

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 21, 2000

Cornelia G. Clark  
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 98-3522**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**GREGG HAGOPIAN AND AMELIA HAGOPIAN,**

**PLAINTIFFS,**

**GENERAL CASUALTY COMPANY OF WISCONSIN,**

**INVOLUNTARY-PLAINTIFF-  
RESPONDENT,**

**V.**

**LAWRENCE LIND AND DOROTHY LIND,**

**DEFENDANTS-THIRD-  
PARTY PLAINTIFFS-APPELLANTS,**

**UNIGARD INSURANCE COMPANY,**

**THIRD-PARTY DEFENDANT.**

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APPEAL from a judgment of the circuit court for Milwaukee  
County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Lawrence and Dorothy Lind appeal from a judgment entered in favor of General Casualty Company of Wisconsin, Incorporated, declaring that General Casualty did not have a duty to defend or indemnify the Linds in a cause of action brought against them by Gregg and Amelia Hagopian. The Linds argue that the trial court erred in determining that the claims the Hagopians alleged were not covered under the terms of the Linds' homeowners insurance policy with General Casualty. We affirm.

### **BACKGROUND**

¶2 According to the allegations of the complaint that the Hagopians filed against the Linds, on November 8, 1994, the Hagopians offered to purchase the Linds' home, which was located at 246 North 50th Street in Milwaukee. The Linds accepted the offer, and the closing occurred on November 23, 1994. Thereafter, the Hagopians discovered many problems with the home, including structural defects in the garage and a leak from the ceiling of the second floor bathroom, which was attributed to "improper insulation in, and inadequate ventilation of, the attic."

¶3 The Hagopians sued the Linds, asserting several causes of action, including negligent construction of the garage and negligent roofing. The Linds sought coverage for the Hagopians' claims under the homeowners insurance policy on their new home, which was issued by General Casualty on November 16, 1994. General Casualty intervened in the lawsuit between the Hagopians and the Linds and sought a declaratory judgment that the Hagopians' claims were not covered by the insurance policy on the Linds' new home. The

trial court found that the claims were not covered and granted the declaratory judgment.

## DISCUSSION

¶4 The Linds argue that the trial court erred in determining that their insurance policy with General Casualty did not cover the negligence claims alleged by the Hagopians. They assert that the allegations of negligent construction of the garage at their former home and negligent roofing on their former home fell within the personal liability coverage of the homeowners insurance policy on their new home.

¶5 “The construction of words and phrases in insurance policies is generally a matter of law and is controlled by the same rules of construction as are applied to contracts generally.” *Kremers-Urban Co. v. American Employers Ins. Co.*, 119 Wis. 2d 722, 735, 351 N.W.2d 156, 163 (1984). “Where no ambiguity exists in the terms of the policy, we will not engage in construction, but will merely apply the policy terms.” *Id.*, 119 Wis. 2d at 736, 351 N.W.2d at 163.

¶6 The insurance policy that General Casualty issued to the Linds for their new home provided, in relevant part:

### SECTION II—LIABILITY COVERAGES

#### COVERAGE E—Personal Liability

If a claim is made or suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which the “insured” is legally liable....
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent....

....

**Policy Period.** This policy applies only to loss in Section I or “bodily injury” or “property damage” in Section II, which occurs during the policy period.

The policy further provided the following definitions:

**5.** “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

**a.** “Bodily injury;” or

**b.** “Property damage.”

**6.** “Property damage” means physical injury to, destruction of, or loss of use of tangible property.

Thus, under the plain language of the policy, there is coverage only if the resulting property damage occurs during the policy period. *See Kremers-Urban*, 119 Wis. 2d at 737, 351 N.W.2d at 164 (construing nearly identical policy language).

¶7 In *Kremers-Urban*, the insured sought coverage of claims brought against it for manufacturing and marketing DES for sale to pregnant women, who then ingested DES and thereby exposed their unborn children to higher risks of developing certain types of cancer. *See id.*, 119 Wis. 2d at 725–726, 351 N.W.2d at 158–159. Some of the relevant insurance policies defined “occurrence” as “an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the accused.” *Id.*, 119 Wis. 2d at 730, 351 N.W.2d at 161. “Bodily injury” was defined as “bodily injury, sickness or disease sustained by any person.” *Id.* The supreme court concluded that, in order for coverage to be invoked under the foregoing policy, “an injury, sickness or disease had to result during that policy period.” *Id.*, 119 Wis. 2d at 737, 351 N.W.2d at 164. Likewise, under the General Casualty homeowners insurance policy at issue here, the property damage must result during the policy period in order to invoke coverage.

## 1. Negligent Construction

¶8 As noted, the Hagopians alleged that the Linds had negligently constructed the garage at their former home. The allegations of the complaint regarding the construction of the garage provided, in relevant part:

**25. Larry [Lind] Built Garage and Stored Lumber on Second Floor.** On information and belief: (a) Larry built the garage at the Property; (b) the Linds stored in the second floor storage area thereof massive weight, including large quantities of lumber; and (c) Larry spent a considerable amount of time in the garage. Prior to the Hagopians' closing, Larry represented to the Hagopians that the garage was constructed in a manner so as to be able to easily accommodate storage of massive weight in the second floor storage area.

