Appeal No. 03-1331 **Cir. Ct. No. 02CV000100**

WISCONSIN COURT OF APPEALS
DISTRICT II

PAUL J. EVERSON AND MICHELLE J. EVERSON,

PLAINTIFFS,

PEKIN INSURANCE COMPANY,

INTERVENING PLAINTIFF-RESPONDENT,

V.

RICHARD J. LORENZ AND LORENZ LAND DEVELOPMENT, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

SHARON JEANQUART, INDIVIDUALLY, AND D/B/A JEANQUART REALTY AND ACE AMERICAN INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

FILED

Jan 28,2004

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

Whether an alleged strict responsibility misrepresentation and/or negligent misrepresentation in a real estate transaction constitutes an "occurrence" for the purposes of a commercial general liability insurance policy such that the insurer's duty to defend the insured is triggered.

What allegations must a complaint contain to sufficiently plead "loss of use" within the meaning of a commercial general liability insurance policy?

Under what circumstances does a misrepresentation, negligent or strict responsibility, cause the "loss of use" of property such that a "causation nexus" is established?

FACTS

Paul J. Everson and Michelle J. Everson purchased a plot of vacant land known as Lot 31 from Lorenz Land Development, Inc. via a vacant land offer to purchase. The Eversons purchased the property for purposes of constructing a single family home in which they intended to reside. Lorenz Land is the developer of the subdivision where the property is located and Richard J. Lorenz is its president.

At the time of the offer to purchase, Pekin Insurance Company insured Lot 31 under a commercial general liability policy. The policy provides coverage for "property damage" only if it is caused by an "occurrence." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage" is defined as:

> 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.

In March 2002, the Eversons filed a complaint against Lorenz and Lorenz Land (collectively, "Lorenz Land") alleging causes of action for negligent misrepresentation, strict responsibility misrepresentation, intentional misrepresentation and breach of contract. The complaint alleged that prior to their accepting the offer, the Eversons received a Real Estate Condition Report, which provided that "no portion of Lot 31 lay within the 100 year flood plain." The complaint stated that when the Eversons purchased Lot 31 they received a Warranty Deed to the property from Lorenz Land, which incorporated by reference the representations contained in the condition report. The complaint further alleged that after having purchased the lot, the Eversons discovered that:

> a substantial portion of Lot 31 lay within the 100 year flood plain making the construction of the home which they wished to construct on the property impossible in the location in which the Plaintiffs wished to build based upon the pre-sale representations of LORENZ, rendering the property unbuildable for the Plaintiffs.

The Eversons claimed to have sustained monetary damages in excess of $37,000 as a result of the alleged misrepresentation.

Following service of the summons and complaint, Lorenz Land tendered its defense to Pekin. Pekin then moved to intervene and bifurcate the insurance coverage issues from the liability and damage issues and for a stay of all liability and damage issues until such time as the insurance coverage issues had

been finally determined. The trial court granted Pekin's motions to intervene, to bifurcate the issues and to stay all liability and damage issues, except for the purposes of limited discovery. Pekin then sought a declaratory judgment that it had no duty to defend or indemnify under the policy.

Pekin thereafter moved for summary judgment, arguing that pursuant to the plain language of the policy, the Everson's complaint "must allege *property damage* caused by an *occurrence* in order for a duty to defend to be triggered" and the Everson's complaint failed to do so. Following a hearing on Pekin's motion for summary judgment, the trial court granted Pekin's motion. The court explained that the policy clearly did not cover causes of action for breach of contract and intentional misrepresentation and that the remaining misrepresentation claims were controlled by ***Smith v. Katz,*** 226 Wis. 2d 798, 816-17, 595 N.W.2d 345 (1999) (***Smith II***) (stating that in most instances, misrepresentations and omissions will not produce property damage as defined in insurance policies).

DISCUSSION

This case presents our supreme court with an opportunity not only to resolve the question of whether strict responsibility misrepresentation and/or negligent misrepresentation constitutes an "occurrence" for the purposes of general liability insurance, a question the court explicitly left unanswered in ***Smith II***, but also to clarify an emerging and unsettled area of law. The parties do not dispute that in order to create a duty to defend, the allegations contained within the four corners of the Everson's complaint must establish that (1) Lorenz Land's conduct, i.e., the alleged misrepresentations, constituted an "occurrence" within the meaning of the policy; (2) the Eversons suffered "property damage," more

specifically, "loss of use to tangible property" as defined in the policy; and (3) a "causation nexus" exists between Lorenz Land's alleged misconduct and the damage claimed. ***Id.*** at 806-07 (holding that an insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy). The parties part ways, however, in their understanding of the principles articulated in ***Smith II*** that are to guide our comparison of the Everson's complaint with Pekin's policy.

The parties first debate the effect of the ***Smith II*** court's discussion of whether an alleged misrepresentation, either negligent or strict responsibility, can constitute an "occurrence" which would trigger an insurer's duty to defend. Lorenz Land claims that ***Smith II*** stands for the proposition that misrepresentations constitute "occurrences." Pekin, on the other hand, asserts that in ***Smith II*** the supreme court "specifically stated they are not."

