go Wireless a formal release. Yet, Go Wireless cites no authority for the proposition that a formal release is required for an accord and satisfaction. Moreover, this court has previously applied the doctrine of accord and satisfaction in circumstances that did not involve formal releases. *See*, *e.g.*, ***Myron Soik***, 175 Wis. 2d 456; ***Butler v. Kocisko***, 166 Wis. 2d 212, 479 N.W.2d 208 (Ct. App. 1991).

¶27 Go Wireless also contends that the doctrine of accord and satisfaction cannot apply in this case because of Maryland's "special status as a regulated insurance company under Wisconsin law." Specifically, Go Wireless argues that, because an insurer has a duty to pay what it owes under the policy, an insurer cannot create an accord and satisfaction simply by paying an amount it acknowledges owing. However, Go Wireless's proposed "insurer exception" to the doctrine of accord and satisfaction would conflict with our prior decision in ***Zubeck v. Edlund***, 228 Wis. 2d 783, 598 N.W.2d 273 (Ct. App. 1999). There, after a dispute over policy limits, a couple accepted a check from their insurer for

an amount which the insurer alleged represented the policy limits. ***Id.*** at 785-86. The couple later sued the insurer for reformation of the policy, seeking additional damages under the reformed policy. ***Id.*** at 786. The circuit court dismissed the couple's claim, concluding an accord and satisfaction took place when the couple cashed the insurer's check. ***Id.*** at 787. We affirmed. ***Id.*** at 793. ***Zubeck*** therefore teaches that there is no "insurer exception" to the doctrine of accord and satisfaction when an insurer pays an amount it acknowledges owing.

¶28 Moreover the statutes and regulations Go Wireless cites do not support its purported "insurer exception." First, Go Wireless argues that recognizing an accord and satisfaction in this case would conflict with WIS. STAT. § 628.46(1), which states, "Unless otherwise provided by law, an insurer shall promptly pay every insurance claim." Go Wireless contends this statute imposed an independent legal obligation on Maryland to "promptly pay claims," including "any 'partial amount' even if the balance is disputed." Go Wireless suggests Maryland violated this obligation by conditioning its $546,400 payment on the release of Go Wireless's business personal property claim. We disagree.

¶29 WISCONSIN STAT. § 628.46(1) requires insurers to pay twelve percent interest on overdue payments. The statute is not intended to penalize insurers, but rather to discourage them from delaying payment of claims and to compensate claimants for the value of the use of their money. ***Kontowicz v. American Standard Ins. Co.***, 2006 WI 48, ¶47, 290 Wis. 2d 302, 714 N.W.2d 105. Thus, we reject Go Wireless's argument that § 628.46(1) imposes an independent legal obligation on an insurer to pay money due under an insurance policy. Instead, the policy itself creates that obligation. An insurance policy is a contract between the insurer and the insured. *See* ***Admiral Ins. Co. v. Paper Converting Mach. Co.***, 2012 WI 30, ¶41, 339 Wis. 2d 291, 811 N.W.2d 351. The

fact that a debtor pays an amount due under a contract does not prevent an accord and satisfaction from barring subsequent claims that the debtor owes additional money under the same contract. In fact, that is precisely the situation in which an accord and satisfaction commonly occurs.

¶30 Go Wireless also argues that recognizing an accord and satisfaction in this case would conflict with WIS. ADMIN. CODE § Ins 6.11 (Aug. 2012).[5] However, § Ins 6.11 merely enumerates unfair claim practices and states that the penalty for committing an unfair claim practice is revocation of the insurer's license to transact insurance in Wisconsin. *See* WIS. ADMIN. CODE § Ins 6.11(3), (5). As Maryland notes, § Ins 6.11 does not create a private right of action or impose upon insurers an independent legal duty to pay claims. Moreover, there is no evidence that Maryland committed any of the claim practices prohibited by the subsections of § Ins 6.11 that Go Wireless cites.[6] Accordingly, we reject Go Wireless's argument that § Ins 6.11 precludes us from finding a valid accord and satisfaction.

¶31 Next, Go Wireless argues that finding an accord and satisfaction in this case would be inconsistent with our decision in ***Kubichek v. Kotecki***, 2011 WI App 32, 332 Wis. 2d 522, 796 N.W.2d 858, *review dismissed*, 2011 WI 89, 336

[5] All references to WIS. ADMIN. CODE § Ins 6.11 are to the August 2012 version.

