COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2009

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. 2009AP592 **Cir. Ct. No. 2007CV542**

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

CAMELOT DEVELOPMENT GROUP, LLC, CDG BELGIUM GROCERY, LLC, BELGUIM VILLAGE MARKET, LLC, WILLIAM EISEMAN AND NANCY EISEMAN,

PLAINTIFFS,

V.

JIM KARRELS TRUCKING SAND & GRAVEL, INC. AND JIM KARRELS,

DEFENDANTS-APPELLANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed*.

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

¶1 PER CURIAM. In this duty-to-defend case, Jim Karrels Trucking Sand & Gravel and Jim Karrels ("Karrels") appeal an order granting summary judgment to Acuity, a Mutual Company, Karrels' commercial general liability insurer. The circuit court concluded that Acuity owed Karrels no duty to defend against the breach of contract, negligence and slander of title claims Camelot Development Group, LLC ("Camelot") and CDG Belgium Grocery, LLC ("CDG") filed against Karrels. We agree and affirm.

¶2 CDG owns property on which it intended to construct the Belgium Village Market, a retail grocery store. In October 2006, Camelot, as CDG's general contractor, subcontracted with Karrels for excavation and grading work preparatory to the construction of the Village Market. William and Nancy Eiseman own Camelot, CDG and the Village Market. Problems arose. In August 2007, Camelot asked Karrels to cease all work on the project.

¶3 Camelot and CDG filed suit alleging that Karrels (1) breached the contract by failing to follow plans and specifications, (2) negligently damaged the property through grading and drainage errors and (3) slandered their title by placing on the property liens supported by information Karrels knew or should have known was false. *See* WIS. STAT. § 706.13(1) (2007-08).[1] They claimed damages in excess of $1 million, including over $832,000 in lost profits because the Village Market's opening was delayed. Acuity undertook a defense of Karrels under a reservation of rights, was permitted to intervene, and sought a declaration

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

either that it had no duty to defend or indemnify Karrels or of the limits of its obligations under the policy.[2]

¶4 Acuity then moved for summary judgment on grounds that it had no duty to defend or indemnify Karrels. It contended that the policy did not make an initial grant of coverage for the claims Camelot and CDG set forth in its amended complaint because none of the claims allege an "occurrence," and because breach of contract and slander of title do not state claims for property damage. *See* ***Vogel v. Russo***, 2000 WI 85, ¶17, 236 Wis. 2d 504, 613 N.W.2d 177, *overruled in part on other grounds*, ***Insurance Co. of N. Am. v. Cease Elec. Inc.***, 2004 WI 139, ¶25 n.6, 276 Wis. 2d 361, 688 N.W.2d 462; *see also* ***Everson v. Lorenz***, 2005 WI 51, ¶25, 280 Wis. 2d 1, 695 N.W.2d 298. Acuity also argued that its "damage to property," "impaired property" and "intentional act" exclusions also barred coverage. Camelot and CDG moved to amend the complaint a second time to add the Eisemans and the Village Market as plaintiffs and to assert all claims directly against Acuity. Camelot and CDG emphasized that they "are not seeking to add *any* new factual allegations…. Rather, the proposed amendments will add only parties in interest to match the allegations already made."

¶5 The circuit court addressed both motions at a single hearing. Seeing no prejudice to any of the parties, the court permitted Camelot and CDG to amend the complaint. As to summary judgment, Acuity acknowledged it may have a duty to defend claims the newly added parties might make, but argued that it had

[2] Acuity issued two consecutive policies during the time frame at issue. As the relevant provisions are identical in both, we will refer to "the policy" rather than "policies."

no obligation to defend Karrels for Camelot's and CDG's current claims. The circuit court agreed, and granted summary judgment. Karrels appeals.

¶6 We first emphasize that this appeal is limited to addressing whether Acuity has a duty to defend against the claims of Camelot and CDG. Claims regarding lost profits, flooding of the Eisemans' adjacent property or damages to the Village Market were not Camelot's and CDG's to make. Such claims were not properly before the circuit court and are not before us here.

¶7 We review summary judgment decisions de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Here we apply that methodology while interpreting an insurance contract. The interpretation of an insurance contract also is a question of law that we review de novo. *See* ***Frost v. Whitbeck***, 2002 WI 129, ¶5, 257 Wis. 2d 80, 654 N.W.2d 225.

¶8 An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. ***Estate of Sustache v. American Fam. Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. The duty is triggered by the allegations within the four corners of the complaint. ***Id.*** A duty to defend exists when the allegations in the complaint, if proved, "give rise to the possibility of recovery" under the policy. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. That coverage exists under the facts in the complaint need only be "fairly debatable" for there to be a duty to defend. *See* ***Liebovich v. Minnesota Ins. Co.***, 2007 WI App 28, ¶3, 299 Wis. 2d 331, 728 N.W.2d 357, *affirmed*, 2008 WI 75, 310 Wis. 2d 751, 751 N.W.2d 764. If even one theory in a complaint appears to fall within the policy's coverage, the insurer is obligated to defend the

entire action. ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶8, 280 Wis. 2d 624, 695 N.W.2d 883.