In ***Smith II***, after recognizing several cases that have addressed similar issues, the supreme court wrote,

> The decisions on negligence will require this court to decide, *at some future date*, whether strict responsibility misrepresentation and/or negligent misrepresentation are sufficiently similar to other kinds of negligence to categorize them as "accidents" in liability insurance policies, or whether these torts are sufficiently different from other kinds of negligence to preclude their categorization as "accidents."

Id. at 822. We are confident that this language reveals that the supreme court intentionally reserved the issue for a more appropriate case. Thus, we are of the opinion that were we to resolve this issue, we would be stepping beyond our authority and improperly making law. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (holding that "unlike the court of appeals, [the

supreme court] has been designated by the constitution and the legislature as a law-declaring court" (citation omitted)).

The parties next dispute whether the complaint sufficiently alleges "property damage," specifically "[l]oss of use of tangible property that is not physically injured," within the meaning of the policy. Lorenz Land maintains that because the Everson's complaint states that the misrepresentations "render[ed] the property unbuildable for the Plaintiffs," it sufficiently pleads "loss of use." Pekin acknowledges this language, but counters that the complaint is "legally insufficient" because the Eversons merely allege that they sustained "damage."

In ***Smith II***, the supreme court concluded that, in most instances, misrepresentations and omissions will not produce "property damage" as defined in insurance policies, but rather will produce economic damage. ***Smith II***, 226 Wis. 2d at 816-17. However, in the same breath, the court acknowledged that this rule was not absolute and that a complaint making "some reference to loss of use, or some demand for relief beyond money damages" could suffice as an allegation of "property damage." ***Id.*** at 817. Although the court determined that the complaint before it failed to sufficiently plead "property damage" because it made only vague references to "damages" and "pecuniary damages," the court allowed that in another case "[a] differently worded complaint might have permitted different inferences and yielded a different result." ***Id.*** at 815-17, 818. While the language in ***Smith II*** clearly provides that a more artfully crafted complaint in a case claiming misrepresentation can establish "property damage," the case did not offer guidance on just what allegations such a complaint must contain.

Finally, the parties debate whether the Eversons complaint sufficiently alleges a "causation nexus," which in turn raises a broader question—

that being, under what circumstances can an alleged misrepresentation cause "property damage?" Lorenz Land contends that the complaint alleges that Lorenz's presale representations caused the damage and thus its complaint is sufficient. Pekin, on the other hand, submits that under well settled Wisconsin law, misrepresentations do not cause "property damage" as defined in insurance policies.

Prior to ***Smith II***, Wisconsin law had not recognized that a misrepresentation about a defect in property could cause property damage. ***Jares v. Ullrich***, 2003 WI App 156, ¶25, 266 Wis. 2d 322, 667 N.W.2d 843, *review denied*, 2003 WI 140, 266 Wis. 2d 64, 671 N.W.2d 851 (Wis. Oct. 1, 2003) (No. 02-3100). Rather, cases had held that it is the defect, not the misrepresentation, that causes the property damage. ***Id.*** (citing ***Smith II***, 226 Wis. 2d at 816-17; ***Benjamin v. Dohm***, 189 Wis. 2d 352, 359, 525 N.W.2d 371 (Ct. App. 1994)). Although the court in ***Smith II*** determined that there was not a sufficient nexus under the facts of that case because "negligent misrepresentations do not cause ground water pressure or cracks in concrete foundations" and there were "too many 'interruptions' between the 'occurrence' and the 'property damage,'" the court allowed that in another case under different facts, the nexus requirement could be satisfied:

> We are not saying that strict responsibility misrepresentations or negligent misrepresentations can *never* cause "property damage" as defined in the policies, particularly when "property damage" can include "loss of use of tangible property that is not physically injured." *Cf.* ***Sola Basic Indus. Inc. v. United States Fidelity & Guar. Co.***, 90 Wis. 2d 641, 280 N.W.2d 211 (1979).

Smith II, 226 Wis. 2d 816-17. This language is clearly intended to leave the door open for a finding of coverage under the proper circumstances. The supreme court, however, has not yet spoken on what those circumstances might be.

In writing this certification, we are mindful that recently, in ***Jares***, 266 Wis. 2d 322, ¶2, we relied on ***Smith II*** to conclude that a complaint alleging that a seller's misrepresentations resulted in a loss of use of the property at issue gave rise to a duty to defend. However, given the unsettled state of the law, we were unable to provide the bench and bar with definitive guidance on what allegations a complaint must contain to sufficiently plead loss of use and under what circumstances a complaint claiming that a misrepresentation resulted in property damage contains a sufficient allegation of a "causation nexus."

CONCLUSION

This case presents the court with a classic real estate dispute certain to recur—the Eversons essentially are claiming that the property they purchased from Lorenz Land was not what they had bargained for—and raises several issues worthy of supreme court review. It provides the perfect vehicle through which the court can both resolve the question of whether a misrepresentation can constitute an occurrence and further refine the principles articulated in ***Smith II*** by providing guideposts for the bar to use in drafting the complaints and the bench to follow in construing the complaints. We therefore respectfully ask the supreme court to impart more definitive guidance on these important matters of legal and public policy