COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 2007

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. 2006AP2484 **Cir. Ct. No. 2005CV938**

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

SANDERFOOT MASONRY, INC. AND CUSTOM PAINTING & WALLPAPERING, INC.,

PLAINTIFFS,

V.

TOD W. RAEHL, D/B/A RAEHL CONSTRUCTION COMPANY, AND JULIE RAEHL, D/B/A RAEHL CONSTRUCTION COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

DAVID SEXTON AND KRISTINE SEXTON,

THIRD-PARTY DEFENDANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Tod Raehl and Julie Raehl, d/b/a Raehl Construction Co., appeal from a summary judgment relieving their insurer, Acuity, of its duty to defend and dismissing Acuity from the case. Raehl contends that the allegations against it, if proven, would give rise to liability under the terms and conditions of its commercial general liability insurance policy, and would therefore trigger Acuity's duty to defend. Because we agree with the circuit court that the allegations found within the four corners of the complaint fail to sufficiently allege facts showing or allowing for the inference of an occurrence as defined in the policy, we affirm the judgment of the circuit court.

BACKGROUND

¶2 On August 9, 2005, Sanderfoot Masonry, Inc. brought a breach of contract action against Raehl Construction seeking payment for work performed on a house built for David and Kristine Sexton. Sanderfoot was a subcontractor on the Sexton house and Raehl Construction was the general contractor. Raehl Construction then brought a third-party breach of contract claim against the Sextons for failing to pay Raehl Construction the full amount of the contract. Soon after, the Sextons filed a counterclaim against Raehl Construction. The counterclaim alleged that Raehl Construction breached its contract with the Sextons and was liable for "defective performance, damage to their property,

slander of title" and other costs and expenses related to the construction of the home.

¶3 Raehl Construction tendered the defense of this lawsuit to Acuity under a commercial general liability (CGL) insurance policy. Acuity accepted the defense under a full reservation of rights. Acuity moved for a declaratory judgment, arguing that it owed no duty to defend Raehl Construction because the claims in the Sextons' complaint did not allege "property damage" caused by an "occurrence," and that in any case, they would fall under certain exclusions found in the policy.

¶4 The circuit court heard arguments and granted Acuity's motion. It concluded that the Sextons' complaint alleged only faulty workmanship and not an occurrence. Because the court ruled that there was no coverage, it did not address the question of whether any of the exclusions applied. At a reconsideration hearing on September 21, the court again ruled that Acuity did not have a duty to defend Raehl Construction. Raehl Construction appeals.

DISCUSSION

¶5 Summary judgment is properly granted if no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. ***Dempich v. Pekin Ins. Co.***, 2006 WI App 24, ¶8, 289 Wis. 2d 477, 710 N.W.2d 691, *review denied*, 2006 WI 108, 292 Wis. 2d 410, 718 N.W.2d 724. An appeals court reviews a grant of summary judgment *de novo*, and applies the same standards and methodology as the circuit court. ***Raymaker v. American Family Mut. Ins. Co.***, 2006 WI App 117, ¶10, 293 Wis. 2d 392, 718 N.W.2d 154, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 204.

¶6 Whether an insurer has a duty to defend under an insurance policy is a question of insurance contract interpretation subject to *de novo* review. ***1325 North Van Buren, LLC v. T-3 Group, Ltd.***, 2006 WI 94, ¶23, 293 Wis. 2d 410, 716 N.W.2d 822. "Insurance policies are construed as they would be understood by a reasonable person in the position of the insured," but will not be interpreted to provide coverage for risks that the insurer did not underwrite and for which it has not collected a premium. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

¶7 A CGL policy is designed to protect the insured against liability for damages the insured's negligence causes to third parties. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶27, 233 Wis. 2d 314, 607 N.W.2d 276. "The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself ...." ***Weedo v. Stone-E-Brick, Inc.***, 405 A.2d 788, 791 (N.J. 1979) (citation omitted).

¶8 The interpretation of an insurance contract requires this court to take three steps. We must first determine whether the policy's insuring agreement makes an initial grant of coverage by examining the facts of the insured's claim; "[i]f it is clear that the policy was not intended to cover the claim asserted, the analysis ends there." ***American Girl***, 268 Wis. 2d 16, ¶24. If the initial grant of coverage is triggered by the claim, this court must then look to the policy's exclusions and determine whether any preclude coverage. ***Id.*** Should an exclusion apply, we lastly look for an exception to that exclusion that would reinstate coverage. ***Id.***

¶9 A standard CGL policy, as is found in this case, covers sums of money the insured becomes legally obligated to pay as a result of property damage caused by an occurrence. ***Id.***, ¶27. Raehl's policy contains the following language:

> **LIABILITY AND MEDICAL EXPENSES COVERAGES**
>
> 1. **Business Liability**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury*, *property damage*, *personal injury* or *advertising injury* to which this insurance applies. We will have the right and duty to defend the insured against any *suit* seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for *bodily injury*, *property damage*, *personal injury* or *advertising injury* to which this insurance does not apply.
>
> ….
>
> **LIABILITY AND MEDICAL EXPENSES DEFINITIONS**
>
> ….
>
> 12. "*Occurrence*" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> ….
>
> 15. "*Property damage*" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the *occurrence* that caused it.

