COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

No. 94-3267

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

OAKFIELD STONE COMPANY,

Plaintiff-Appellant,

v.

NEIL HOBBS, WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY, JAMES GRANT,

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Oakfield Stone Company appeals from the trial court's order granting summary judgment in favor of Oakfield Stone's former counsel, Neil Hobbs and James Grant, and their insurer. Oakfield Stone brought this malpractice action against Hobbs and Grant contending that they should have tendered to Oakfield's insurer the defense of an earlier action brought against Oakfield. The trial court ruled that Oakfield's insurer did not

have a duty to defend against the prior action and, consequently, there was no malpractice on the part of Hobbs and Grant. We affirm.

Summary judgment allows controversies to be settled without trial where there are no disputed material facts and only legal issues are presented. ***In re Cherokee Park Plat,*** 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). On review of a summary judgment order, we employ the same methodology as the trial court. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court order granting summary judgment. ***Id.***

Whether an insurer has a duty to defend depends on the allegations of the complaint and the language of the insurance policy. ***Professional Office Bldgs., Inc. v. Royal Indem. Co.,*** 145 Wis.2d 573, 581, 427 N.W.2d 427, 430 (Ct. App. 1988). In order to prove a claim of legal malpractice, Oakfield had to show that its former attorneys' failure to tender the defense of the prior action to its insurers caused damage to Oakfield because it had to provide its defense at its own cost. *See* ***Lewandowski v. Continental Casualty Co.,*** 88 Wis.2d 271, 277, 276 N.W.2d 284, 287 (1979). Thus to prove legal malpractice, Oakfield had to show that its insurers had a duty to defend.

In the prior action, the complaint alleged that Oakfield took boulders from land Eden Stone had previously leased "knowing it would have to trespass the ... leased ... land and take holey boulders without permission." The Wausau Insurance contract provided that it did not apply to "[P]roperty damage expected or intended from the standpoint of the insured." It further provided that an "occurrence" under the policy "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Because the allegations of the complaint did not trigger a duty to defend, Hobbs's and Grant's failure to tender defense of the action to the insurers did not constitute malpractice. Eden's complaint alleged that Oakfield acted "knowing it would have to trespass the ... leased ... land and take holey boulders without permission." The insurance policy excludes coverage for "property damage expected or intended from the standpoint of the insured."

The complaint alleges that Oakfield's actions were knowingly done. The complaint does not allege that Oakfield acted negligently, inadvertently or by mistake. The complaint does not allege that Oakfield removed the boulders from Eden's leased lands under the mistaken belief that Oakfield had a right to do so. Because the complaint alleges that Oakfield's actions were knowingly done, those actions were expected or intended from Oakfield's standpoint, and not covered under the policy.[1]

Oakfield contends that its trespass on the lands was "unintended" under ***Patrick v. Head of Lakes Coop. Elec. Ass'n,*** 98 Wis.2d 66, 295 N.W.2d 205 (Ct. App. 1980). ***Patrick*** held that cutting down trees was not an "intentional" act under an insurance policy because, although employees of a cooperative intended to trim trees interfering with transmission lines, "[a]ny unauthorized cutting ... was unintended." ***Id.*** at 70, 295 N.W.2d at 207.

The holding in ***Patrick*** is based on the fact that the damage was unintentional; the employees of the Cooperative did not intend to cut trees located outside of the Cooperative's easement. In this case, the complaint did not allege that Oakfield's conduct was unintentional. The complaint alleged that Oakfield took the boulders "knowing it would have to trespass ... and take holey boulders without permission." Because the complaint did not trigger a duty to defend, the attorneys' failure to notify Oakfield's insurer about the lawsuit was not a cause of injury to Oakfield.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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[1] Oakfield argues that the portion of Eden's complaint that alleges that Oakfield took the boulders knowing it would have to trespass and take them without permission refers only to the tortious interference claim, not to the trespassing and conversion claims. The complaint is not broken down into separate causes of action. We cannot read the complaint to mean that Oakfield knew it would have to knowingly take the boulders away without permission for purposes of one claim, but did not know for the purposes of the other claims.