

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2011

A. John Voelker
Acting 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. 2010AP2620

Cir. Ct. No. 2009CV102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GERARD G. GEIGER AND KELLY K. GEIGER,

PLAINTIFFS-APPELLANTS,

V.

COLEMAN ENGINEERING COMPANY,

DEFENDANT,

CHICAGO TITLE INSURANCE COMPANY AND DORIS A. HANNEMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Iron County:
MARK MANGERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerard and Kelly Geiger appeal a grant of summary judgment to Chicago Title Insurance Company. The Geigers argue that

Chicago Title had a duty to defend and indemnify them under a title insurance policy against claims in a prior boundary line dispute lawsuit. We affirm.

¶2 The boundary dispute involved adjoining parcels of lake-front property. The two properties were originally part of one larger tract owned by Ray and Joan Wolfe. The Wolfes decided to subdivide some of the land. In 1988, Robert and Doris Hanneman purchased a parcel. The metes and bounds description in the warranty deed referenced “the iron pipe near the shore of Trude lake” located at the northwest corner of the property. In 1991, Bruce and Ellen Gilbert purchased the adjoining parcel to the north. The Hannemans sold their property to the Geigers in 2003. Chicago Title issued a title insurance policy to the Geigers. Coleman Engineering was commissioned to resurvey the lot on behalf of the Geigers, but it was not completed prior to the closing. Several weeks after the closing, the Geigers’ resurvey indicated the shared boundary to be forty-five feet less lake frontage than the Geigers had thought.

¶3 After the Geigers notified the Gilberts of the result of their resurvey, the Gilberts commenced a boundary dispute lawsuit against the Geigers in Washington County, seeking a declaration of the correct property line. Chicago Title rejected a tender of defense by the Geigers. This court affirmed a circuit court judgment in the Gilberts’ favor. *See Gilbert v. Geiger*, 2008 WI App 29, 307 Wis. 2d 463, 747 N.W.2d 188. We concluded that the iron pipe referenced in the legal description most accurately represented the parties’ intent as to the disputed boundary. *Id.*, ¶¶7, 17-21. The Geigers’ deed was subsequently reformed to conform to our decision.

¶4 The Geigers then commenced the present action seeking the recovery of attorney fees and expenses incurred in defending the Gilbert lawsuit

after Chicago Title rejected their tender of defense. Chicago Title moved for summary judgment, asserting that a survey exception to the title insurance policy concerning boundary disputes excluded coverage for the Gilberts' claims. The circuit court granted summary judgment and the Geigers now appeal.¹

¶5 We review de novo a circuit court's grant of summary judgment. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We also interpret insurance contracts de novo. *Rebernick v. Wausau Gen. Ins. Co.*, 2005 WI App 15, ¶5, 278 Wis. 2d 461, 692 N.W.2d 348, *aff'd*, 2006 WI 27, 289 Wis. 2d 324, 711 N.W.2d 621. Absent an ambiguity, we interpret all contracts as the language dictates. *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751.

¶6 “[T]he duty to defend is broader than the duty to indemnify” *Acuity v. Bagadia*, 2008 WI 62, ¶52, 310 Wis. 2d 197, 750 N.W.2d 817. The duty to defend is determined by the complaint and not by extrinsic evidence. *Grube v. Daun*, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992). “If there are allegations in the complaint which, if proven, would be covered, the insurer has a duty to defend.” *Id.*

¶7 The complaint in *Gilbert v. Geiger*, *supra*, did not allege a cause of action for which there was the potential for coverage under the Chicago Title policy. The Gilberts' complaint against the Geigers in the Washington County lawsuit alleged a boundary line dispute:

¹ Doris Hanneman filed a petition to intervene in this appeal, which this court granted on January 31, 2011.

4. The plaintiffs [Gilberts] and the defendants [Geigers] each allege and maintain that the common property lines between their respective real estate parcels are described and located differently.

¶8 In addition, the prayer for relief in the Gilbert complaint seeks “a declaration of rights with respect to the correct property line between the parcels of real estate owned by the plaintiffs [Gilberts] and defendants [Geigers].”

¶9 An exclusion in the Chicago Title policy removed coverage for boundary line disputes. The applicable exclusion stated:

This policy does not insure against loss or damage (and the Company will not pay costs, attorney’s fees or expenses) which arise by reason of the following:

....

(3) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the premises.

Accordingly, there was no coverage because of the boundary line dispute exception in the policy. Chicago Title was not obligated to defend the Geigers.²

¶10 The Geigers insist that not all boundary line disputes are excluded from coverage, but only those “which would be disclosed by an accurate survey[.]” Without citation to the record on appeal, the Geigers insist that an accurate survey would not have disclosed the boundary line dispute in this case,

² Chicago Title contends that the duty to defend is invoked under the policy by “written request by the insured.” Chicago Title contends that the Geigers did not tender their defense until May 2006, approximately one month before trial. Chicago Title insists that “[i]n no event would the Geigers be entitled to payment of defense costs incurred before their tender.” We need not reach this issue because we conclude Chicago Title had no duty to defend the Geigers. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W.2d 663 (1938) (Only dispositive issues need be addressed).

and therefore the survey exclusion does not negate coverage. However, as the circuit court emphasized in its decision granting summary judgment, the Geigers offered no affidavits or other evidence below, such as what an accurate survey would have disclosed. Accordingly, they failed to raise a genuine issue in this regard.

¶11 In contrast to the duty to defend, which is determined by the allegations in the complaint, a duty to indemnify must be supported by fully developed facts. *Acuity*, 310 Wis. 2d 197, ¶52. Here, the fully developed facts established that the Geigers never owned land beyond the iron pipe. Accordingly, there was no duty to indemnify the Geigers for the value of the forty-five feet of lake shore between the iron pipe and the boundary later set by the Geigers' surveyor.

¶12 Finally, Doris Hanneman intervened in this appeal based upon the assertion that she has a question of law in common with Chicago Title. In addition to their claims against Chicago Title, the Geigers had alleged claims against Hanneman for breach of warranty and misrepresentation. Hanneman concedes she did not seek summary judgment in the circuit court. Thus, no supporting, or opposing, affidavits or other proof were submitted concerning the Hanneman claims.³ *See* WIS. STAT. § 802.08(3) (2009-10).

³ Hanneman refers in her response brief to two documents: the warranty deed and the "owner's printed affidavit." The Geigers reply that the "owner's printed affidavit" is not contained in the record on appeal. We cannot discern from Hanneman's citation to Gerard Geiger's deposition an appropriate record citation to the "owner's printed affidavit," and admonish counsel that failure to provide proper citation to the record on appeal in the future may result in sanctions.

¶13 Nevertheless, Hanneman argues that her interests were “covered” by the circuit court’s decision on summary judgment. She reasons that summary judgment was based upon “all of Chicago [Title]’s legal arguments.” According to Hanneman, one of Chicago Title’s arguments was that the Geigers never obtained title to all the land described by their surveyor because the survey was erroneous. No breach of warranty therefore occurred because the Geigers could not rely upon their faulty survey for ownership. Similarly, the warranty deed contained no misrepresentations, but simply conveyed what the court determined Hanneman owned.

¶14 We decline to consider these issues raised by Hanneman for the first time on appeal. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). The circuit court is the appropriate forum for such matters, not an appeal from a judgment to which Hanneman was not a participating party.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

