COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP270 **Cir. Ct. No. 2013CV9**

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

JENNIFER DAHL AND COLLIN DAHL,

PLAINTIFFS,

JP MORGAN CHASE BANK, NA AND BAYLAKE CORP., A WISCONSIN CORPORATION,

INVOLUNTARY-PLAINTIFFS,

V.

PENINSULA BUILDERS, LLC AND JEFFREY S. HARDING,

DEFENDANTS-APPELLANTS,

ERIE INSURANCE EXCHANGE, A FOREIGN CORPORATION,

INTERVENOR-RESPONDENT.

APPEAL from a judgment of the circuit court for Door County: JAMES A. MORRISON, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Peninsula Builders, LLC and Jeffrey Harding (collectively, "Peninsula") appeal a judgment declaring Erie Insurance Exchange had no duty to defend or indemnify Peninsula and dismissing all claims against Erie. Peninsula argues that there was an occurrence triggering coverage and that the court erroneously determined several exclusions in the Erie policy barred coverage. We conclude there was no occurrence giving rise to coverage and therefore do not address the exclusions. Accordingly, we affirm.

BACKGROUND

¶2 Jennifer and Collin Dahl hired Peninsula to remodel their home. After Peninsula completed work on the home, the Dahls sued Peninsula. Erie, which had issued Peninsula a commercial general liability (CGL) policy, intervened in the action. Erie later sought a declaration that it had no duty to defend or indemnify Peninsula on the eight claims alleged in the Dahls' amended complaint.

¶3 Peninsula conceded there was no initial grant of coverage for six of the claims. Thus, the only two claims still at issue were claim one, "breach of contract," and claim four, "damage to property." The breach claim alleged Peninsula "breached the contract … by failing to complete the work that they were contractually obligated to complete and failed to perform work in a workmanlike and timely manner." The property damage claim alleged:

> [Peninsula's] conduct caused physical damage to the plaintiffs' property, including, but not limited to, the following:
>
> A. Damaged stone foundation; B. Damaged and destroyed exterior wiring, outlets and light fixtures; C. Damaged

> exterior trim pieces; D. Damaged exterior residence; E. Damaged exterior stairways; F. Damaged interior electrical, including but not limited to, wires, switches, outlets and ceiling fixtures; G. Damaged interior walls and flooring, including but not limited to, drywall, insulation, headers, baseboards and trim work; H. Damaged heating system, insulation and ventilation; I. Damaged windows and doors; J. Damaged rafter and soffit system; K. Caused other property damage.
>
> B. ….
>
> [Peninsula] caused additional damage to the plaintiffs' property as follows:
>
> A. Damaged plaintiffs' yard; B. Damaged terra cotta pots; C. Damaged plaintiffs' lawn; D. Damaged plaintiffs' telephone lines; E. Damaged plaintiffs' landscaping.

(Formatting modified.)

¶4 The circuit court first rejected Erie's argument that, under ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, 295 Wis. 2d 556, 721 N.W.2d 704, there was no "occurrence" so as to trigger policy coverage.[1] The circuit court explained:

> It is clear … that the determination of whether there is coverage under this particular policy … turns on an analysis of the facts of this case and these facts have not been fully developed so on that basis, the Court cannot at this time grant the [motion] ….

However, the court then proceeded to analyze several of the policy's coverage exclusions, determined they applied, and granted Erie's motion on that basis. The court declared Erie had no duty to defend or indemnify Peninsula, and dismissed all claims against Erie. Peninsula appeals.

[1] The court rejected Erie's argument despite observing Peninsula had "entirely ignored" the argument.

DISCUSSION

¶5 Peninsula argues that there was an occurrence giving rise to coverage under its CGL policy with Erie and that the circuit court erroneously determined several exclusions barred coverage. Interpretation of an insurance contract presents a question of law subject to our independent review. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. Coverage questions may involve three inquiries: first, whether there is an initial grant of coverage; second, whether an exclusion applies; and third, whether an exception applies to an exclusion and reinstates coverage. ***Id.***, ¶24.

¶6 Where, as here, an insurer has provided an initial defense pending a final coverage determination, the "four-corners rule"—related to the duty-to-defend inquiry—is not implicated. *See* ***Olson v. Farrar***, 2012 WI 3, ¶34, 338 Wis. 2d 215, 809 N.W.2d 1. Instead, the court simply proceeds to a coverage determination. ***Id.*** The court may consider extrinsic evidence and, if there is no arguable coverage, determine on summary judgment that there is no duty to indemnify. ***Id.***, ¶¶35-37. "'The insurer's duty to continue to defend is contingent upon the court's determination that the insured has coverage if the plaintiff proves his case.'" ***Id.***, ¶38 (quoting ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶29, 311 Wis. 2d 548, 751 N.W.2d 845).

¶7 Peninsula and Erie dispute whether the Dahls have alleged an occurrence triggering coverage under the CGL policy. The policy provides coverage for "property damage" caused by an "occurrence," which "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Together with the allegations in claims one and four

of the amended complaint, Peninsula relies on the following discovery response from the Dahls to demonstrate there was an occurrence:[2]

> Although this all can be considered unfinished work under the agreement or change orders, I am distinguishing these items because work at the house performed by Harding created damage that did not exist prior to his being there.
>
> Kitchen—damages to walls and ability to heat the room. …
>
> 1. East Kitchen window. … Drywall and plastering repairs need to be done. … Baseboard trim needs to be reinstalled.
>
> 2. West Kitchen window. … Drywall and plastering repairs need to be done. …
>
> 3. East door. … Drywall and plastering repairs need to be done. …
>
> …
>
> Living room
>
> …
>
> 4. There are two holes in the floor where the former forced air registers used to be.
>
> Hall and Bathroom
>
> 1. Drywall needs to be repaired.