¶9 Camelot's and CDG's complaint[3] states claims for breach of contract, negligence and slander of title. Specifically, it alleges that Karrels failed to perform the agreed-upon excavation and grading services, damaged the property by cutting trenches, miscalculating the grade and creating pools of trapped water, failed to timely and properly complete the work, and slandered Camelot's and CDG's title by filing falsely supported claims for lien. The plaintiffs' answers to interrogatories asserted that Karrels hit drain tile on the property, causing flooding to the property and to land adjacent to it,[4] leading to construction delays which in turn delayed the opening of the Village Market. Camelot's and CDG's claimed damages relate to the cost of repairing Karrels' allegedly negligent work, completing that left unfinished under the contract and lost profits from the delayed store opening.

¶10 The CGL policy Acuity issued Karrels during the time frame at issue provided in relevant part:

> **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of … *property damage* to which this insurance applies. We will have the right and duty to defend the insured against any *suit*

[3] "Complaint," which we use for simplicity, refers to the first amended complaint so as not to confuse it with the second amended complaint which added three new plaintiffs.

[4] The adjacent land is owned by newly added plaintiffs Nancy and William Eiseman.

> seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for … *property damage* to which this insurance does not apply
>
> ….
>
> b. This insurance applies to … *property damage* only if:
>
> (1) The … *property damage* is caused by an *occurrence* that takes place in the coverage territory

"Property damage" means either physical injury to tangible property including loss of its use or loss of use of tangible property that is not physically injured. "Occurrence" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶11 Karrels asserts that Acuity owes a duty to defend because there is arguable coverage for at least some of what Camelot's and CDG's complaint alleges. Specifically, Karrels contends that the negligence claim, expanded upon in the answers to interrogatories, alleges physical injury to tangible property—the broken drain tile with consequent flooding of the subject property and adjacent property—and also alleges loss of use of tangible property—the resultant delays in the construction project and store opening. Karrels argues that this property damage was caused by an "occurrence," his inadvertent damaging of the drain tile.

¶12 Acuity disputes that Karrels' unintended striking of the drain tile constituted an "occurrence" but asserts that, even if it is, at least one of the policy exclusions precludes coverage. For the reasons set forth below, we agree that at least one exclusion applies. Accordingly, we bypass the issue of whether there was an occurrence within the meaning of the policy.

¶13 The policy states the following exclusions to Coverage A:

> This insurance does not apply to:
>
> ….
>
> **j. Damage to Property**
>
> *Property damage* to:
>
> ….
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the *property damage* arises out of those operations;
>
> (6) That particular part of any property that must be restored, repaired or replaced because *your work* was incorrectly performed on it.

¶14 Acuity contends that exclusion j(5) bars coverage because, as Nancy Eiseman testified at deposition, all of the damage from Karrels' faulty workmanship was to the land itself and occurred while Karrels was performing his operations on it. She specifically testified that no damage other than wetting to the land resulted from Karrels allegedly hitting drain tile and that she "would like to stress" she did not know if he hit it at all. The construction manager likewise testified that he was not aware of damage to any property other than the land on which Karrels was working. Acuity also argues that exclusion j(6) bars coverage because, according to Nancy Eiseman, all of the damages Camelot and CDG claim are to restore, repair or replace work Karrels deficiently performed.

¶15 Naturally, Karrels disagrees. He contends the j(5) exclusion applies only to damages arising out of the insured's "operations," and he was not "performing operations" on the drain tile when he struck it. The j(6) exclusion

similarly does not apply, he argues, because it bars coverage only for damage occurring when "your work was incorrectly performed on it" and, again, he was not "perform[ing work]" on the drain tile, but on the land. In support, Karrels directs us to several cases in which courts in other jurisdictions applied comparable exclusions to arguably similar facts and found coverage.[5] We focus our discussion on ***EOTT Energy Pipeline Limited Partnership v. Hattiesburg Speedway, Inc.***, 303 F. Supp. 2d 819 (S.D. Miss. 2004), the closest to this case.