¶10 The duty to defend is triggered not by extrinsic evidence, ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992), but rather by the allegations found within the four corners of a complaint. ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis. 2d 824, 835, 501 N.W.2d 1 (1993). The duty to defend depends on the nature of the complaint and not its merits, and if there is any doubt as to the duty to defend, it must be resolved in favor of the insured. ***Elliott v. Donahue***, 169 Wis. 2d 310, 321, 485 N.W.2d 403 (1992). When considering the complaint in comparison to the insurance policy, the allegations within the complaint are to be construed liberally. ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666.

¶11 Raehl contends that allegations of "property damage" caused by an "occurrence" are found within the Sextons' complaint, specifically, the Sextons' allegation that Raehl Construction is:

> liable to the Sextons for any and all amounts that the Sextons have paid in excess of the original contract price of $1,516,214.40 ... in addition to further sums to compensate the Sextons for defective performance, *damage to their property*, slander of title, amounts paid by the Sextons to other parties, costs incurred by the Sextons to remedy Raehl's breach ...." (Emphasis added.)

¶12 Under well-established case law, CGL policies do not cover faulty workmanship, only damage to other property caused by faulty workmanship. *See, e.g.*, ***Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer***, 2006 WI App 161, ¶30, 295 Wis. 2d 556, 721 N.W.2d 704; ***Kalchthaler v. Keller Constr. Co.***, 224 Wis. 2d 387, 395, 591 N.W.2d 169; ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 265, 371 N.W.2d 392 (Ct. App. 1985). While faulty workmanship may *cause* an occurrence, faulty workmanship, by itself, is not an occurrence. ***Glendenning's***, 295 Wis. 2d 556, ¶30.

¶13 Raehl's CGL policy defines an "occurrence" as an "accident." The Wisconsin Supreme Court in ***American Girl*** looked to BLACK'S LAW DICTIONARY 15 (7th ed. 1999), to define "accident" as used in accident policies, and found it to be "an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." ***American Girl***, 268 Wis. 2d 16, ¶37. The distinction is helpful here, where the Sextons' complaint does refer to "damage to their property" but does not allege, or allow for the fair inference of, an "accident" or "occurrence." At best, the Sextons' complaint alleges faulty workmanship, which is not enough to trigger coverage under the CGL policy.

¶14 ***American Girl*** involved the construction of a warehouse. The CGL policyholder, a general contractor, hired a soil engineering subcontractor to conduct an analysis of soil conditions. ***Id.***, ¶¶1, 3. The subcontractor gave faulty advice regarding soil conditions and preparation, resulting in excessive settlement of the building. ***Id.***, ¶3. This resulted in leaking windows, shifted sewer lines, and deformed steel supports, in addition to other problems. ***Id.***, ¶14. The court found that the unexpected settling of soil (which so damaged this warehouse that it was later dismantled) was an "occurrence" under the CGL policy in question. ***Id.***, ¶¶16, 38.

¶15 Raehl concedes that the Sextons' complaint does not expressly use the term "occurrence" or "accident," but argues that "[i]t only makes sense" that an "occurrence" be inferred from the complaint. Referring to both ***American Girl's*** dictionary definition of "occurrence" and that court's conclusion that the settling of the soil that damaged the warehouse was an "occurrence" under the policy, Raehl contends that parallels may be drawn between the facts of that case and the one at hand.

¶16 Raehl suggests that the "occurrence" in this case is self-evident. Since there is no logical reason why Raehl Construction would intentionally cause harm to property, it must follow that any "damage to property" must have been caused by accident and, therefore, demonstrates an "occurrence." However, the ***American Girl*** court distinguished between the cause of an occurrence and the occurrence itself. In that case, the faulty workmanship of the soil engineer caused the "occurrence" that damaged the building, it was not the occurrence itself. The court stated, "[t]he damage to the [warehouse] occurred as a result of the ... settlement of the soil underneath the building. [The soil engineer]'s inadequate site-preparation advice was a cause of this exposure to harm." ***Id.***, ¶38.

¶17 This distinction is key. The Sextons' complaint makes a reference to "damage to property," but does not say anything about damage to property other than the faulty work performed by Raehl and its subcontractors. While it is certainly true that as in ***American Girl***, "[n]o one seriously contends that the property damage ... was anything but accidental," ***id.***, the Sextons' complaint simply does not allege any damage beyond the flawed work.

¶18 Whether the Sextons' counterclaim expressly used the word "occurrence" is not controlling here: this court acknowledges that complaints are to be construed liberally, ***Fireman's Fund***, 261 Wis. 2d 4, ¶20, and that a defendant insured is not held at the mercy of the plaintiff's complaint. Nevertheless, the allegations found within the four corners of the Sextons' counterclaim allege, at most, faulty workmanship.

¶19 Because we conclude there is no initial grant of coverage under Raehl Construction's CGL policy, it is unnecessary for us to consider whether the policy contains any exclusions precluding coverage, nor whether there are

exceptions to those exclusions. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (when a decision on one point disposes of the appeal, we need not address other issues raised).

CONCLUSION

¶20 We conclude that Acuity does not owe a duty to defend Raehl Construction under Raehl's CGL policy. Though we have construed the Sextons' counterclaim liberally, we ascertain no allegation of damage caused by an "occurrence," and therefore coverage is unavailable and Acuity is relieved of its duty to defend. Accordingly, we affirm the circuit court's summary judgment.

By the Court.—Judgment affirmed.

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