**26. Garage Problems.** After the Hagopians purchased the Property, they discovered that *various of the joists in the garage were improperly nailed or secured, that various of them have stress cracks and fractures, and that various are split.* On information and belief: (a) *the Linds knew of such (or reasonably should have known of such)* prior to the Hagopians' purchase, and *at the time they made the Oral and other representations to the Hagopians, and when they signed the Offer, the Condition Report, and the Affidavit;* (b) Larry Lind was intimately familiar with the garage, having built it himself and having spent considerable time in the garage; (c) the Linds Knew (or reasonably should have known) when they built the garage that the storage of heavy lumber and great weight in the second floor storage area would place too heavy a burden on the garage as designed and built. The improper nailing of the joists, and the cracking, fracturing, and splitting of the same constitute a breach of the warranties and representations that the Linds made to the Hagopians, ... fraud, negligent misrepresentation, strict responsibility intentional misrepresentation, and negligent construction.

....

**54. Negligent Construction.** The Linds had a duty to properly construct the ... garage ... in a good and workmanlike manner ... so as to accommodate safely their intended uses and applications. The Linds breached that duty (a) by constructing the garage in a manner so as not to be able to adequately bear the heavy lumber stored on the

second floor, [and] (b) by not adequately securing the joists in the garage .... The Linds' negligence caused foreseeable harm to the Hagopians ... and stress cracks and fractures in garage joists. The Linds negligently constructed the garage ....

(Emphasis added.)<sup>1</sup> The complaint clearly alleges that the damage to the garage existed prior to and at the time that the Hagopians offered to purchase the property, which occurred on November 8, 1994. The General Casualty homeowners insurance policy was issued to the Linds on November 16, 1994, and, as noted, provided coverage only for property damage occurring during the policy period. Thus, the policy does not cover the claim for negligent construction of the garage because the property damage was alleged to have resulted prior to the policy period.

## 2. Negligent Roofing

¶9 The Hagopians also alleged a claim for negligent roofing. The allegation of negligent roofing provided:

12. **Negligent Roofing.** The Hagopians also hereby add to their causes of action that the Linds were negligent concerning the roof work they did to or at the property at 246 N. 50th Street, Milwaukee.

The complaint had no further explanation of the negligent roofing claim. The claim, however, was apparently based on allegations that the Hagopians had set forth in previous sections of their complaint, which provided:

8. **Ice Dams.** The Hagopians allege that:

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<sup>1</sup> The complaint alleged that the Linds made oral representations about the garage to the Hagopians while they were viewing the property, and that the Hagopians relied on those oral representations in making their offer to purchase the property.

A. On 1/15/98, they noticed water leaking in from the ceiling of the second floor bathroom. They suspected that the problem related to a build[-]up of snow and ice on the roof above the ceiling.

B. On 1/16/98, they had a contractor visit the Property who installed an electric gutter wire on that section of the roof as a temporary measure to ameliorate the instant water leaking problem.

C. On 1/18/98, an architect visited the Property and informed the Hagopians that the problem was due to improper insulation in, and inadequate ventilation of, the attic, and that such was creating ice damming, which, in turn, was creating the water problem.

D. On 1/27/98, Larry Lind and his lawyer inspected the Property, and Larry Lind made comments revealing that he had prior knowledge of ice dams and water leaks affecting the home of the Property, and of inadequate and improper insulation and ventilation of the attic.

E. Orally, the Linds falsely represented to the Hagopians that new vents that the Linds had allegedly installed in the attic had solved any ice dam problem that the Linds used to have.

....

9. **Breach of Duty to Disclose.** The Linds breached their common law and statutory duties to disclose to the Hagopians the ice dam problems, and inadequate, improper attic insulating and ventilating problems, affecting the house at the Property. The same were known to the Linds prior to the Hagopians entering the Offer with the Linds and prior to the Hagopians buying the Property from them, and they constituted material adverse facts not readily discernible to the Hagopians. When the Hagopians bought the Property, they acted upon the reasonable assumption that the ice dam/attic/insulating/ventilating problems did not exist and that they had been corrected by the Linds. The Linds, having lived in the Property for over 15 years, and having insulated the attic and reroofed the house on their own, and having allegedly installed additional roof vents, had special knowledge or means of knowledge not available to the Hagopians.

(Emphasis added.) Again, the conditions identified in the complaint were alleged to have existed prior to the Hagopians' offer to purchase the property, and, thus, prior to the policy period. Additionally, the allegation of negligent roofing does

not contain any allegation of property damage as a result of the alleged negligence.<sup>2</sup> As noted, the policy applies only to occurrences that result in property damage during the policy period. The negligent roofing claim is therefore not covered by the General Casualty homeowners insurance policy on the Linds' new home.

¶10 Under the clear language of the Linds' homeowners insurance policy on their new home, there was no coverage for the Hagopians' negligence claims against the Linds. Thus, General Casualty did not have a duty to defend or indemnify the Linds in the cause of action that the Hagopians brought against the Linds. *See Professional Office Bldgs., Inc., v. Royal Indem. Co.*, 145 Wis. 2d 573, 580, 427 N.W.2d 427, 429 (Ct. App. 1988) (an insurer has a duty to defend its insured against a lawsuit only if the complaint “alleges facts which, if proven, would give rise to liability covered under the terms and conditions of the policy”).

*By the Court.*—Judgment affirmed.

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

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<sup>2</sup> Although the Hagopians alleged that they noticed the leak in 1998, they alleged that the conditions of the roof that caused the leak existed prior to their offer to purchase the property, and thus prior to the policy period. They did not allege that the property was damaged in any way as a result of the leak.