[6] *See* WIS. ADMIN. CODE § Ins 6.11(3)(a)8. (prohibiting "[f]ailure to settle a claim under one portion of the policy coverage in order to influence a settlement under another portion of the policy coverage"); WIS. ADMIN. CODE § Ins 6.11(3)(a)9. (prohibiting "failure to offer settlement under applicable first party coverage on the basis that responsibility for payment should be assumed by other persons or insurers"); WIS. ADMIN. CODE § Ins 6.11(3)(a)10. (prohibiting "[c]ompelling insureds and claimants to institute suits to recover amounts due under [the insurer's] policies by offering substantially less than the amounts ultimately recovered in suits brought by them").

Wis. 2d 640, 804 N.W.2d 82. In ***Kubichek***, a trial resulted in a $16 million verdict for the plaintiff. ***Id.***, ¶10. Five days later, defense counsel wrote to the plaintiff's attorney offering the defendant insurer's policy limits of $300,000 for a "full and final resolution of this matter including a release of all claims" against both the insurer and its insured. ***Id.***, ¶11. Plaintiff's counsel promptly declined the offer. ***Id.*** After five additional days, defense counsel sent the plaintiff's attorney a second letter enclosing a $300,000 check. ***Id.*** Unlike the previous letter, the second correspondence made no reference to settlement. ***Id.*** Moreover, the letter specifically referred to the parties' motions after verdict, stating, "I expect to have my motions after verdict prepared and filed within the next two days." ***Id.***, ¶36. Based on previous conversations with defense counsel, the plaintiff's attorney believed the insurer was tendering its policy limits to prevent the accrual of further interest on its portion of the jury verdict. ***Id.***, ¶11. He therefore deposited the check in his trust account without examining the back side, which stated:

> The payee by endorsing this check acknowledges full settlement of claim or account shown on other side and in consideration of this payment hereby fully releases the maker hereof from all liability with respect to such claim or account.

Id.

¶32 We concluded these facts did not give rise to an accord and satisfaction because the plaintiff did not have reasonable notice that the check was offered in full satisfaction of his claims. ***Id.***, ¶35. First, the letter accompanying the check made no reference to settlement. ***Id.***, ¶36. Second, the letter referenced motions after verdict, but "[t]here would be no reason for [the defendants] to continue pursuing motions after verdict if they believed they had fully settled [the plaintiff's] claims." ***Id.*** Third, the notation on the back of the check was

ambiguous because it referred to a claim or account number, but no such number was present on the front of the check. ***Id.***, ¶37. Fourth, shortly before issuance of the check, defense counsel indicated that the insurer intended to tender its policy limits to prevent the accrual of further interest on the verdict. ***Id.***, ¶38. Fifth, the plaintiff's attorney had recently informed defense counsel that his client would not accept a $300,000 settlement. ***Id.*** Under these circumstances, we determined the plaintiff "simply had no reason to believe that [the insurer] intended the $300,000 check to be a full settlement of [his] claims." ***Id.***

¶33 ***Kubichek*** is factually distinguishable from this case. First, unlike the transmittal letter in ***Kubichek***, which did not reference settlement in any way, Maryland's second letter to Go Wireless stated that the enclosed payment "would bring the claim settlement amount to the [business personal property] policy limit … thus exhausting [business personal property] coverage for this loss." Second, while the letter in ***Kubichek*** referred to motions after verdict, Maryland's letters did not provide any clear indication that Maryland anticipated continued controversy over the business personal property claim. Third, unlike the plaintiff in ***Kubichek***, Go Wireless never explicitly informed Maryland that it would not accept the amount offered as a full settlement of its claim. Fourth, while the plaintiff's attorney in ***Kubichek*** reasonably believed the insurer tendered its policy limits to prevent interest from accruing on a jury verdict, Go Wireless had no reason to believe that Maryland's checks were offered for any purpose other than full settlement. Consequently, ***Kubichek*** does not prevent us from finding that the facts of this case gave rise to an accord and satisfaction.

¶34 Finally, Go Wireless argues that Maryland waived its right to assert accord and satisfaction by failing to plead accord and satisfaction as an affirmative defense. Go Wireless correctly notes that accord and satisfaction must be set forth

in a party's pleadings and cannot be raised by motion. *See* ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 70, 393 N.W.2d 299 (Ct. App. 1986). However, we disagree with Go Wireless's assertion that Maryland did not plead accord and satisfaction.

