COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2008

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. 2007AP1763 **Cir. Ct. No. 2006CV2710**

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

TOLDT WOODS CONDOMINIUMS OWNER'S ASSOCIATION, INC.,

PLAINTIFF,

V.

MADELINE SQUARE, LLC AND GEOFFREY R. ROBINSON,

DEFENDANTS-APPELLANTS,

MADELINE SQUARE CONDOMINIUM OWNERS' ASSOCIATION, INC., CARL DRALLE, VIRGINIA DRALLE, CHANDRASEKHR MOTHUKURI, MADHURI VEMURI, JUDITH L. CHIN, AUDREY A. HOUSTON, AND REAZ RASUL,

DEFENDANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Reversed and cause remanded with directions.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 NEUBAUER, J. Madeline Square, LLC, and Geoffrey R. Robinson (hereinafter collectively referred to as Madeline Square) appeal from a summary judgment entered in favor of their insurer, Acuity, a Mutual Insurance Company. The issue presented is whether Acuity has a duty to defend claims made against defendants, Madeline Square, LLC, and Geoffrey R. Robinson, by Toldt Woods Condominiums Owner's Association, Inc., relating to the construction of condominiums on Madeline Square's property. The determination turns on (1) whether Toldt Woods' complaint alleges an "occurrence" under Acuity's comprehensive general liability (CGL) policy; (2) whether policy exclusions preclude coverage, and (3) whether Toldt Woods seeks "damages" covered by the policy.

¶2 We conclude that Toldt Woods' complaint, construed liberally in favor of Madeline Square, alleges an occurrence; that the policy exclusions do not preclude a defense; and Toldt Woods' claims seek "damages." In sum, we conclude that Acuity has a duty to defend Madeline Square against Toldt Woods' claims and, therefore, reverse the trial court's grant of summary judgment in favor of Acuity and remand for further proceedings.

BACKGROUND

¶3 Toldt Woods filed a complaint seeking a temporary injunction and other relief for, among other things, damages allegedly caused by Madeline Square's negligence during the construction of a condominium development

located next to the Toldt Woods condominiums. Madeline Square tendered its defense to Acuity.

¶4 Acuity filed a motion for leave to intervene, bifurcate and stay proceedings. Acuity subsequently moved for declaratory relief contending that it had no duty to defend or indemnify Madeline Square. Madeline Square opposed Acuity's request.

¶5 The trial court held a hearing and found that "the property damage that is alleged in this complaint was actually caused by the negligent construction of the easement and the pond and thus the property damage … was not caused by an occurrence within the meaning of that term under Acuity's policy." The court agreed with Acuity that "the alleged property damage as stated in this complaint in fact is an anticipated consequence of alleged faulty workmanship." The trial court additionally found that the trespass claim fell under the "intentional act" exclusion in Acuity's policy.

¶6 The trial court found that Acuity had no duty to defend or indemnify Madeline Square and granted Acuity's motion for summary and/or declaratory judgment. Madeline Square appeals.

DISCUSSION

¶7 *Standard of Review*. The issue on appeal is whether Acuity has a duty to defend Madeline Square against Toldt Woods' claims. This presents a question of law which we review de novo. ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992). The insurer's duty to defend is triggered by the allegations within the four corners of the complaint. ***Midway Motor Lodge v. Hartford Ins. Group***, 226 Wis. 2d 23, 30, 593 N.W.2d 852 (Ct. App. 1999). To

determine whether a duty to defend exists, we compare the allegations in the complaint to the terms of the insurance policy—first looking to see whether the policy makes an initial grant of coverage and if so, whether any policy exclusions apply. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666; ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶8, 280 Wis. 2d 624, 695 N.W.2d 883. A duty to defend exists when the allegations in the complaint, if proven, "give rise to the possibility of recovery" under the policy. ***Fireman's Fund***, 261 Wis. 2d 4, ¶19.

