COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2015

Diane M. Fremgen
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. 2014AP1183 **Cir. Ct. No. 2013CV007107**

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

VIOLETTA SCHAPIRO,

PLAINTIFF,

V.

VINCENT TOARMINA,

DEFENDANT,

V.

SHERIN SCHAPIRO,

THIRD-PARTY DEFENDANT-APPELLANT,

V.

WEST BEND MUTUAL INSURANCE CO.,

INTERVENOR-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Sherin Schapiro, *pro se*, appeals the summary judgment granted to West Bend Mutual Insurance Co. Because the "owned property" exclusion in West Bend's policy applies and precludes coverage, we affirm.

BACKGROUND

¶2 This lawsuit stems from allegedly faulty tile work on the porch of Violetta Schapiro's home.[1] Violetta filed a lawsuit against Vincent Toarmina, claiming that he misrepresented his abilities and qualifications to do the work requested, mislaid the tile, and damaged it.

¶3 Toarmina, in response, brought a third-party action against Violetta's husband, Sherin Schapiro. Toarmina alleged that Schapiro was the general contractor on the project and that as the general contractor, he failed to perform his responsibilities, "selected improper tile" and "interfered" with Toarmina's work. The third-party complaint further alleged that Schapiro was liable to Violetta for her alleged damages or to Toarmina in contribution and indemnity for Violetta's alleged damages.

¶4 Schapiro tendered the defense of the third-party action to West Bend claiming that the homeowners policy issued to Violetta required West Bend to

[1] To avoid confusion, we refer to Violetta Schapiro by her first name only.

defend him. West Bend intervened seeking a determination on its obligations to Schapiro.

¶5 West Bend subsequently moved for summary judgment, arguing that it had no duty to defend Schapiro in this action because the alleged incident causing damage was not an occurrence and because even if the allegations described an occurrence causing property damage, it would be expressly excluded under the terms of the policy. West Bend asserted that the policy excludes liability coverage for damage to an insured's property, and here, both the complaint and the third-party complaint concern damage to property owned by an insured.

¶6 Schapiro argued that the allegations of negligence triggered West Bend's duty to defend and that the policy was ambiguous and, as such, should be construed against West Bend. Additionally, Schapiro asserted that West Bend's reliance on the exclusion in its policy was contrary to the reasonable expectation of its insureds, that an exception to the exclusion applied, and that West Bend had "unclean hands."

¶7 The circuit court concluded that the "owned property" exclusion in the policy precluded coverage and granted West Bend's summary judgment motion.

DISCUSSION

¶8 We review a grant of summary judgment *de novo*, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there is

no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2) (2013-14).[2]

¶9 In order to determine whether coverage is available, we must interpret West Bend's insurance policy, which presents a question of law that we review *de novo*. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). When interpreting an insurance policy, we construe policy language from the perspective of a reasonable insured, giving the words used in the policy their common and ordinary meanings. ***Stubbe v. Guidant Mut. Ins. Co.***, 2002 WI App 203, ¶8, 257 Wis. 2d 401, 651 N.W.2d 318. If policy language is unambiguous, we simply apply it as written. *See* ***id.***

¶10 Before delving into the policy language, however, we first address Schapiro's contention that West Bend has improperly raised new arguments in its response brief. We take this opportunity to point out that this court can consider new arguments raised by respondents who seek to uphold the results reached below.[3] *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶27 n.4, 326 Wis.2d 729, 786 N.W.2d 78.

¶11 Turning now to the language, Schapiro argues that two exceptions to the policy exclusions apply, and as such, he should be afforded coverage. First, he relies on the written contract exception to the liability exclusion in the policy.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] There is a distinction between an appellant's duty to raise all objections at the circuit court level and the respondent's freedom to raise new arguments for the first time on appeal. *See, e.g.*, ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds.*

Second, he argues that coverage was a reasonable expectation of the insureds, which, according to Schapiro is a judicially enunciated rule of exception to exclusions. Both arguments fail.

¶12 West Bend's policy provides, in relevant part:

> **F. Coverage E – Personal Liability**
>
> Coverage **E** does not apply to:
>
> **1.** Liability:
>
> ….
>
> **b.** Under any contract or agreement entered into by an "insured". However, this exclusion does not apply to written contracts:
>
> **(1)** That directly relate to the ownership, maintenance or use of an "insured location"; or
>
> **(2)** Where the liability of others is assumed by you prior to an "occurrence";
>
> unless excluded in **a.** above or elsewhere in this coverage form;
>
> **2.** "Property damage" to property owned by an "insured". This includes costs or expenses incurred by an "insured" or others to repair, replace, enhance, restore or maintain such property to prevent injury to a person or damage to property of others, whether on or away from an "insured location" ….

Pursuant to 1.b.(1) above, Schapiro argues that because Violetta has such a contract, West Bend's exclusions are inapplicable. Schapiro, however, makes no mention of the limiting language the follows the exceptions set forth at 1.b.(1) and (2), "unless excluded … elsewhere in this coverage form."

¶13 To the extent Schapiro is arguing that the exception found at 1.b.(1) somehow makes the remaining exclusions in the policy inapplicable, he is wrong.

> We analyze each exclusion separately; the inapplicability of one exclusion will not reinstate coverage where another exclusion has precluded it. Exclusions sometimes have exceptions; if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies.

American Family Mut. Ins. Co. v. American Girl, Inc., 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65.

¶14 Based on the plain language, the exception to the exclusion is inapplicable. The exceptions are prefaced by the language, "*this exclusion* does not apply to written contracts," and goes on to describe two specific types of contracts. (Emphasis added.) We agree with West Bend that the exceptions are clearly limited to the specific liability exclusion under the terms of the policy. The exceptions are further limited by the language "unless excluded … elsewhere in this coverage form." This construction is in accordance with the reasonable expectations of insureds. *See* ***Gross v. Lloyds of London Ins. Co.***, 121 Wis. 2d 78, 87, 358 N.W.2d 266 (1984) ("When construing language covering an obligation such as the insurer's duty to defend the insured, courts must look to the reasonable expectations of the insured.").

¶15 West Bend argues that because the damaged property at issue was owned by the named insured, Violetta, the policy it issued to her does not provide for defense or indemnity to Schapiro. West Bend relies on the "owned property" exclusion set forth at 2. above. Schapiro does not discuss the circuit court's conclusion that the "owned property" exclusion precluded coverage. Consequently, we deem this issue forfeited. *See* ***State v. Lindgren***, 2004 WI App 159, ¶28, 275 Wis. 2d 851, 687 N.W.2d 60 ("If an appellant fails to discuss an

alleged error in his or her main brief, the appellant may not do so in the reply brief. We may decline to review an issue inadequately briefed and deem this issue waived.") (internal citation omitted); *see also* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (distinguishing "waiver" from "forfeiture," with the latter being the act of failing to timely assert a right).

¶16 Because the "owned property" exclusion applies, we do not discuss West Bend's alternative arguments for affirming. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged."); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

By the Court.—Judgment affirmed.

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