COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP2037-AC **Cir. Ct. No. 2008CV2411**

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

JAMES E. LEWIS AND DAWN C. BARR,

PLAINTIFFS,

V.

WOLTER BROTHERS BUILDERS, INC.,

DEFENDANT-APPELLANT,

ACUITY, A MUTUAL INSURANCE COMPANY AND CONTINENTAL WESTERN INSURANCE COMPANY,

INTERVENORS-DEFENDANTS-RESPONDENTS,

USSA CASUALTY INSURANCE COMPANY,

SUBROGATED-PLAINTIFF.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Wolter Brothers Builders, Inc., appeals the grant of summary judgment in favor of its successive comprehensive general liability (CGL) insurers, Acuity, a Mutual Insurance Company and Continental Western Insurance Company.[1] The circuit court held that Acuity and Continental had no duty to defend or indemnify Wolter because Wolter's untimely notice of claim prejudiced them. We agree. The known loss doctrine also justifies the grant of summary judgment to Continental. We affirm.

¶2 The material facts are undisputed. Wolter purchased ten lots in the Town of Oconomowoc's Westshore subdivision and built houses on five of them. Wolter completed construction of a house for James Lewis and Dawn Barr in March 2005. In April 2007, Wolter president John Atkinson learned that basements in its Westshore houses developed significant water intrusion problems after heavy rains. By a letter dated April 19, 2007, which he copied to the Westshore homeowners, Atkinson wrote the subdivision developer that he believed the developer bore responsibility for the problem because Wolter followed the developers' grading plan. On April 23, Lewis responded to Atkinson's letter to the developer. Lewis claimed he already had contacted two Wolter employees several times in 2006 about "significant water seepage in our

[1] Wolter had CGL coverage with Acuity from July 10, 2004 to July 10, 2007, and with Continental from July 10, 2007 to July 10, 2009.

basement" with unsatisfactory response.[2] Lewis advised Atkinson that the water level still was not receding despite three sump pumps drawing 12,000 gallons of water per hour. Lewis' letter ended:

> I hope I have given you a much clearer picture of where I personally stand with Wolter Brothers. I feel that your company had ample opportunity to work with [the developer] last year, but chose to treat me as a noisy customer, disgruntled by unknown reason and easily set aside. I assure you, I am not that easily set aside. I am willing to reopen conversation with you personally regarding this issue. If that doesn't work for you, I am alright with that as well. Either way, I would appreciate a personal response with your intentions.

Atkinson did not respond to Lewis' letter.

¶3 A year later, in April 2008, Attorney Daniel Stevens wrote a letter ("the Stevens letter") on behalf of Lewis and Barr advising Wolter that the water problem persisted and that they intended to either file a civil lawsuit or pursue arbitration. Wolter responded to Stevens on April 29, copying in its legal counsel, advising that it would send an engineer and expediters to the Lewis/Barr property. Test diggings revealed that the water table was higher than the basement floor.

¶4 In June 2008, Lewis' and Barr's insurer, USAA Casualty Insurance Company, notified Wolter that it intended to seek reimbursement from Wolter for the $10,000 in damages it had paid. In July 2008, Lewis and Barr filed suit solely against Wolter. Wolter did not advise its insurance broker, Donald Miller of Diversified Insurance Services, of the letters to the developer or from Lewis, Stevens and USAA or, until three months later, about the lawsuit.

[2] Wolter asserts that its employees "consistently and vehemently deny receiving any complaints from plaintiffs in 2006 as alleged in Mr. Lewis' letter."

¶5 Atkinson, Kay Richards and David Ketterhagen own all shares of Wolter. Richards handles the company's insurance. On October 21, 2008, Miller came to Wolter's offices to discuss an unrelated insurance matter with Richards. The parties' affidavits set forth divergent accounts of the events at the end of the Miller/Richards meeting. Richards and Ketterhagen aver that the three owners met with Miller specifically to discuss the lawsuit filed against Wolter. Miller avers that Atkinson mentioned only "in passing … that the company was having a problem" with a party for whom Wolter had built a house because "the lot had a water problem"; Miller responded that if the problem was with the lot, it "sounded like a problem for the developer." Richards and Ketterhagen claim Miller did not offer to turn the matter over to their insurer; Miller claimed no one asked him to tender the matter or to request a defense.

