**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 8, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP1835** **Cir. Ct. No. 2009CV169**

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

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**THE SELMER COMPANY,**

**PLAINTIFF-APPELLANT,**

**V.**

**SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA AND THE CHARTER OAK FIRE INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. The Selmer Company appeals an order dismissing its claims for insurance coverage against Selective Insurance Company of South Carolina and The Charter Oak Fire Insurance Company on summary judgment.

Selmer contends that there are genuine issues of material fact as to whether the insurance policies provide coverage, necessitating trial. The insurance companies contend that their policies exclude coverage on the undisputed facts of this case. We conclude that there are no material facts in dispute and the insurance policies exclude coverage. Accordingly, we affirm.

## *Background*

¶2 Selmer entered into a contract with the United States Army Corps of Engineers for Selmer to construct a United States Army Reserve Center in Wausau. Selmer entered into a subcontract with Premier Roofing, Inc., for Premier to do the roofing work on the project. Premier installed the roof in November and December 2006. In June 2007, Selmer's project manager discovered that nail heads were sticking through the shingles on the roof.

¶3 Selmer had an insurance policy with Charter Oak. Premier had an insurance policy with Selective from March 31, 2006 to March 31, 2007, which named Selmer as an additional insured. Selmer brought this action for coverage under both policies for the costs of replacing the damaged roof.

¶4 Selective moved for summary judgment, arguing that the undisputed facts established that the damage to the roof occurred in June 2007, outside of the coverage period under the policy it issued to Premier. Charter Oak also moved for summary judgment, arguing that an exclusion in its policy precludes coverage for Selmer's claim. The circuit court granted summary judgment to the insurance companies. Selmer appeals.

## *Standard of Review*

¶5 We review a circuit court's decision on summary judgment de novo, applying the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Under WIS. STAT. § 802.08(2) (2009-10),[1] a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

## *Discussion*

*Selective Insurance Company*

¶6 Selmer contends that summary judgment was improperly granted to Selective because there is evidence in the record that the roof was constructed during the policy period. Selmer contends that Wisconsin follows the "negligent act" rule, which requires insurance coverage when the negligent act causing the damage occurred during the policy period, citing ***Lund v. American Motorists Insurance Co.***, 797 F.2d 544 (7th Cir. 1986), and ***Western Casualty & Surety Co. v. Budrus***, 112 Wis. 2d 348, 332 N.W.2d 837 (Ct. App 1983). It asserts that, under the negligent act rule, the fact that the roof was constructed during the policy period brings the damage to the roof within Selective's coverage.

¶7 Selmer's reliance on ***Lund*** and ***Budrus*** is misplaced. In ***Lund***, 797 F.2d at 545, the Seventh Circuit analyzed an insurance policy that provided

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

coverage "for property damage 'caused by accident,'" and that "applie[d] to 'accidents which occur during the policy period.'" The court determined that "Wisconsin has adopted the 'negligent act' rule of insurance coverage. Wisconsin courts have found that, in general, the negligent act (such as the negligent design and construction of the roof), as opposed to the resulting damage (the collapse of the roof), triggers coverage under the insurance policy." ***Id.*** at 546. The court stated that when an insurance policy uses the term "occurrence," coverage is "triggered by the negligent or wrongful act, not the resulting injury, unless the policy specifically states that the resulting injury must occur during the policy period." ***Id.*** at 547. It then applied the same analysis to use of the term "accident." ***Id.*** at 547-48.

¶8 In ***Budrus***, 112 Wis. 2d at 351, we analyzed an insurance policy that provided coverage for "property damage caused by an occurrence." Under that policy, "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"; "property damage" was defined as "loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period." ***Id.*** at 351-52. We rejected the insurer's claim that there was no "occurrence" during the policy period because only the accident, not the resulting property damage, fell within the policy period. ***Id.*** at 352. We said that the policy did not contain a requirement that the damage arise during the policy period. ***Id.***

¶9 Here, Selective asserts that its insurance policy contains specific language requiring that the property damage occur within the policy period to trigger coverage.[2] Selective's policy provides: "This insurance applies to … 'property damage' only if: (1) The … 'property damage' is caused by an 'occurrence' …; [and] (2) The … 'property damage' occurs during the policy period." We agree with Selective that, by its plain language, Selective's policy requires that the property damage occur during the policy period to trigger coverage. Unlike the insurance policies in ***Lund*** and ***Budrus***, which required that an occurrence or an accident transpired within the policy period but did not require that the resulting damage arose within the policy period, Selective's policy expressly requires the property damage occur within the policy period.[3] Because

[2] Selective argues that Selmer did not raise an argument based on the "negligent act" rule in the circuit court, and therefore may not assert it on appeal. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983). Because we reject Selmer's argument on the merits, we need not decide whether it was forfeited.

