

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2001

Cornelia G. Clark
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. 01-0729
STATE OF WISCONSIN

Cir. Ct. No. 98-CV-35

**IN COURT OF APPEALS
DISTRICT III**

**WILLIAM PALMER, KAREN PALMER, AND COMMERCIAL
CREDIT CORPORATION,**

PLAINTIFFS-RESPONDENTS,

v.

DUPONT MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
ROBERT A. KENNEDY, Judge. *Reversed and cause remanded for further
proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dupont Mutual Insurance Company appeals a summary judgment ordering it to pay the limits of its homeowners insurance policy issued to William and Karen Palmer. Dupont argues that the Palmers were not occupying their house as a dwelling under WIS. STAT. § 632.05(2), the valued

policy law, when a fire destroyed their house. We conclude that summary judgment was inappropriate because the undisputed facts allow for reasonable competing inferences. Therefore, we reverse the judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The following facts are undisputed. The Palmers owned a house in Elcho. Dupont issued a homeowners insurance policy to the Palmers with policy limits of \$45,000. In early May 1997, the house was destroyed by fire.

¶3 Prior to the fire, in November 1996, the Palmers separated and Karen moved out of the house. When she left, she took some of the dressers, clothes, and toys. However, by March 1997, the Palmers had reconciled and David began spending time at Karen's residence in Pelican Lake.

¶4 During the month before the fire, William spent approximately five to ten overnights at the Elcho house. The last time he spent a night at the house was approximately two weeks before the fire. William also allowed an acquaintance, Bruce Scott, to stay in the home for a week or two before the fire. William visited Scott at the Elcho house two or three days before the fire.

¶5 During the same time, a mortgage holder commenced an action for foreclosure on the Elcho house. Fearing the personal property at the house would be seized as a result of the foreclosure, William removed the refrigerator, stove, and the washer and dryer and placed them in a rented storage garage. William also had the heat and water turned off, but kept the electricity on.

¶6 At the time of the fire, the home contained working smoke alarms, a hide-a-bed, recliner, dresser, table, lamps, vacuum cleaner, bedding, glasses,

plates, clothes and small appliances such as an oscillating fan, coffee maker, heater, and a television radio. William also had a vehicle and a boat parked at the house.

¶7 After the fire, Dupont calculated the fair market value of the destroyed house at \$18,000 and paid that amount to the mortgage holders. The Palmers filed suit against Dupont demanding that it pay the policy limits.

¶8 Both parties moved for summary judgment. The circuit court concluded that, as a matter of law, the Palmers were occupying their house as a dwelling at the time of the fire. Therefore, Dupont was required to pay its policy limits under WIS. STAT. § 632.05(2).

STANDARD OF REVIEW

¶9 Whether summary judgment was appropriate presents a question of law that we review independently of the circuit court. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). Summary judgment is appropriate if there is no genuine issue about both the material facts and the inferences that can reasonably be drawn from those facts. *See* WIS. STAT. § 802.08(2); *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). A motion for summary judgment carries with it the "explicit assertion that the movant is satisfied that the facts are undisputed and that on those facts he is entitled to judgment as a matter of law." *Powalka v. State Mut. Life Assurance Co.*, 53 Wis. 2d 513, 518, 192 N.W.2d 852 (1972). Therefore, when only one reasonable inference can be drawn from those undisputed facts as a matter of law, reciprocal motions for summary judgment waive the right to a jury trial. *Id.*

DISCUSSION

¶10 The trial court found that the Palmers were occupying the Elcho house as a dwelling at the time of the fire. Both parties agree that the historical facts are undisputed. However, they disagree about the inferences that may be drawn from those facts. Therefore, the issue on appeal is whether only one reasonable inference can be drawn from the facts.

¶11 WISCONSIN STAT. § 632.05(2), the valued policy law, states:

Whenever any policy insures real property which is owned and *occupied by the insured as a dwelling* and the property is wholly destroyed, without criminal fault on the part of the insured or the insured's assigns, the amount of the loss shall be taken conclusively to be the policy limits of the policy insuring the property. (Emphasis added.)

Several elements must be present in order for the valued policy law to apply. The property must be owned by the insured, the property must be occupied by the insured as a dwelling, the property must be wholly destroyed, and there must be no criminal fault on the part of the insured or his or her assigns.

¶12 The only element at issue here is whether the Palmers occupied the Elcho house as a dwelling. While application of WIS. STAT. § 632.05(2) to a set of facts is a question of law, whether the property here was occupied by the insured as a dwelling presents a question of fact.

¶13 Dupont challenges the circuit court's conclusion that the Palmers were occupying the Elcho house as a dwelling at the time of the fire. Dupont contends that William's occasional use of the house, removing some of the personal property, and allowing Scott to reside at the house all support its

contention that the Palmers were not occupying, and in fact had abandoned, the Elcho house as a dwelling.

¶14 On the other hand, the Palmers argue that they continued to occupy the Elcho house as a dwelling despite the fact that they were spending most of their time at the Pelican Lake house. The Palmers contend that they were attempting to refinance and eventually move back into the Elcho house. According to the Palmers, the occasional use of the house, allowing Scott to stay there, and keeping some of their personal property on the premises, all indicate that they were still occupying the Elcho house.

¶15 By both moving for summary judgment, each party asked the circuit court to rule that the conclusion it drew about whether the Palmers occupied the Elcho house as a dwelling was the only reasonable conclusion that could be drawn. Undisputed as well as disputed facts can create material issues necessitating a trial. See *Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 446, 492 N.W.2d 131 (1992). Summary judgment is appropriate only if there is no genuine issue about both the material facts and the inferences that can reasonably be drawn from those facts. *Id.*

¶16 Here, William had retained some personal property at the Elcho house. He kept a hide-a-bed and some furniture like a recliner and a table. Some of his and the children's clothes were there. The electricity was on and there were working fire alarms. Further, there were simple appliances at the house like a fan, coffee maker, vacuum cleaner, a small television radio, and lamps. William had a vehicle and a boat parked next to the house. William also slept there for five to ten nights in the month preceding the fire. From these facts, a jury could reasonably infer that William still occupied the house as a dwelling.

¶17 On the other hand, William had shut off the water and heat and moved the major appliances into storage. Karen had not stayed at the house since the previous year, and had taken the beds and dressers along with most of the children's clothes. Most of the items of value were removed. William was staying most nights at Karen's. Further, Scott was staying at the Elcho house. From these facts, a jury could reasonably infer that the Palmers had abandoned the house and that the Palmers were not occupying it as a dwelling.

¶18 We conclude that, under the facts of this case, whether WIS. STAT. § 632.05(2) applies is not a matter that can be determined by summary judgment. The circuit court could not, as a matter of law, say that the Palmers were either occupying or not occupying the Elcho house as a dwelling under § 632.05(2) because a reasonable jury could return a verdict in favor of either party. Therefore, summary judgment was inappropriate.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

