COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

Appeal No. 2011AP19 **Cir. Ct. No. 2010CV151**

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

SHARON A. HAMANN AND ESTATE OF MARK W. HAMANN,

PLAINTIFFS,

DODGE COUNTY HUMAN SERVICES AND HEALTH DEPARTMENT,

SUBROGATED-PLAINTIFF,

V.

PROGRESSIVE CLASSIC INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

ESTATE OF JOEL T. CAHOON,

DEFENDANT-APPELLANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND UNITED HEALTH CARE OF WISCONSIN, INC.,

DEFENDANTS.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Vergeront, Sherman and Blanchard, JJ.

¶1 PER CURIAM. The Estate of Joel Cahoon appeals an order relieving Cahoon's insurer of its duty to defend in a personal injury action. We affirm.

¶2 Sharon Hamann and the Estate of Mark Hamann (the Hamanns) brought this suit against the Estate of Joel Cahoon (the Estate) and insurance companies. The complaint alleged that Cahoon negligently caused a motor vehicle accident. One of the defendants was Progressive Classic Insurance Company. Progressive moved for a judgment declaring that it is entitled to pay its policy limit of $250,000 per person and be relieved of any further duty to defend Cahoon or the Estate. The circuit court granted the motion. The Estate appeals.

¶3 The Estate first argues that Progressive should not have been released because Progressive's policy limits on property damage had not been exhausted. The Estate's argument appears to be in two parts.

¶4 The first part is that if Progressive's right to be released from defense is to be judged by whether the Hamanns' complaint seeks damages for injury to property, the Estate argues that the complaint does allege such a claim. In support, the Estate points to several passages in the complaint that refer to the plaintiffs' seeking damages, but which do not specify or limit the type of damages sought. These passages are arguably ambiguous and, under notice pleading rules, might be sufficient to allege a claim for property damage, since the factual

allegations of the complaint clearly state that the Cahoon vehicle struck the Hamann vehicle, and thus presumably caused at least some property damage.

¶5 However, we need not try to interpret the complaint in a vacuum. In response to the Estate's argument, Progressive points out that the potential ambiguity as to property damage was discussed by the parties during a hearing on its motion to be released from the case. At that hearing, Progressive's coverage counsel asserted that there is no property claim, which prompted the court to ask the Hamanns' attorney directly whether they seek damages as to property. The attorney responded: "Not that I'm aware of, Your Honor. If it's not in the complaint, then we're not making that claim." After that, Progressive's counsel for the Estate on the merits of the tort action addressed the issue and stated that Progressive had already paid for property damage claimed by the Hamanns.

¶6 The court then turned to counsel for the Estate to clarify the Estate's position. The Estate did not state a position on whether the Hamann complaint makes a property claim. Instead, the Estate argued that regardless of whether it does, Progressive should not be released because it has not paid out its full property limit. The court rejected that argument and, later, counsel for the Estate asked the court to clarify why the unpaid property damage limit does not prevent Progressive's release. The court stated that there is "no claim made in the complaint for it … it's not in the complaint; plaintiff's counsel indicates there's no claim; there's a representation that that has been settled."

¶7 In reply on appeal, the Estate asserts that the statement by the Hamanns' attorney can also be read as saying that they *are* making a property claim, if it appears in the complaint, which the Estate believes it does. The Estate

asserts that the Hamanns' attorney did not stipulate that the complaint contained no property damage claim.

¶8 We reject this argument. It is clear from the hearing that the circuit court ultimately read the complaint as not including a property claim, and that the Hamanns' attorney concurred in that reading. During that hearing, the Estate did not dispute that reading of the complaint. Therefore, the Estate is making this argument for the first time on appeal, and we can reject it on that basis. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (superseded by statute on other grounds). Furthermore, in light of the events at the hearing, it lacks substantive merit. Whatever ambiguity may exist in the text of the complaint was resolved at the hearing in a manner that does not support the Estate.