¶8 In making this narrow inquiry, we bear in mind that the complaint is construed liberally in favor of the insured and the insured is entitled to the benefit of all reasonable inferences from the facts pled in the complaint. ***Id***., ¶20. In addition, doubts over whether coverage exists due to incomplete or ambiguous information in the complaint are resolved in favor of the insured. ***Monfils v. Charles***, 216 Wis. 2d 323, 331, 575 N.W.2d 728 (Ct. App. 1998). If there is a possibility of recovery on any covered claim in the complaint, the insurer must provide a defense to the entire lawsuit, even if the other allegations are not covered by the policy. ***Bradley Corp. v. Zurich Ins. Co.***, 984 F. Supp. 1193, 1198 (E.D. Wis. 1997).

¶9 *Toldt's Complaint*. The Toldt Woods complaint states three claims: (1) breach of covenants and negligent construction practices; (2) breach of covenants and negligent construction of a pond; and (3) trespass. Madeline Square focuses our inquiry on Toldt Woods' first claim, and specifically, the allegations of negligent construction practices.

¶10 Relevant to the first claim, the complaint alleges: Madeline Square was developing a condominium project on its land which is located next to Toldt

Woods Condominiums. Toldt Woods complains that it has been "inundated by mud rivers and other damage arising out of defective or non-existent erosion control practices during the period of construction of Madeline Square Condominium." Toldt Woods complains of Madeline Square's "land-disturbing [construction] activities" "during its construction of the Madeline Square Condominium," alleging that Madeline Square failed to comply with the provisions of local ordinances which required an erosion and sediment control plan intended to minimize to the extent practicable soil erosion and the transport of sediment from land-disturbing activities to waters of the state or other property. Toldt Woods further alleges that, even subsequent to a stop-work order from the Town of Brookfield, Madeline Square failed to mitigate erosion problems: "dirt piles remain unprotected and are substantially eroded by rainfall; the paths for calculated overland water flow have been blocked by sediment; required silt fences are lacking; grading activities which have loosened the soil have resulted in mud rivers flowing down the slopes and down and across the private drives of Toldt Woods Condominiums."

¶11 The first claim additionally alleges that "[t]he construction practices of … Madeline Square … failed to conform with state law and local ordinances; were not workmanlike; and constituted negligent construction activity…. As a direct and proximate consequence of the negligence, the breach of covenants, and the violation of state and local law, the plaintiff has suffered substantial injury."

¶12 Toldt Woods' second claim complains of Madeline Square's failure to construct a pond in conformity with storm water management plans which called for two retention ponds, "one of them to be located on Toldt Woods land along a natural course of water which eventually flowed to wetlands." Attached to the complaint as an exhibit is a Storm Water Drainage Easement and Agreement

which addresses construction of the storm water retention pond on Toldt Woods property. Madeline Square agreed to pay for the construction and maintenance of the pond and related improvements, and Toldt Woods granted the easement to Madeline Square for the purpose of maintaining, replacing and using the pond and the runoff areas leading to the pond for drainage and retention purposes. Madeline Square agreed to indemnify Toldt Woods for liabilities, claims, damages and expenses for property damage arising out of the construction, maintenance and use of the pond. The easement does not address construction activities on the Madeline Square property.

¶13 The prayer for relief includes a request for a preliminary injunction and for compensatory and statutory damages.

¶14 *Acuity's Policy*. Acuity issued a commercial general liability (CGL) policy to Madeline Square, LLC, effective August 20, 2006. The relevant provisions are as follows.

> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury* or *property damage* 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* or *property damage* to which this insurance does not apply….
>
> b. This insurance applies to *bodily injury* and *property damage* only if:
>
> (1) The *bodily injury* or *property damage* is caused by an *occurrence* that takes place in the *coverage territory*[.]

¶15 Acuity's CGL policy defines "occurrence" as: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Property damage is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property," and "[l]oss of use of tangible property that is not physically injured."

¶16 *Occurrence*. The threshold question is whether Toldt Woods' complaint alleging damages from mud rivers flowing from the Madeline Square construction site onto Toldt Woods property alleges property damage caused by an "occurrence." The parties direct us to several recent cases addressing whether claims of faulty workmanship allege property damage caused by an "occurrence." ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65; ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, 295 Wis. 2d 556, 721 N.W.2d 704; ***Kalchthaler v. Keller Constr. Co.***, 224 Wis. 2d 387, 591 N.W.2d 169 (Ct. App. 1999).[1] These cases establish that "a CGL policy does not cover faulty workmanship, only faulty workmanship that causes damage to other property." ***Kalchthaler***, 224 Wis. 2d at 395 (citing ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 265, 371 N.W.2d 392 (Ct. App. 1985) ("The policy in question … does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.")).

