COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2318 **Cir. Ct. No. 2002CV2022**

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

FIRST AMERICAN TITLE INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

DENNIS A. DAHLMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Dennis A. Dahlmann appeals a circuit court order granting declaratory judgment to First American Title Insurance Company,

ruling Dahlmann's title insurance policy did not cover the claim Dahlmann presented to First American. Dahlmann argues the encroachment of a real estate improvement onto adjacent property creates a defect in his title and impairs the marketability of the land from which the improvement originated. Dahlmann further argues First American's deletions from the title insurance commitment, including its survey exception, results in coverage against encroachments on adjacent property under the final title insurance policy. Finally, Dahlmann contends that even if First American denies coverage, ambiguities created within the policy must be construed in favor of coverage. We disagree with all these contentions and affirm the circuit court's order.

FACTS

¶2 The facts of this case are undisputed. Dahlmann bought certain real estate in the City of Madison (the City), a hotel property known as the Madison Inn, from a person not a party to this lawsuit. The property abuts Frances Street, which is owned by the City. At the time of the closing in January 1999, Dahlmann acquired a title insurance policy from First American. The closing officer was a First American employee and the closing occurred at one of First American's offices. An attorney represented Dahlmann during this transaction.

¶3 In connection with the closing, the seller provided a 1994 survey done by Jeffrey Johnson (the Johnson survey) along with an affidavit indicating there were no changes to the size or location of the improvements on the property since the date of the 1994 survey. First American issued a written title insurance commitment prior to the closing. At the request of Dahlmann's attorney and in reliance on the Johnson survey and the seller's affidavit, a First American-authorized employee made certain handwritten deletions to the commitment.

These deletions eliminated the following exceptions to coverage in the final policy:

> 1. Any discrepancies or conflicts in boundary lines, any shortages in area, or any encroachment or overlapping of improvements.
>
> 2. Any facts, rights, interests or claims which are not shown by the public record but which could be ascertained by an accurate survey of the land.
>
> ….
>
> 10. Public or private rights in such portion of the subject premises as may be presently used, laid out or dedicated in any manner whatsoever, for street, highway, and/or alley purposes.

¶4 Approximately three years after Dahlmann purchased the Madison Inn, he learned that a portion of the hotel's underground parking garage encroached on Frances Street. The City sought to collect an annual fee from Dahlmann for the privilege of this encroachment by a separate legal action in municipal court. Neither Dahlmann nor First American had actual prior knowledge of the encroachment. In addition, neither the Johnson survey nor the seller's affidavit, presented at the closing, revealed any part of the underground parking garage as encroaching on Frances Street.

¶5 However, old building plans show the encroachment existed at the time of the closing. The seller had left the old building plans in a box at the Madison Inn; Dahlmann or his representative obtained the old building plans within a week of the closing. The encroachment by the underground parking garage had apparently existed since the Madison Inn was built in 1960. The title insurance company had not examined the old building plans prior to issuing the title insurance policy. Dahlmann's attorney had also not examined the old building plans at the closing. Dahlmann's attorney did not see the old building

plans until more than three years later when the City discovered the encroachment while making street repairs.

¶6 Dahlmann turned to First American for a defense and indemnification for his damages. First American in turn filed this action seeking a declaration it was not liable to Dahlmann under the policy. Dahlmann counterclaimed for damages.

¶7 The parties waived a jury trial and later submitted the case on stipulated facts. This Stipulation incorporated numerous documents as exhibits and also held Dahlmann's counterclaim in abeyance pending resolution of the insurance coverage issue. On June 7, 2004, the circuit court granted declaratory judgment in favor of First American, concluding there was no title insurance coverage for Dahlmann's claim. The circuit court did not address Dahlmann's counterclaim. Dahlmann appeals.

DISCUSSION

¶8 "Title insurance policies are subject to the same rules of construction as are generally applicable to contracts of insurance." ***Laabs v. Chicago Title Ins. Co.***, 72 Wis. 2d 503, 510, 241 N.W.2d 434 (1976). "Application of the terms of an insurance policy to established facts is a question of law." ***Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co.***, 144 Wis. 2d 68, 77, 423 N.W.2d 521 (1988). We review questions of law without deference to the circuit court's conclusions. ***Id***.

¶9 An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy**.** ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. The first issue in construing an

insurance policy is to determine whether an ambiguity exists regarding the disputed coverage issue. ***Id***., ¶13. Insurance policy language is ambiguous "if it is susceptible to more than one reasonable interpretation." ***Id***. (citation omitted). If there is no ambiguity in the language of an insurance policy, it is enforced as written, without resort to rules of construction or applicable principles of case law. ***Id***. If there is an ambiguous clause in an insurance policy, we will construe that clause in favor of the insured. ***Id***.

¶10 Dahlmann first argues the encroachment of the underground parking garage, an improvement to real estate, onto adjacent property creates a defect in title and impairs the marketability of his property. We disagree.