¶6 In November 2008, the other Westshore homeowners filed suit against Wolter, the developer and its engineer and unknown insurers. Wolter's counsel sent copies of the Westshore and Lewis/Barr complaints to Miller on February 12, 2009.[3] The circuit court granted the insurers' motions to intervene, bifurcate and stay proceedings. Acuity and Continental moved for summary judgment/declaratory judgment under WIS. STAT. §§ 802.08 and 806.04 (2007-08)[4] seeking a declaration that they owed no duty to defend or to indemnify because Wolter provided untimely notice of claim. Continental also asserted that Wolter knew that property damage occurred prior to the policy period, thus precluding coverage under the known loss doctrine.

[3] Miller gave notice of the claim to Acuity and Continental on February 16, 2009.

[4] All references to the Wisconsin Statutes are to the 2007-08 version.

¶7 The circuit court concluded that the April 2008 Stevens letter constituted notice to Wolter of a "substantial probability" that a claim would occur, thereby triggering its duty as an insured under the policies to notify the insurers. It further concluded that by the July 2008 filing of the Lewis/Barr lawsuit Wolter had notice "absolutely beyond any reasonable doubt" of an alleged loss, yet Acuity and Continental were not given actual notice until February 2009 virtually on the eve of trial. The court concluded that the October 2008 meeting with Miller, scheduled to discuss an unrelated matter, did not satisfy Wolter's reporting duty under the policies. Concluding that the failure to give timely notice "substantial[ly] prejudice[d]" the insurers, the court granted summary judgment in their favor. Wolter appeals.

¶8 A circuit court's ruling on a motion for declaratory judgment is within its discretion. ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665. When the resolution of a motion for declaratory judgment turns on a question of law such as the interpretation of an insurance contract, however, our review is de novo. ***Id.*** Similarly, we independently review a circuit court's summary judgment ruling. ***Id.*** We need not repeat here summary judgment's well-established methodology. Suffice it to say that summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶9 The first issue is whether Wolter gave the necessary timely notice to the insurers. *See* ***Neff v. Pierzina***, 2001 WI 95, ¶29, 245 Wis. 2d 285, 629 N.W.2d 177. The notice requirements in the Acuity and Continental policies are

virtually identical.[5] Failure to give such notice within the time the policy requires does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit. WIS. STAT. § 631.81(1).

¶10 Wolter contends that when it gave the insurers notice remains in dispute. We may not decide factual issues on summary judgment but are limited to determining if a material factual issue exists. ***Coopman v. State Farm Fire and Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). But merely alleging that a factual dispute exists will not defeat an otherwise properly supported summary judgment motion. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999).

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[5] The notice requirements provide in relevant part:

> **2.** Duties in the Event of Occurrence, Offense, Claim or Suit
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> **a.** You must see to it that we are notified as soon as practicable of an *occurrence* or an offense which may result in a claim….
>
> **b.** If a claim is made or *suit* is brought against any insured, you must:
>
> ….
>
> (2) Notify us as soon as practicable.
>
> ….
>
> **c.** You … must:
>
> (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or *suit* ….

¶11 Wolter argues that it gave the insurers notice in October 2008 through Miller, *see* WIS. STAT. § 631.09(2), and that any failure to do so earlier was reasonable from the vantage point of a reasonable insured who is "not sophisticated in … the intricacies of [its] policy." Wolter points out that the policy defines "occurrence" as "an accident" and does not define "practicable." It asserts that it therefore reasonably did not consider the Stevens letter to be "an accident" or "an offense," reasonably distinguished the letter's threatened action from an actual claim or suit and reasonably retained counsel when served with the Lewis/Barr lawsuit in July 2008. Wolter argues that, unless unreasonably long, mere passage of time—here, ten months—does not as a matter of law constitute noncompliance with the notice provisions of the contract. *See* ***Gerrard Realty Corp. v. American States Ins. Co.***, 89 Wis. 2d 130, 143, 277 N.W.2d 863 (1979).

¶12 Wolter's arguments are unpersuasive. By the time of the April 2008 Stevens letter threatening litigation, Atkinson knew for at least a year that Lewis and Barr claimed water problems for which, correctly or not, they held Wolter at least partly responsible. We have no trouble concluding that the Stevens letter put Wolter on notice of "an occurrence," thus triggering Wolter's duty to notify the insurers "as soon as practicable." Wolter suggests it did not understand "practicable"; it cannot claim it did not understand "immediately," the time frame of the reporting duty triggered by service of the summons and complaint in July. Yet, Wolter did not send in the legal papers then or give them to Miller in October. Retaining counsel or unilaterally working with the homeowners does not relieve Wolter of its explicit contractual obligation to "immediately" tender legal papers to the insurers. We conclude the insurers received notice in February 2009 and that no genuine issue as to timeliness exists for trial.