[1] The policies in ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, ¶21, 295 Wis. 2d 556, 721 N.W.2d 704, ***American Family Mutual Insurance Co. v. American Girl, Inc.***, 2004 WI 2, ¶37, 268 Wis. 2d 16, 673 N.W.2d 65, and ***Kalchthaler v. Keller Construction Co.***, 224 Wis. 2d 387, 395, 591 N.W.2d 169 (Ct. App. 1999), contained nearly the same "occurrence" definition as that contained in the Acuity policy—"an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶17 Thus, in ***Kalchthaler***, the court found that there was a covered "occurrence" when the parties agreed that the subcontractor's work resulted in windows that leaked, causing water damage to the interior of a residence. ***Id.*** at 391. The court stated:

> The policy applies to property damage caused by an occurrence. Property damage, as defined by the policy, means physical injury to tangible property. Here, water entering leaky windows wrecked drapery and wallpaper. This is a physical injury to tangible property. An occurrence, as defined in the policy, is an accident. An accident is an "event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes producing an unfortunate result." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1993). Here, the parties have stipulated that fifty percent of the damages were due to [the subcontractors'] negligence. Furthermore, there is no question that an event occurred: the window leaks. This is an accident. So we have property damage caused by an occurrence and the policy applies.

Id. at 397. "[T]he 'occurrence' was the leaking of the windows; it was not the faulty workmanship." ***Glendenning's***, 295 Wis. 2d 556, ¶29; *see also* ***American Girl***, 268 Wis. 2d 16, ¶48.

¶18 In ***American Girl***, the CGL policyholder, a general contractor, hired a soil engineering subcontractor to analyze site soil conditions for construction of a warehouse. ***American Girl***, 268 Wis. 2d 16, ¶¶1, 3. The subcontractor's faulty advice regarding soil conditions and site preparation resulted in excessive settlement of the building. ***Id***., ¶3. The soil settlement caused multiple structural problems with the warehouse, and its eventual dismantling. ***Id***., ¶¶14, 16. The court found that the subcontractor's faulty advice caused the unexpected settling of soil—an "occurrence" under the CGL policy. Looking to the dictionary definition of "occurrence" the court held, "The word 'accident,' in accident

policies, means 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*." ***Id.***, ¶37 (citing BLACK'S LAW DICTIONARY 15 (17th ed. 1999)) (emphasis added). In that case, no one contended that the cause of the property damage (the settling soil) was intentional or expected, thus, the property damage to the building was the result of an "occurrence." ***Id.***, ¶38. *See also* ***Glendenning's***, 295 Wis. 2d 556, ¶30 (construing ***American Girl*** to hold that "faulty workmanship may cause, or be a cause of, an 'occurrence,' such as the leaking of windows or the settling of soil under a building"; faulty workmanship is not in itself an "occurrence.")

¶19 In ***Glendenning's***, a general contractor sought coverage under its CGL policy for breach of contract and implied warranty claims arising out its subcontractor's alleged negligent improvements to a dairy facility. ***Id.***, ¶¶2, 4. The plaintiffs alleged that the subcontractors had poured and finished concrete cow stalls with an inadequate slope; the cow stalls were not built to specifications and had to be repaired; the subcontractors improperly installed stall loops and loose, irregular neck bars; manure and urine puddled due to inadequate slopes; and a scraper damaged rubber mats installed by the general contractor or his subcontractors. ***Id.***, ¶6.

¶20 The court determined that the claim of improperly installed rubber mats, which were damaged by the scraper that cleaned manure from them, alleged an "occurrence." ***Id.***, ¶42. The subsequent unanticipated event—the scraper damaging the mats—was not intended. By contrast, the claims of faulty workmanship associated with the irregularly installed stall loops and neck bars did not allege that the faulty workmanship caused an event or accident that caused property damage. ***Id.***, ¶43. The "only cause alleged for these [other problems] is

the negligent work of the subcontractors and that … does not, in itself, constitute an 'occurrence.'" ***Id***.

