

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 8, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-3448-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**RICHARD WANTA, CAROL WANTA AND  
WANTA HOMES, INC.,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**FREDERICK C. MUELLER AND BETH L. MUELLER,**

**DEFENDANTS-THIRD-  
PARTY PLAINTIFFS,**

**v.**

**WANTA HOMES, INC., WILLIAMS REALTY, INC., AND  
UNKNOWN INSURANCE COMPANY NO.2,**

**THIRD-PARTY DEFENDANTS,**

**CITIZENS SECURITY MUTUAL INSURANCE COMPANY,**

**THIRD-PARTY DEFENDANT-  
RESPONDENT.**

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**CAROL M. WANTA (SALESPERSON, WILLIAMS REALTY),**

**PLAINTIFF,**

**V.**

**FREDERIC C. MUELLER AND BETH L. MUELLER,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Marathon County:  
RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Richard and Carol Wanta and Wanta Homes, Inc. appeal a summary judgment dismissing their insurer, Citizens Security Mutual Insurance Company, from this lawsuit.<sup>1</sup> They argue that the trial court should not have considered matters outside the complaint when determining Citizens Security’s duty to defend and that the court erred when it determined that the Wantas’ alleged misrepresentation can only be intentional and therefore not covered by the insurance policy. We reject these arguments and affirm the judgment.

The Wantas agreed to sell Frederick and Beth Mueller a “new house” that had never been inhabited but had undergone more than \$45,000 repair costs due to water damage. The Muellers backed out of the sale and the Wantas sued them for breach of contract. The Muellers counterclaimed, alleging

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

negligent, intentional and strict responsibility misrepresentation. Citizens Security hired an attorney to represent the Wantas, requested bifurcation on the coverage issue and, upon completion of discovery, moved for summary judgment. The trial court concluded that the insurance policy did not cover intentional misrepresentation and that the evidence would not support a negligent misrepresentation claim. Therefore, it granted summary judgment dismissing the action against Citizens Security and relieving it of its duty to defend the Wantas.

The trial court properly considered matters outside the complaint when it determined that the evidence would not support a negligent misrepresentation finding. The rule that the court will only consider the complaint, like the duty to defend, does not extend indefinitely. The appropriate procedure was set out in *Kenefick v. Hitchcock*, 187 Wis.2d 218, 234-36, 522 N.W.2d 261, 267-68 (Ct. App. 1994). When the insurer requests a bifurcated procedure and defends its insured until coverage issues are resolved in the insurer's favor, the insurer has satisfied its duty to defend. Whether the coverage issue is resolved by summary judgment or trial, the issue at that stage of the proceedings is not restricted solely to examining the complaint.

The evidence presented on summary judgment establishes as a matter of law that the Wantas' misrepresentations, if any, were intentional. The Muellers do not claim losses based on the water damage, but on the Wantas' failure to inform them of the water damage. The Wantas admit that they knew the house had suffered extensive water damage, researched whether they had a duty to disclose damage and repair, and deliberately chose not to inform the Muellers. The decision not to inform prospective buyers of the water damage was a deliberate act that is not covered under the insurance policy.

*By the Court.*—Judgment affirmed.

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