¶13 Therefore, we next must examine whether Wolter's breach of duty prejudiced the insurers. *See* ***Neff***, 245 Wis. 2d 285, ¶42. Late notice is not prejudicial per se, "but the risk of nonpersuasion is upon the person claiming there was no prejudice." ***Id.***; *see also* WIS. STAT. § 632.26(2).

¶14 Prejudice is "a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense." ***Neff***, 245 Wis. 2d 285, ¶44. An insurer is prejudiced by late notice when, for example, it cannot investigate the facts necessary to determine if coverage should be provided or when it has been denied the opportunity to have input into the manner in which the underlying claim is being defended. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶61, 261 Wis. 2d 4, 660 N.W.2d 666. Where no genuine issues of material fact exist, we may determine as a matter of law whether the late notice caused prejudice. *See* ***Neff***, 245 Wis. 2d 285, ¶48.

¶15 By February 12, 2009, when the insurers received notice of the claim, critical Scheduling Order deadlines had passed. It was too late to amend the pleadings, file dispositive pretrial motions, complete discovery, serve trial exhibits on opposing counsel, complete mediation, name witnesses and provide expert reports. Wolter had not impleaded the developer or the project engineer and failed to raise affirmative defenses such as contributory negligence or that the plaintiffs' damages resulted from the acts or omissions of others over whom Wolter had no control. Wolter's counsel had conducted no depositions—not the plaintiffs, the developer or the project engineer—and had submitted no written reports for any designated expert, risking exclusion of their testimony at trial. An insurer generally maintains the right to control the defense, the settlement of a claim, and the payment of a claim within policy limits. ***Marten Transport Ltd. v. Hartford Specialty Co.***, 194 Wis. 2d 1, 18, 533 N.W.2d 452 (1995). By not

availing itself of numerous reasonable opportunities to give the insurers notice, Wolter foreclosed them from exercising those rights to at least Acuity's significant prejudice. Wolter does not carry its burden.

¶16 Finally, we address the known loss doctrine, which is unique to Continental's position. The known loss doctrine is a common law defense to insurance coverage by which insurers are not obligated to cover losses that either are occurring when the coverage is written or already have occurred. *See* ***American Family Mut. Ins. Co. v. Bateman***, 2006 WI App 251, ¶26, 297 Wis. 2d 828, 726 N.W.2d 678. For the known loss doctrine to apply under a CGL policy, the insured must know more than the fact that there has been an occurrence that has caused damage to the property of a third party; the insured also must know that it is substantially probable that the insured will be liable for the damage. ***State v. Hydrite Chem. Co.***, 2005 WI App 60, ¶28, 280 Wis. 2d 647, 695 N.W.2d 816. The first insuring agreement between Continental and Wolter ran from July 10, 2007 to July 10, 2008 and incorporated the known loss doctrine into it.[6]

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[6] As noted, the second contract ran from July 10, 2008 to July 10, 2009. The two were identically worded. They provided in relevant part:

> **b.** This insurance applies to … "property damage" only if:
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> …
>
> (3) Prior to the policy period, no insured … knew that the … "property damage" had occurred, in whole or in part. If such … insured … knew, prior to the policy period, that the … "property damage" occurred, then any continuation, change or resumption of such … "property damage" during or after the policy period will be deemed to have been known prior to the policy period.
>
> …

(continued)

¶17 The undisputed facts show that in April 2007 Atkinson had contacted the developer about the Westshore homeowners water intrusion problems and had been contacted by Lewis. In his deposition, Atkinson agreed that he knew the water intrusion posed a problem and that, if he ignored it, Wolter likely would see either a lawsuit or breach of warranty claim. Regardless of whether the 2006 contacts Lewis claimed in his letter actually occurred, his dissatisfaction with Wolter is clear, and he "assur[es]" Atkinson he is "not that easily set aside." The record thus establishes that Wolter, through Atkinson, had "[b]ecome[] aware … that … 'property damage'" at the very least "ha[d] begun to occur" before the Continental policy became effective on July 10, 2007, and that it was substantially probable that Lewis/Barr would attempt to hold Wolter liable for the damage. *See* ***id.*** The known loss doctrine applies to relieve Continental of the obligation to cover Wolter's losses.

By the Court.—Order affirmed.

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

> **d.** … "[P]roperty damage" will be deemed to have been known to have occurred at the earliest time when any insured … :
>
> ….
>
> **(3)** Becomes aware by any … means that … "property damage" has occurred or has begun to occur.