¶9 The second part of the Estate's argument appears to be that, even if the complaint did *not* seek property damages, Progressive cannot be released from its duty to defend on the bodily injury claim because it has not exhausted its policy limit for property claims. In support of this argument, the Estate relies on ***St. John's Home of Milwaukee v. Continental Cas. Co.***, 147 Wis. 2d 764, 434 N.W.2d 112 (Ct. App. 1988). That case does not support its position.

¶10 In ***St. John's***, the circuit court determined before trial that some of the damages sought from the insureds were not covered by the policy, although some were. ***Id.*** at 778. The court allowed the insurers to pay those covered damages and withdraw from defense. ***Id.*** at 779-80. This left the insureds to defend themselves at trial. ***Id.*** We held that the circuit court erred. We stated that:

> [i]f an insurer owes any money at all under its insurance policy, it must defend, because Wisconsin is one of those states which requires an insurer to exhaust its total policy

> limits before it is freed from the duty to defend. Thus, an insurer in Wisconsin is not freed from the duty to defend until after it pays the maximum amount required under the insurance contract.

Id. at 787.

¶11 The Estate argues that its situation is analogous to that in ***St. John's*** because Progressive has not yet exhausted its property damage limit. However, this case is not analogous because here the insurer *has* exhausted its policy limit as to all damages actually being sought by the plaintiffs. In ***St. John's***, the plaintiffs also sought other damages, and our holding was that the insurer remained obligated to defend as to all damages, including the ones that would be excluded, up to the point of exhausting its policy limit. However, nothing in ***St. John's*** changes the concept that the duty to defend is measured against what the plaintiff actually seeks. Accordingly, we conclude that Progressive can properly withdraw from defending the Estate as to the bodily injury claim being made, even though its policy limit for unmade property damage claims has not been exhausted.

¶12 The Estate next argues that Progressive cannot withdraw because it has not exhausted its $500,000 bodily injury limit per incident, and a claim by Mark Hamann's son Thomas remains to be decided. That claim is not present in this suit, and therefore is irrelevant to the issues before us. Progressive has not been released from defending against that claim.

¶13 The Estate next argues that Progressive did not sufficiently prove that Cahoon actually received the policy with the provision allowing the company to withdraw from defense. The Estate argues that Progressive's affidavits were inadequate. Specifically, it argues that "Progressive's own records show a different postal address" for Cahoon. The Estate's concern appears to be that

some of Progressive's documents show a mailing address for Cahoon that contains a street address, but no post office box, while another document shows the same street address, along with a post office box. There is no merit to the Estate's argument. The absence of the post office box in one version of the address is not enough to support a reasonable inference that Cahoon did not receive the policy at his street address. Therefore, the circuit court properly held that Progressive's affidavits were sufficient. The Estate has not directed us to any affidavits it submitted in opposition.

¶14 Similarly, the Estate argues that Progressive's materials presented three different documents as being the Cahoon policy. Even if true, the Estate fails to explain why that makes a difference. The Estate does not argue that the copies were different in any material way.

¶15 The Estate next argues that the provision allowing Progressive to withdraw is "contextually ambiguous," and therefore unenforceable. Specifically, the Estate argues that the provision is located other than where it should be expected. The Estate does not acknowledge or distinguish the case the circuit court relied on to reject this argument. ***Novak v. American Family Mut. Ins. Co.***, 183 Wis. 2d 133, 515 N.W.2d 504 (Ct. App. 1994). The provision in the present case is similar in language and location to the one we approved in ***Novak***. ***Id.*** at 135-36, 138-40. The Estate offers no reason to reach a different conclusion here.

¶16 The Estate next asserts that Progressive's withdrawal "prejudices their insureds" in some manner. The argument consists of a treatise quotation and a series of rhetorical questions. There is no developed legal argument to respond to.

¶17 Finally, we note that the appellant's brief is entirely devoid of citations to the record, in violation of WIS. STAT. RULE 809.19(1)(d) and (1)(e). The absence of record citations unnecessarily makes the work of opposing counsel and the court more difficult. If a motion to strike the brief on this ground had been filed, we likely would have granted it.

By the Court.—Order affirmed.

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