

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP2396

Cir. Ct. No. 2006CV1668

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BLOOMFIELD ROAD, LLC,

PLAINTIFF,

ALLSTATE INSURANCE COMPANY,

INTERVENING PLAINTIFF-RESPONDENT,

v.

PAUL DEMICHELE,

DEFENDANT-APPELLANT,

SCHMIDT FINANCIAL GROUP, JOHN KOSOWSKI, JUDITH KOSOWSKI, RAYMOND KOSOWSKI, KAREN KOSOWSKI, ROBERT MARTWICK, GLORIA MARTWICK, KENNETH RAPP, JANET L. RAPP, AND BERNADINE DEMICHELE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA KLUKA, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Bloomfield Road, LLC, sued Paul DeMichele and other owners of adjacent lakefront properties for an injunction requiring docks to be placed based on the “right angle method.” DeMichele appeals pro se from a judgment declaring that his homeowner and personal umbrella insurance provider, Allstate Insurance Company, does not provide coverage for the subject of Bloomfield’s lawsuit. We affirm the judgment.

¶2 Allstate intervened in the underlying action to seek a declaration on coverage. The circuit court concluded that there was no personal injury, no property damage, and no occurrence as defined in the policies and granted summary judgment in favor of Allstate. Review of summary judgment requires we perform the same function as the circuit court, making our review de novo. *Gulmire v. St. Paul Fire & Marine*, 2004 WI App 18, ¶9, 269 Wis. 2d 501, 674 N.W.2d 629. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08 (2005-06).¹ Where, as here, the decision to grant declaratory judgment rests on the interpretation of an insurance contract, a question of law is presented that we independently review. *Gulmire*, 269 Wis. 2d 501, ¶10.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 It is undisputed that the insuring clause in the personal umbrella policy provides: “Allstate will pay when an insured becomes legally obligated to pay for personal injury or property damage caused by an occurrence.” DeMichele argues that Allstate’s personal umbrella policy not only extends liability limits that exist under his homeowner’s policy, but also extends the type of liability covered and, particularly, that it provides coverage for this suit because it defines personal injury as including “invasion of rights of occupancy.”

¶4 Before considering the umbrella policy, we observe that the circuit court focused on the homeowner’s policy and concluded that there would have to first be coverage under the homeowner’s policy “before any umbrella policy would be triggered or applicable.” Allstate does not assert that position on appeal. Allstate does not identify any provision in the umbrella policy that coverage is only triggered by coverage under the homeowner’s policy.²

¶5 DeMichele only argues that Bloomfield’s suit is covered as an action for the “invasion of rights of occupancy.” The homeowner’s policy does not include the phrase “invasion of rights of occupancy” within the definition of bodily injury covered by the policy.³ Not until his reply brief does DeMichele claim that he has not conceded or waived any coverage issue under the homeowner’s policy. DeMichele’s reply brief does not make an argument that

² In fact, the umbrella policy provides under “Amounts We Pay” [i]f ... no other insurance applies to the occurrence, we will pay only those amounts which exceed the Retained Limit,” and that limit is \$250 in Wisconsin.

³ DeMichele quotes a definition of bodily injury in the homeowner’s policy which includes “invasion of privacy, wrongful eviction or wrongful entry.” That definition is found in optional coverage G pertaining to special assessments against members of a homeowner’s association. There is no suggestion that DeMichele paid for coverage G.

coverage exists under the homeowner's policy. Unlike the circuit court, we do not consider coverage under the homeowner's policy first. We may affirm a circuit court's decision even if the lower court reached its result for different reasons. *See Lecander v. Billmeyer*, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992).

¶6 It is undisputed that Bloomfield's complaint in the underlying litigation seeks only declaratory and injunctive relief to force adjacent lakefront property owners to position their docks in a certain way in the future. Our examination of Bloomfield's complaint on this point focuses on whether Bloomfield seeks declaratory or injunctive relief that is remedial in nature, that is to provide compensation for past wrongs, or if it is only looking to the future. *See, e.g., General Cas. Co. of Wisconsin v. Hills*, 209 Wis. 2d 167, 180, 561 N.W.2d 718 (1997). Bloomfield only wants the docks placed in a certain manner in the future and is not seeking any compensation or remedial money damages. There is no request for payment associated with past harm, or any allegation of damage to Bloomfield's property.

¶7 Here coverage exists only when the insured is "legally obligated to pay for personal injury." The policy requires that money will have to be paid for personal injury to give rise to liability under the policy. The complaint only seeks injunctive relief to prevent future injuries and does not seek the payment of any money to compensate or redress Bloomfield for past injury or violation of Bloomfield's rights. So accepting that Bloomfield's allegation that DeMichele placed his dock in a manner that encroaches on Bloomfield's riparian space is an invasion of the right of occupancy and a personal injury under the umbrella policy, there is no allegation that DeMichele will have "to pay" any amount for the

alleged invasion of the right of occupancy.⁴ See *Green v. Heritage Mutual Ins. Co.*, 2002 WI App 297, ¶18, 258 Wis. 2d 843, 655 N.W.2d 147 (where the only relief sought under the complaint was injunctive relief, and there was no claim seeking damages, it failed to allege claims for which the insureds would have been “legally obligated to pay” as required for coverage). DeMichele has no coverage under the Allstate umbrella policy for the subject of Bloomfield’s lawsuit. Allstate had no duty to defend either.⁵ See *Baumann v. Elliott*, 2005 WI App 186, ¶9, 286 Wis. 2d 667, 704 N.W.2d 361 (“the duty to defend ends once the court resolves the coverage issue in favor of the insurer”).

By the Court.—Judgment affirmed.

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

⁴ The result is the same under the homeowner’s policy which provides that Allstate “will pay damages which an insured person becomes legally obligated to pay because of bodily injury or property damage.” See *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶69, 264 Wis. 2d 60, 665 N.W.2d 257 (a policy covering “damages” that the insured is legally required to pay precludes coverage for the insured’s prospective conduct).

⁵ The umbrella policy’s defense provision provides that Allstate “will defend an Insured if sued as the result of an occurrence covered by this policy even if the suit is groundless, false or fraudulent.”