[3] In its reply brief, Selmer for the first time identifies the following policy language to establish that the property damage occurred at the time the roof was installed:

> "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.

First, we do not address arguments raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492–93, 588 N.W.2d 285 (Ct. App. 1998). Second, Selmer has not explained why, under sub. (a), the "physical injury" would mean the installation of the roof rather than the later damage to the roof; nor has it explained why sub. (b), which applies to loss of use of property that is not physically injured, would apply here, where it is undisputed that the roof was physically injured.

it is undisputed that the damage to the roof occurred in June 2007, outside the Selective policy period as we have discussed above, there are no material facts in dispute as to whether Selmer is entitled to coverage under the policy.[4] Accordingly, we conclude that summary judgment was properly granted to Selective.

*Charter Oak Fire Insurance Company*

¶10 Selmer contends that the circuit court improperly granted summary judgment to Charter Oak because there is a disputed issue of fact as to whether Charter Oak's policy provides coverage for the damaged roof. Selmer concedes that the Charter Oak policy has an exclusion for "your work" that was incorrectly performed, which applies to the improperly constructed roof. Selmer contends, however, that there is evidence to support a jury finding that the roofing project falls within an exception to the exclusion.

¶11 The exception at issue is the following. The Charter Oak policy provides that the "your work" exclusion does not apply to property damage included in the products-completed operations hazard (PCOH). The PCOH includes property damages arising out of "your work" that occurs away from premises the insured owns or rents, but does not include work that has not yet been completed. It provides that work will be deemed completed under various scenarios, including "[w]hen that part of the work done at a job site has been put

[4] In the circuit court, Selmer argued that there was a genuine issue of material fact as to whether the damage to the roof occurred before the end of the Selective policy period on March 31, 2007. On appeal, Selmer does not argue that there is any dispute that the damage to the roof occurred in June 2007, although it characterizes the damage as becoming manifest at that time.

to its intended use by any person or organization other than another contractor or subcontractor working on the same project." Thus, if the work is not completed under this definition, the PCOH exception to the "your work" exclusion does not apply. Selmer concedes that the Army Reserve Center, as a whole, had not been put to its intended use by anyone other than another contractor or subcontractor working on the building when the roof damage occurred. Selmer contends, however, that a jury could find that once roof construction was finished, the roof was put to its intended use of protecting the interior of the building by the Army Corps, as distinguished from the roof's role as merely a component of the building. We disagree.

¶12 Selmer has pointed to no evidence in the record to support its argument that the Army Corps put the roof to any intended purpose once the roof work was finished. Instead, Selmer contends that the roof, by its very nature, protects the interior of a building, and that the Army Corps, as the owner of the building, had an interest in protecting the interior. However, by definition, any part of a structure that is completed is being put to its intended use *as a component of the building*, and the owner of the building will have an interest in that component being in place. Following Selmer's reasoning, the Charter Oak policy would apply any time a component of a construction project was completed and then failed. This would effectively nullify the distinction between work that has or has not been completed, because any discrete part of a project, once installed, would be deemed completed.[5] Absent any evidence in this case to support a jury

[5] On this issue, Selmer contends that the circuit court erred in relying on the following passage from ***Bulen v. West Bend Mutual Insurance Co.***, 125 Wis. 2d 259, 371 N.W.2d 392 (Ct. App. 1985), which was subject to criticism in ***American Family Mutual Insurance Co. v. American Girl, Inc.***, 2004 WI 2, ¶40, 268 Wis. 2d 16, 673 N.W.2d 65: "The [commercial general liability insurance] coverage is for tort liability for physical damages to others and not for (continued)

finding that the Army Corps actually put the roof to some particular intended use, as opposed to merely being the future beneficiary of a building that has a roof as a component, such a jury finding would be based on speculation alone. Thus, we conclude summary judgment was properly granted to Charter Oak.

*By the Court.*—Order affirmed.

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

contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." However, Selmer does not develop an argument that ***American Girl*** supports coverage in this case.