¶21 Acuity contends that the allegations in Toldt Woods' complaint are limited to faulty workmanship and not an occurrence arising from faulty workmanship. We reject Acuity's argument. We conclude that Toldt Woods' allegations of damage caused to the Toldt Woods' property by the negligent erosion control practices during construction of the Madeline Square condominium allege an "occurrence." Toldt Woods alleges that the mud rivers flowing onto the Toldt Woods property, resulting in substantial injury to Toldt Woods, *arose from* faulty workmanship in the management of the construction area. The faulty workmanship—the unprotected dirt piles, the failure to maintain sufficient silt fences, allowing paths for calculated overland flow to be blocked by sediment and performing grading activities which have loosened soil—resulted in the means or cause of the alleged substantial injury—mud rivers flowing onto Toldt Woods' property.[2]

¶22 Acuity argues that the consequences (i.e., the mud rivers) caused by Madeline Square's failure to follow the construction site erosion control plan were an expected cause of the property damage, and thus, not an accident. However,

[2] In both its appellate and circuit court briefs, Acuity acknowledges that Toldt Woods' complaint alleges property damage. Acuity points to allegations in the complaint relating to the negligent construction practices resulting in the "transport of sediment" and "property damage to the pond and paths for calculated overland water flow." Therefore, while at the oral argument the issue of whether the complaint had sufficiently alleged property damage was raised, Acuity's briefing reveals that it did. *See* ***Midway Motor Lodge v. Hartford Ins. Group***, 226 Wis. 2d 23, 35, 493 N.W.2d 852 (Ct. App. 1999) ("[T]he complaint must give the defendant fair notice of not only the plaintiff's claim but 'the grounds upon which it rests' as well."). Further, an issue raised at oral argument but not developed in the briefs is deemed waived. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

based on the four corners of the complaint, we are satisfied that the negligence allegations, if proven, give rise to a possibility of recovery—that these mud rivers were not an anticipated consequence of the negligent construction practices. We decline Acuity's invitation to construe the allegations of the complaint to conclude that Madeline Square anticipated the means or cause of the property damage, i.e., that it was no accident that the mud rivers flowed onto Toldt Woods' property.[3] Instead, we adhere to the well-established law that when the allegations in the complaint, if proven, *give rise to the possibility of recovery* under the policy, a duty to defend exists. ***Fireman's Fund***, 261 Wis. 2d 4, ¶19.[4]

¶23 *Exclusions*. We next look to see if any exclusions apply; exclusions are narrowly or strictly construed against the insurer and any ambiguities are resolved in favor of coverage. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990). Acuity argues that the damages alleged fall under its contractual liability exclusion, damage to property exclusion and damage to your product exclusion. We disagree.

¶24 Acuity's contractual liability exclusion precludes coverage for "*Bodily injury* or *property damage* for which the insured is obligated to pay

[3] The duty to defend is broader than the duty to indemnify because "the duty to defend arises from allegations contained in the complaint, whereas the duty to indemnify is supported by fully developed facts." ***Acuity v. Bagadia***, 2008 WI 62, ¶52 (citing ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶¶19-20, 261 Wis. 2d 4, 660 N.W.2d 666). "Accordingly, an insurer may be obligated to defend claims that it ultimately may not be obligated to indemnify." ***Acuity***, 261 Wis. 2d 4, ¶52 (citing ***Fireman's Fund***, 261 Wis. 2d 4, ¶¶20-21).

[4] We do not examine the other claims because there is one theory of liability which falls within the policy's coverage, and as such, the insurer has a duty to defend the entire lawsuit. ***Bradley Corp. v. Zurich Ins. Co.***, 984 F. Supp. 1193, 1198 (E.D. Wis. 1997).

damages by reason of the assumption of liability in a contract or agreement." Attached to Toldt Woods' complaint is the Storm Water Drainage Easement and Agreement that Madeline Square and Toldt Woods entered into prior to the construction of a storm water retention pond on the Toldt Woods property. In the Easement Agreement with Toldt Woods, Madeline Square agreed to indemnify Toldt against "all liability, suits, actions, claims, costs, damages, liens, and expenses … because of any injuries or damages received or sustained by any persons or property on account of or arising out of the construction, use and/or maintenance of the Pond …."