¶16 There, the Hattiesburg Speedway operated a racetrack on property under and through which EOTT operated and maintained an oil pipeline by virtue of a right-of-way duly recorded in county land records. ***Id.*** at 820. The Speedway had a CGL policy through T.H.E. Insurance covering its racing operations. ***Id.*** While grading a road to the racetrack, the grader driver struck the pipeline with the grader blade, causing an extensive oil spill. ***Id.*** EOTT sued the Speedway, alleging negligence, and filed a declaratory action against T.H.E. to establish coverage, seeking damages for repair of the pipeline, the cost of cleaning up the

[5] *See also* ***Columbia Mut. Ins. Co. v. Schauf***, 967 S.W.2d 74, 76-77, 80-81 (Mo. 1998) (en banc) (j(5)-type exclusion barred coverage only for damage to kitchen cabinets after subcontractor, hired to finish all of a home's interior and exterior surfaces, was cleaning equipment after lacquering kitchen cabinets and his pump generator started a fire that caused extensive damage throughout the house); ***American Equity Ins. Co. v. Van Ginhoven***, 788 So. 2d 388, 389, 391 (Fla. Dist. Ct. App. 2001) (j(5) and (6) exclusions barred only coverage for swimming pool replacement after contractor hired to perform minor repairs to pool surface negligently drained the pool, damaging it, as well as the heating system, pump, deck, screen enclosure, landscaping and sprinkler system); ***Cincinnati Ins. Co. v. Federal Ins. Co.***, 166 F. Supp. 2d 1172, 1184 (E.D. Mich. 2001) (j(6) exclusion did not bar coverage when component of machine being reassembled fell and struck another portion of the same machine because contractor did not "incorrectly perform" work on the damaged part); and ***ACUITY v. Burd & Smith Constr., Inc.***, 721 N.W.2d 33, 42 (N.D. 2006) (j(5)- and (6)-type exclusions did not bar coverage for rainstorm water damage to interior of apartment building after roofing contractor failed to protect building during roof replacement, and interior not the "particular part" those exclusions reference).

spill and complying with regulatory authorities, the cost of oil lost in the spill, and lost profits from oil delivery disruption. ***Id.*** T.H.E. moved to dismiss. ***Id.***

¶17 The court concluded that neither property damage exclusion, which track the j(5) and (6) exclusions at issue here, barred coverage. *See* ***id.*** at 826. The court stated that Speedway was not working on EOTT's pipeline but on the road above it. ***Id.*** Thus, the pipeline was not "'real property' on which Hattiesburg Speedway was 'performing operations'" and the "it" on which the grader driver's work was incorrectly performed was the road. ***Id.***

¶18 The circuit court here saw it differently. It reasoned that, while difficult to "parse out" a piece of real property, an oil pipeline is "totally disassociated" from the roadway, whereas drain tile buried in a farm field is "so associated with the property that [Karrels] wasn't working on something different when he damaged the drain tile. He was working on the property. Itself." We agree.

¶19 The pleadings in ***EOTT Energy*** are telling. Although hired to work on the road surface, the complaint there alleged that the grader driver negligently caused the grader blade to strike the pipeline, rupturing it and causing a costly oil spill. The prayer for relief reflected the costs generated by the damage to the pipeline itself, the consequent cleanup, and the lost profits. The complaint here, by contrast, alleges defective workmanship on and damage to "the subject property," not to the drain tile. The supplemental itemization of damages does not mention repair to the tile. Claims for flood damages on neighboring property and the over $832,000 lost profits were not Camelot's and CDG's claims to make.

¶20 The j(5) and (6) exclusions bar coverage for property damage to "[t]hat particular part" of the property being worked on. We agree with the circuit

court that the drain tile was intrinsically tied to"[t]hat particular part" of the property being worked on, thus also precluding coverage for damages involving it.

¶21 Acuity next contends that the "impaired property" exclusion bars coverage because Camelot and CDG have no claim for loss of use. That exclusion essentially bars coverage for damage to unusable or less useful tangible property that, if repaired, can be restored to use. A loss-of-use claim requires that the property be rendered useless. *See* ***Everson***, 280 Wis. 2d 1, ¶29. The allegedly impaired property is a four-foot strip of land intended for use as parking spaces but currently unusable in that capacity due to Karrels' improper grading. Nancy Eiseman testified, however, that the area currently is in use, albeit as a swale, and its intended use could be regained through repair of Karrels' grading errors.

¶22 Finally, Acuity asserts that the "intentional act" exclusion bars coverage for slander of title because Camelot and CDG would have to prove that Karrels filed, documented or recorded against them a "knowingly" made false, sham or frivolous claim of lien. *See* ***Kensington Dev. Corp. v. Israel***, 142 Wis. 2d 894, 902-903, 419 N.W.2d 241 (1988); *see also* WIS. STAT. § 706.13(1).

¶23 We address these exclusions no further because Karrels does not raise them. Rather, he rests on the argument Camelot and CDG offered at summary judgment that at least another of the theories fall within the policy's coverage obligating Acuity to defend the entire action. *See* ***State Farm Fire & Cas. Co.***, 280 Wis. 2d 624, ¶8. While we are to construe pleadings liberally, we conclude that Camelot and CDG have not sufficiently pled that they suffered property damage to other than the particular of the property on which Karrels was performing operations. The j(5) and/or (6) exclusions apply.

By the Court.—Order affirmed.

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