(Formatting modified; omissions as set forth in Peninsula's brief.)

¶8 The parties essentially agree regarding the case law we should apply; their views diverge, however, at the point of application. In ***Glendenning's***, the court considered a CGL policy with the same definition of "occurrence" as the

[2] The response answered an interrogatory stating, "Describe all claims, demands, damages or injuries you are claiming for the repair or replacement of work done by [Peninsula]."

Erie policy. *See* ***Glendenning's***, 295 Wis. 2d 556, ¶20. The court observed, "***American Girl*** clearly establishes that the circumstances giving rise to a breach of contract or breach of warranty claim may be an 'occurrence' within the meaning of a CGL policy: the analysis focuses on the factual basis for the claim and not on the theory of liability." ***Id.***, ¶¶24-25 (citing ***American Girl***, 268 Wis. 2d 16, ¶¶39, 41).

¶9 The ***Glendenning's*** court then considered ***American Girl***'s analysis of "occurrence" to determine what event or set of facts was necessary to satisfy that condition. ***Id.***, ¶26. The court concluded the "occurrence" in ***American Girl*** was not the inadequate advice of a soil engineer, but rather the settling of the soil under a building that led to significant property damage after the engineer's erroneous advice was followed. ***Id.***, ¶¶26-27. ***Glendenning's*** next analyzed ***Kalchthaler v. Keller Construction Co.***, 224 Wis. 2d 387, 391, 591 N.W.2d 169 (Ct. App. 1999), where the covered occurrence was found to be the leaking of windows that, in turn, wrecked drapery and other property—as opposed to the faulty workmanship that caused the windows to leak. ***Id.***, ¶¶28-29. Addressing ***American Girl***'s analysis of ***Kalchthaler***, the ***Glendenning's*** court explained, "We understand this to mean 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; we do not read it to say that faulty workmanship in itself is an 'occurrence.'" ***Id.***, ¶30.

¶10 Ultimately, ***Glendenning's*** held:

> We therefore conclude that faulty workmanship in itself is not an "occurrence"—that is, "an accident"—within the meaning of the CGL policy. An "accident" may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as

> negligence, is not an "accident," and thus not an "occurrence" under the policy.

Id., ¶39. Peninsula relies on ***Acuity v. Society Insurance***, 2012 WI App 13, 339 Wis. 2d 217, 810 N.W.2d 812, but, as Peninsula recognizes, that case merely reaffirms the state of the law described in ***Glendenning's***. ***Acuity*** explains:

> The lessons of ***American Girl***, ***Glendenning's***, and ***Kalchthaler*** are that while faulty workmanship is not an "occurrence," faulty workmanship may cause an "occurrence." That is, faulty workmanship may cause an unintended event, such as soil settling in ***American Girl***, the leaking windows in ***Kalchthaler***, or, in this case, the soil erosion, and that event—the "occurrence"—may result in harm to other property.

Id., ¶24.

¶11 Accordingly, the law—unlike the soil in prior cases—is well-settled. We agree with Erie that, applying the rule of ***Glendenning's*** here, there is no alleged event that could constitute an occurrence. Indeed, Peninsula fails to identify *what* it is that it believes to be an occurrence. This is the substance of Peninsula's argument:[3]

> Peninsula has never argued that the alleged faulty workmanship in itself constitutes an "occurrence" that triggers coverage. Rather, it was the alleged faulty workmanship that caused the "occurrence." … [T]he Dahls described … alleged damage caused by Peninsula's work that did not exist prior to completing the work[.]
>
> ….

[3] Peninsula separately addresses claim four of the amended complaint, "damage to property." However, Peninsula explains that the alleged property damage is merely that set forth in the breach of contract claim, and that the damage resulted from the alleged failure to perform in a workmanlike manner. Thus, we need not separately address the issue because it is subsumed by our analysis of the breach of contract claim.

> The Dahls' discovery response confirms that the property damage, if proven, was caused by Peninsula Builder's alleged failure to complete the work in a workmanlike manner.
>
> ….
>
> [T]he damages alleged by the Dahls are damages that did not exist before Peninsula completed its work. The facts have been developed sufficiently to establish "property damage" caused by an "occurrence."
>
> It is not the alleged failure of Peninsula to perform in a workmanlike manner that was the "occurrence." Rather, it was the alleged failure to perform in a workmanlike manner that caused the "occurrence." Similar to ***American Girl*** and ***Acuity***, it was Peninsula's allegedly faulty workmanship that caused an unintended event, and that event—the "occurrence"—resulted in alleged harm to other property.

¶12 Peninsula's argument is difficult to address other than to simply observe it is conclusory and undeveloped. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (inadequately developed arguments need not be addressed). Peninsula claims the alleged faulty workmanship caused an occurrence. Yet, Peninsula fails to then identify any intervening accident or conditions that could have caused the alleged property damage. Faulty workmanship itself cannot be an occurrence. ***Glendenning's***, 295 Wis. 2d 556, ¶30. Because Peninsula does not actually identify any other occurrence, the only conclusion we can draw is that Peninsula concedes there was none. The buildings that gave way in ***American Girl*** and ***Acuity*** were better supported than Peninsula's argument.

¶13 As Peninsula has failed to identify any event that could constitute an occurrence, policy coverage was not triggered. Erie therefore has no duty to

indemnify or further defend Peninsula in the action. *See* ***Olson***, 338 Wis. 2d 215, ¶38.[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[4] As we have determined there was no initial grant of coverage under the policy, we need not address the parties' arguments concerning whether any exclusions would remove coverage. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).