¶25 Madeline Square contends that the contractual liability exclusion does not preclude a defense because Toldt Woods' "claims for damages resulting from the overflow of water, mud and sediment onto the Toldt Woods property do not relate to the storm water pond, but instead relate to the alleged failures on the part of Madeline Square … during the course of construction of Madeline's condominium project." We agree with Madeline Square that, construing the complaint liberally and resolving all ambiguities in favor of the insured, Toldt Woods' allegations in the first claim relate to the construction of the Madeline Square condominium, and not the construction of the pond (which is addressed in the second claim). Therefore, Madeline Square's agreement to indemnify Toldt

Woods against liability stemming from the construction of the pond does not result in the application of the contractual liability exclusion.[5]

¶26 Acuity also relies on the "damage to property" exclusion to preclude coverage. The damage to property exclusion excludes coverage for "[t]hat particular part of real property on which you or any contractors or sub-contractors working directly or indirectly on your behalf are performing operations, if the *property damage* arises out of those operations; …" Here, Madeline Square is claiming coverage for damages on Toldt Woods' property which arose out of the condominium construction on Madeline Square's property. The allegations are not limited to property on which Madeline Square was performing operations. The damage to property exclusion is not applicable to this third-party property damage claim.

¶27 Lastly, Acuity relies on the "damage to your product" exclusion to preclude coverage. The damage to your product exclusion excludes coverage for "[*p*]*roperty damage to your product* arising out of it or any part of it." "Your product" is defined as "[a]ny goods or products other than real property, manufactured, sold, handled, distributed or disposed of by" Madeline Square. The damage to your product exclusion is not applicable to this third-party property damage claim, as it falls under the exception for real property.

[5] While the parties did not brief the issue, or discuss the exclusion in full, we also question whether Acuity's application of the exclusion to this indemnity is inconsistent with ***American Girl***. In that case the supreme court explained that contractually assumed liability exclusions do not apply to all liability arising out of a contract. The relevant distinction "is between incurring liability as a result of a breach of contract and specifically contracting to assume liability for another's negligence." ***American Girl***, 268 Wis. 2d 16, ¶¶57-59; *see also,* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶¶33-35, 304 Wis. 2d 750, 738 N.W.2d 578.

¶28 None of the business risk exclusions apply to Toldt Woods' claims pertaining to the condominium construction activities. We therefore reject Acuity's argument that the duty to defend is precluded by its policy exclusions.

¶29 *Request for Relief.* Acuity also contends that Toldt Woods' "request for injunctive/equitable relief does not constitute damages in the context of the policy." In support, Acuity points to Toldt Woods' request for an order enjoining and restraining Madeline Square from continuing with construction activities and from using or being allowed to use the water retention pond. It also cites to the supreme court's decision in ***Johnson Controls, Inc. v. Employers Insurance of Wausau***, 2003 WI 108, ¶48, 264 Wis. 2d 60, 665 N.W.2d 257, for the proposition that, when equitable relief is requested, sums required to be paid constitute "damages" within a CGL policy only if those sums are paid to compensate a past wrong or injury.

¶30 However, Acuity inexplicably fails to address Toldt Woods' allegations of damages in its complaint, allegations of past wrongs and injuries, and the additional request for "compensatory and statutory damages in an amount to be determined at trial." Toldt Woods sufficiently alleges "damages" under the Acuity policy. We therefore reject Acuity's argument.

CONCLUSION

¶31 We conclude that Toldt Woods' complaint alleges a claim for "property damage" arising out of an "occurrence" for which there is a possibility of recovery under Acuity's policy. We further conclude Acuity's policy exclusions do not preclude the potential coverage for this claim and that the damages alleged in the complaint fall under the scope of the policy. As such, Acuity owes a duty to defend to Madeline Square against the entirety of Toldt

Woods' lawsuit. We reverse the trial court's grant of declaratory and/or summary judgment in favor of Acuity and remand with directions to enter judgment consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.