¶35 ***Hertlein*** illustrates that no magic words are required to raise the defense of accord and satisfaction. In that case, a contractor cashed a check that was less than the full amount of his bill. ***Hertlein***, 133 Wis. 2d at 69. He later sued his customers for the balance due under their contract. ***Id.*** The circuit court determined the contractor's acceptance of the check constituted an accord and satisfaction. ***Id.*** at 70. On appeal, the contractor argued the customers had failed to raise accord and satisfaction as an affirmative defense. ***Id.*** We rejected his argument, reasoning, "Under the heading 'Affirmative Defenses,' the [customers'] answer states that they 'have paid ... the contract price in full.' That is an ample statement of the defense." ***Id.***

¶36 Just as the customers in ***Hertlein*** alleged they had paid the contract price in full, Maryland alleged in its answer that it "complied with the contractual obligations stated in its relevant policies of insurance." Under the circumstances, that assertion meant that Maryland had paid the limits of the policy's business personal property coverage. Thus, under our liberal rules of notice pleading, Maryland adequately pled the affirmative defense of accord and satisfaction. *See* ***Welzien v. Kapec***, 98 Wis. 2d 660, 661, 298 N.W.2d 98 (Ct. App. 1980) (rules of pleading should be liberally construed); ***Korkow v. General Cas. Co.***, 117 Wis. 2d 187, 193, 344 N.W.2d 108 (Ct. App. 1984) ("This functional approach to pleading reflects a determination that the resolution of legal disputes should be made on the merits of the case rather than on the technical niceties of pleading."). Because Maryland did not waive its accord and satisfaction defense, and because the

undisputed facts established an accord and satisfaction, the circuit court properly granted Maryland summary judgment on Go Wireless's claims.

II. Northern's cross-claim

¶37 The circuit court also granted Maryland summary judgment on Northern's cross-claim. The cross-claim was premised on the notion that, because Go Wireless contacted the Zurich Small Business Customer Service Center to make certain changes to its policy, Maryland, through the customer service center, acted as Go Wireless's insurance agent. Northern contends that, as Go Wireless's insurance agent, Maryland had a duty to advise Go Wireless that removing locations from its policy would result in a loss of blanket coverage and that the remaining business personal property coverage would be inadequate. Consequently, Northern argues that if it is found liable to Go Wireless, it will be entitled to contribution or indemnification from Maryland.

¶38 An insurance agent has a duty to exercise reasonable care, skill, and diligence in procuring the coverage he or she agreed to procure. ***Avery v. Diedrich***, 2007 WI 80, ¶23, 301 Wis. 2d 693, 734 N.W.2d 159. However, Wisconsin courts have established limitations on an insurance agent's duty to an insured, in the absence of special circumstances. ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 547, 514 N.W.2d 1 (1994). Specifically, an insurance agent does not normally have a duty to:

> "[I]nform about or recommend policy limits higher than those selected by the insured," "update the contents limit of the [insureds'] policy or to advise them regarding the adequacy of coverage," "advise [the insured] to increase the limits of its insurance coverage for personal property," or "anticipate what liabilities an insured may expect a policy to cover or to identify which exclusions in a policy an insured may deem important[.]"

Avery, 301 Wis. 2d 693, ¶28 (quoted sources omitted).

¶39 There are several reasons for the general rule that, absent special circumstances, an insurance agent is not liable for failing to advise an insured about the availability or adequacy of coverage. First, "imposing liability on insurers for failure to advise clients of available coverage would remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available." ***Nelson v. Davidson***, 155 Wis. 2d 674, 681, 456 N.W.2d 343 (1990). Second, placing an affirmative duty to advise on insurance companies and agents would subject them "to liability for failing to advise their own clients of every possible insurance option, or even an arguably better package of insurance offered by a competitor." ***Id.*** at 682. Third, the creation of a duty to advise would give insureds the opportunity to obtain coverage after the loss merely by asserting that they would have bought the additional coverage had it been offered. ***Id.***

¶40 Accordingly, absent special circumstances, Maryland did not have a duty to advise Go Wireless about the adequacy of its business personal property coverage. To determine whether special circumstances were present, we must consider: (1) whether Maryland held itself out to the public as a skilled insurance advisor or consultant; (2) whether Maryland took it upon itself to advise Go Wireless about the coverages Go Wireless should have; (3) whether Go Wireless relied on Maryland's expertise; (4) whether Go Wireless paid Maryland an additional fee for special consultation and advice; and (5) whether there was a long established relationship of entrustment between Maryland and Go Wireless. *See* WIS JI—CIVIL 1023.6 (1995).