¶11 A title insurance contract is a contract of indemnity. ***Blackhawk Prod. Credit Ass'n***, 144 Wis. 2d at 78. "Its purpose is to indemnify the insured for impairment of its interest due to failure of title as guaranteed in the title insurance reports." ***Id***. "[I]t protects against losses sustained in the event that a specific contingency, such as the discovery of an unexpected lien affecting title, occurs." ***Id***. A title insurance company

> is not an abstractor of title employed to examine title. Rather, a title insurance company guarantees the status of title and insures up to the policy limits against existing defects. Thus, the only duty undertaken by a title insurance company in issuing a policy of insurance is to indemnify the insured up to the policy limits against loss suffered by the insured if the title is not as stated in the policy.

Greenburg v. Stewart Title Guar. Co., 171 Wis. 2d 485, 493, 492 N.W.2d 147 (1992).

¶12 Schedule A of the title insurance policy at issue here describes the insured land as follows: "Lot Seven (7), and the East 25 feet of Lot Six (6), Block

Seven (7), Original Plat of the City of Madison, Dane County, Wisconsin. Tax ID: 60-0709-143-0201-6." Schedule A sets forth the entire statement of the scope of the land insured. There is no mention of Frances Street or of any building or structure encroaching onto any street or of any rights beyond the platted lots.

¶13 The policy specifically states it does not insure any rights outside of the land described in Schedule A. The policy defines "land" as

> the land described or referred to in Schedule (A), and improvements affixed thereto which by law constitute real property. The term "land" *does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy*.

(Emphasis added.) Thus, by the terms of the policy itself, "land" does not include any property other than that listed in Schedule A and specifically does not include any right or interest in abutting streets, roads, avenues or alleys.

¶14 A title insurance policy insures an owner's title to a given description of land and only that description of land. What is at issue here is an improvement that goes beyond that description of the land and encroaches onto other land. Dahlmann asks First American for compensation for an encroachment upon adjacent property; he, in essence, asks First American to insure that part of Frances Street upon which his land encroaches. However, First American never agreed to insure anything beyond the boundaries of the description of land provided in the policy; that description does not include Frances Street.

¶15 Dahlmann next argues First American's deletions from the title insurance commitment, including its survey exception, results in coverage against

encroachments on adjacent property under the final title insurance policy as issued. We disagree. The removal of certain coverage exceptions did not create coverage against encroachments on Frances Street.

¶16 "A title commitment is a document which describes the property as the title insurer is willing to insure it and contains the same exclusions and general and specific exceptions as later appear in the title insurance policy." ***Greenberg***, 171 Wis. 2d at 488. Exclusions from coverage do not grant coverage:

> We first observe that the clauses under consideration here are exclusion clauses-not coverage clauses. A reasonable person in the position of the insured should, thus, be put on notice that these portions of the policy limit coverage rather than confer it. Such clauses *subtract* from coverage rather than grant it.

Bulen v. West Bend Mut. Ins. Co., 125 Wis. 2d 259, 263, 371 N.W.2d 392 (Ct. App. 1985).

¶17 Dahlmann and First American stipulated that First American strike certain exceptions from the policy. By removing these exceptions, the policy provided coverage against matters affecting the land described in Schedule A. The removal of those exceptions did not expand the quantity of land insured by the policy or cause the policy to insure ownership of improvements outside the land described in Schedule A. The deletion of the survey exceptions simply meant that, had someone else had an improvement encroaching on the described parcel, that encroachment would be covered because the survey exceptions were removed. Removal of the exceptions does not extend the property description to include items beyond the described boundaries.

¶18 Finally, Dahlmann contends that even if First American denies coverage, the ambiguities created within the policy must be construed in favor of

coverage. Because we conclude the policy is not ambiguous, we reject this argument.

¶19 If an insurance policy is ambiguous as to coverage, it will be construed in favor of the insured. ***Folkman***, 264 Wis. 2d 617, ¶16. Provisions in an insurance policy are ambiguous if the language is "'susceptible to more than one reasonable interpretation.'" ***Id***., ¶13 (citation omitted).

¶20 Dahlmann's assertion that the policy is ambiguous seems to center around the deletion of the survey exception. His argument appears to be that the policy admittedly provides no coverage under Schedule A and its definition of "land" but the removal of the survey exception implicitly creates coverage and thus ambiguity. We have previously concluded the removal of the exception did not create coverage; thus the policy is not ambiguous.

¶21 The language of Schedule A is plain, clear and unambiguous. The policy in question insures "Lot Seven (7), and the East 25 feet of Lot Six (6), Block Seven (7), Original Plat of the City of Madison, Dane County, Wisconsin. Tax ID: 60-0709-143-0201-6" and nothing more. The deletion of the survey exception does not render this clear and unequivocal description ambiguous. Therefore, we do not construe the title insurance policy in favor of coverage.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.