COURT OF APPEALS
DECISION
DATED AND RELEASED

August 12, 1997

NOTICE

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

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

No. 96-1998

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

JAY W. SMITH AND DEBRA J. SMITH,

PLAINTIFFS,

WEST BEND MUTUAL INSURANCE COMPANY,

INTERVENOR-PLAINTIFF-RESPONDENT,

V.

PAUL KATZ, D/B/A UNDERROOF BUILDING AND DESIGN AND ROBERT L. REISINGER, JR.,

DEFENDANTS,

PHILIP A. GIUFFRE,

DEFENDANT-THIRD PARTY PLAINTIFF-APPELLANT,

DAVID A. AND MARY A. STAWSKI,

THIRD PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Philip A. Giuffre appeals from a judgment and an order declaring that West Bend Mutual Insurance Company has no duty to defend or indemnify him for the lawsuit filed by Jay W. and Debra J. Smith, which alleged that Giuffre misrepresented the condition of a real estate lot sold to the Smiths. Giuffre claims the trial court erred in its declaration because: (1) the complaint alleges that the misrepresentation caused the damages, triggering a duty to defend; (2) the Smiths claim that the misrepresentation caused property damages covered by the policy; and (3) the "premises you sell" exclusion does not apply. Because West Bend's policy contains an exclusion which applies to preclude coverage, we affirm the decision of the trial court.[1]

I. BACKGROUND

In July 1991, the Smiths purchased a vacant lot located at 5064 South 101st Street in Greenfield from Giuffre. The purchase price was $29,000. Two years later, the Smiths hired Underroof Building and Design to construct a residence on the land. As alleged in the amended complaint, during construction "the entire foundation hole filled up with water and the foundation kept collapsing and collapsed three to four times." The complaint alleges that Giuffre failed to disclose the existence of "underground and surface springs and water problems."

[1] Based on our disposition of this case on the basis of the policy exclusion, we need not address Giuffre's additional claims of error. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

The Smiths completed the construction of the residence and then filed a lawsuit against Giuffre alleging breach of warranty, intentional misrepresentation, strict responsibility misrepresentation and negligent misrepresentation. The Smiths filed an amended complaint adding claims for breach of contract against Underroof and negligence against Underroof's engineer, Robert Reisinger. West Bend, as Giuffre's Commercial General Liability insurer, intervened in this action when Giuffre tendered the defense to West Bend. Subsequently, West Bend filed a motion for summary judgment asking the trial court to declare that it had no duty to defend or indemnify on the claim. The trial court granted the motion and dismissed West Bend from the lawsuit. The trial court denied Giuffre's motion for reconsideration of this decision. Giuffre now appeals.

II. DISCUSSION

This appeal arises from the trial court's grant of summary judgment. Summary judgment is governed by § 802.08, STATS. *See* ***Shannon v. Shannon***, 150 Wis.2d 434, 441, 442 N.W.2d 25, 29 (1989). Summary judgment methodology is well established and will not be repeated here. *See* ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). Our review is *de novo*. *See* ***id.*** at 115, 334 N.W.2d at 582. Further, this case involves the interpretation of an insurance contract, which is a question of law that we review independently from the trial court. *See* ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis.2d 206, 212, 341 N.W.2d 689, 691 (1984).

In granting the motion for summary judgment and dismissing West Bend from the case, the trial court relied on various provisions of the insurance policy. We examine only that part of the trial court's decision relating to the

exclusion, which forms the basis for our decision. As grounds for declaring that West Bend was not obligated to defend or indemnify Giuffre, the trial court cited the exclusion found within the policy which states: "This insurance does not apply to … '[p]roperty damage' to … [p]remises you sell … if the 'property damage' arises out of any part of those premises."

The trial court concluded that based on this exclusion, the allegations of the Smith complaint were not covered under the plain language of the West Bend policy. In reaching this determination, the trial court reasoned:

> This is property that was sold, and the question is did the property damage arise out of any part of those premises? Well, the property damage arises out of a condition that existed on the property, which the plaintiff said was not revealed, such that construction on the real property was substantially likely to be damaged because of the pitch of ground water.
>
> What does the word premise mean? Premise is not defined in the policy. Court would look to an established mean[ing] under the law for the word premise. In that regard the court is looking to the latest edition of Black's Law Dictionary, which defines premises in the subheading quote, "In estates and property." And here is the definition. "Lands and tenements. An estate, including land and buildings thereon, the subject matter of a conveyance."
>
> It's very clear that all of the property, not just the buildings, are the premises as that term is commonly used in the law. So the question is whether or not the ground water on the premises causing the damage to the structure later built, is excluded from coverage under section 2 J 2.
>
> Court finds the plain meaning of section 2 J 2, "Premises you sell, if the property damage arises out of any part of those premises" is applicable here, as the property damage does arise out of any part of those premises, it arises out of the part of the premises which has ground water seeping up through it. And so therefore, the motion for summary judgment is granted.

We agree with the trial court. The Commercial General Liability insurance policy issued by West Bend specifically provides:

> **2. Exclusions.**
>
> This insurance does not apply to:
>
> ….
>
> **j.** "Property damage" to:
>
> ….
>
> **(2)** Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises[.]

Giuffre argues that West Bend is obligated to defend this action because the complaint alleges that the misrepresentation caused property damage. Absent the above exclusion, we would agree. The policy, however, does contain the exclusion and therefore, there is no coverage under the policy.[2]

Giuffre argues that the exclusion does not apply because the complaint alleges damages to the basement of the home and because he did not sell the Smiths the home. In other words, he contends that the "premises you sell" exclusion would only apply if he had sold the Smiths the lot with a house already constructed on it. We are not persuaded.

As noted by the trial court, "premises" includes both the land and the buildings on it. As alleged in the complaint, the damage to the home resulted from ground water seeping or pressing against the Smiths' basement walls. This ground

[2] The policy also contains an "intentional acts" exclusion, which the trial court relied on in concluding that the policy did not provide coverage for property damage expected or intended. Giuffre does not contest this ruling.

water was a part of the land that Giuffre sold to the Smiths. Therefore, the property damage to the Smiths' home arose out of "any part of the premises sold." Thus, the exclusion applies. There is no coverage under the plain meaning of West Bend's policy.

We also reject Giuffre's contention that for the exclusion to apply, the property damaged must be a part of the premises at the time the premises was sold. In other words, he argues that because the damage did not occur until two years post-sale of the vacant lot, the damage did not exist at the time of the sale, and, therefore, cannot be considered a part of the premises sold. In rejecting this argument, we adopt the trial court's reasoning:

> It doesn't really in any way, shape, or form require that the property damage has to be in exist[e]nce prior to the date of sale. It just says the property damage has to arise out of any part of the premises. So if I warrant these premises are appropriate for construction, and then that construction occurs and there's property damage, that property damage arises out of a part of the premises and falls squarely into this exclusion.

For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

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