¶41 Northern does not argue that *any* of the factors set forth in WIS JI—CIVIL 1023.6 support the existence of special circumstances in this case. Moreover, a review of the parties' summary judgment submissions confirms that, based on the undisputed facts, Maryland and Go Wireless did not have a special relationship giving rise to a duty to advise. First, there is no evidence that Maryland held itself out to Go Wireless as a skilled insurance advisor or consultant. Second, Maryland never actually advised Go Wireless about its insurance coverage. Third, Go Wireless never relied on Maryland to provide any insurance advice. Fourth, there is no evidence that Maryland received an additional fee as compensation for providing special consultation or advice. Finally, Maryland acted as Go Wireless's insurance agent for only two years, which does not amount to a "long established relationship of entrustment." *See* WIS JI—CIVIL 1023.6 (1995).

¶42 Northern apparently concedes that a special relationship did not exist between Maryland and Go Wireless. Nonetheless, Northern argues Maryland had a duty to advise Go Wireless about the adequacy of its business personal property coverage pursuant to the producer agreement between Maryland and Northern. Northern contends that, under the producer agreement, Maryland assumed duties it would not otherwise have had, including "communicating directly with policyholders regarding their insurance needs[.]" Northern therefore argues the producer agreement "arguably" made Maryland, rather than Northern, responsible for advising Go Wireless.

¶43 We do not agree with Northern that the producer agreement creates a genuine issue of material fact with respect to Northern's claim for contribution or indemnification. Instead, we agree with the circuit court that, regardless of any duty created by the producer agreement, the undisputed facts show that Go

Wireless always communicated about its insurance needs with Northern and never actually sought advice from Maryland. Vosters testified she never had any substantive discussions with Maryland about the policy and never asked Maryland for any advice or opinions. Similarly, Bartels testified unequivocally that Go Wireless always relied on Northern for insurance advice and never sought advice from Maryland. Both Bartels and Graves testified they met regularly with representatives from Northern to discuss Go Wireless's insurance needs, but they did not testify to any similar discussions with Maryland. Thus, the undisputed facts show that, in spite of the producer agreement, Northern continued to be Go Wireless's exclusive insurance advisor.

¶44 Moreover, Northern does not explain why, if it actually expected Maryland to assume the role of insurance advisor, it nevertheless continued providing extensive insurance advice to Go Wireless. Furthermore, unlike Northern, which had developed an intimate knowledge of Go Wireless's business, Maryland had no way of knowing that Go Wireless still wanted or needed $2.5 million in blanket business personal property coverage after it removed the vast majority of its locations from the policy. We therefore agree with the circuit court that, in practice, the responsibility for advising Go Wireless remained with

Northern, regardless of the language of the producer agreement. Consequently, Northern's cross-claim for contribution or indemnification fails.[7]

¶45 Alternatively, Northern argues that Maryland had a common law duty to "maintain existing levels of blanket coverage despite a change in the number of insured locations." In support of this argument, Northern notes that, even absent special circumstances, an insurance agent has a duty to act in good faith and carry out the insured's instructions. *See* ***Poluk v. J.N. Manson Agency, Inc.***, 2002 WI App 286, ¶13, 258 Wis. 2d 725, 653 N.W.2d 905. However, Northern does not explain how Maryland failed to act in good faith. Additionally, Northern does not cite any evidence that Go Wireless ever instructed Maryland to maintain $2.5 million in blanket business personal property coverage. Thus, Maryland did not breach a duty to carry out Go Wireless's instructions. Accordingly, the circuit court properly dismissed Northern's cross-claim against Maryland.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] Northern points out that the producer agreement contained an indemnification clause, which required Maryland to "indemnify and hold harmless [Northern] against any direct damages … arising out of errors or omissions on the part of [Maryland] in its preparation or handling of any policy[.]" However, an indemnification agreement generally does not apply to the indemnitee's own negligent acts absent a specific and express statement to that effect. ***Mikula v. Miller Brewing Co.***, 2005 WI App 92, ¶34, 281 Wis. 2d 712, 701 N.W.2d 613. Here, the producer agreement specifically provided that Maryland would not indemnify Northern "to the extent [Northern] has caused, contributed to, or compounded such error or omission." Consequently, the producer agreement does not require Maryland to indemnify Northern for Northern's own negligence.