**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 29, 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. 98-3657**

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

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**MARCIA FENNER AND DONALD FENNER,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT,**

**GARY W. GILLIS, PERSONALLY AND D/B/A COUNTRY BUILDERS, PINE RIDGE LOG HOMES, INC., ABC INSURANCE COMPANY, JOHN DOE, DEF INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

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

¶1 BROWN, P. J. American Family Mutual Insurance Company appeals from a judgment entered upon a jury verdict against it for $57,119.99. American Family insured a carpenter whom the plaintiffs in this action hired to assemble a log cabin from a kit. When the carpenter walked off the job, the whole project came to a halt. During the ensuing delay in completion, other people's work was damaged and the cabin was unusable. In order to repair the damage and hire a new person to assemble the cabin, the owners had to refinance their farm. Furthermore, during this time, they lost the use of their homestead as rental property since they were unable to move into the cabin as planned. The jury found that both the loss of use and the cost of refinancing were covered damages under the American Family policy. We agree.

¶2 The facts relevant to the issue on appeal are as follows. Marcia and Donald Fenner ordered a log cabin kit from Pine Ridge Log Homes, Inc. The kit included all the materials necessary to build a log cabin. The Fenners hired Gary W. Gillis to assemble the cabin. They hired others to install the heating, air conditioning and plumbing and Donald did the electrical work himself. After Gillis had spent about ten months erecting the cabin, he left without explanation. The cabin stood unfinished through the winter. This exposure to the elements damaged the cabin. When the Fenners hired a new person to complete the assembly of the kit, several repairs had to be made. For example, logs had to be bleached, plumbing and electrical work had to be removed and replaced, duct work had to be redone and the entire structure had to be pulled plumb to correct sagging. During this time, the Fenners were unable to use the cabin and consequently were unable to rent their home to their son as they had planned. In order to pay for all the work on the cabin, the Fenners had to refinance the mortgage on their farm at a less favorable rate.

¶3 The jury found the refinancing damages to be $46,555.04 and the damages related to loss of use to be $7,350. Further, the jury found that Gillis had breached his contract with the Fenners and that he was negligent in his performance. The trial court awarded the Fenners judgment on this verdict in the amount of $53,905.04, plus costs and interest. American Family appeals, arguing that its policy excluded coverage for these damages.

¶4 Our standard of review on coverage questions is de novo, as the construction of an insurance contract is a question of law. *See* ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis.2d 375, 382, 480 N.W.2d 1, 3 (1992).[1]

¶5 American Family issued Gillis a standard commercial general liability policy (CGL policy). Under the policy, American Family agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." In order to be covered, the bodily injury or property damage must be caused by an "occurrence," which is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." As is typically done in CGL policies, damages are excluded from coverage if they arise out of a failure to perform a contract. Similarly, damage to the insured's own work or product is not covered. This is known as the business risk exclusion.

> The risk intended to be insured is the possibility that the goods, product or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a

[1] The Fenners dispute the standard of review. They urge us to grant deference to the trial court's decision to enter judgment on the verdict because the legal conclusion on coverage is so "intertwined with underlying facts." However, it is well established that the application of an insurance policy to a set of facts is a question of law which we decide without deference to the trial court. *See* ***Schaefer v. General Cas. Co.***, 175 Wis.2d 80, 84, 498 N.W.2d 855, 856 (Ct. App. 1993).

> source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.

***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 264-65, 371 N.W.2d 392, 394 (Ct. App. 1985) (quoted sources omitted). As stated in ***Bulen***, the standard form CGL policy "does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident." ***Id.*** at 265, 371 N.W.2d at 395.

¶6 American Family argues that the damages here are excluded from coverage by the business risk exclusion. American Family contends that Gillis merely failed to complete his contract with the Fenners. Under paragraph 2(m), the policy excludes damage arising out of a "delay or failure … to perform a contract or agreement in accordance with its terms." Furthermore, the jury found that there were no damages to physical property other than the log home. American Family posits that the log home was Gillis's product. Because the only damage was to the insured's own product, American Family sees this case as governed by ***Trio's, Inc. v. Jones Sign Co.***, 151 Wis.2d 380, 444 N.W.2d 443 (Ct. App. 1989), where lost profits were denied as consequential damages where the only property damage was to the insured's product—a defective sign.

¶7 The Fenners respond that there was damage to property other than Gillis's work or product. First, the log cabin was not Gillis's product or work; rather, it was a kit he was assembling and the kit itself was damaged by his negligence. Second, there was damage to plumbing and electrical work done by

others. Third, the Fenners argue that they lost the use of their farm as equity to support a favorable loan and the use of their homestead as potential rental property since they were prevented from moving into the log cabin. "Loss of use of tangible property that is not physically injured" counts as "property damage" under paragraph 15(b) of the policy. Addressing American Family's argument under exclusion 2(m), the Fenners argue that coverage is restored by an exception to that exclusion for "loss of use of other property." Citing ***Jacob v. Russo Builders***, 224 Wis.2d 436, 592 N.W.2d 271 (Ct. App. 1999), the Fenners argue that the refinancing costs are covered collateral damage to other property. Finally, the Fenners argue that there is coverage under the "products-completed operations hazard," which covers damages arising out of the insured's completed or abandoned work.

¶8 We agree with the Fenners that this is a ***Jacob*** case, not a ***Trio's*** case. In ***Jacob***, faulty masonry work caused water damage to the interior of a home. The mason's insurer argued that all damages should be excluded under the business risk exclusion because all were directly or indirectly related to the defective work itself. This court agreed that damage to the masonry work itself was not covered. The cost of replacement of the defective work was economic loss based on contractual liability, which was not covered under the CGL policy. *See* ***Jacob***, 224 Wis.2d at 448, 592 N.W.2d at 276. However, there was also tangible physical damage to other property. This "physical damage to other property based upon tort liability" triggered coverage under the CGL policy. ***Id.*** at 448-49, 592 N.W.2d at 276. In ***Jacob***, as in the present case, the jury had awarded damages for refinancing costs. We remanded for a determination whether these and other damages were "damage wholly and directly related to repairing or

replacing the defective work which is not covered [or] … collateral economic loss which is covered." ***Id.*** at 451, 592 N.W.2d at 277.

¶9 In ***Trio's***, on the other hand, the only physical damage was to the insured's own product. Trio's had ordered a neon sign from Jones. The sign did not work and Trio's brought suit for direct damages based on the contract price and consequential damages of lost profits. The court noted that under the policy language and case law "property damage need not be physical damage, but can be loss of use or diminished value of tangible property." ***Trio's***, 151 Wis.2d at 383, 444 N.W.2d at 445. However, Trio's had alleged no damage to or diminution of value of anything except the sign itself. The court distinguished that situation from the one in ***Sola Basic Industries, Inc. v. United States Fidelity & Guaranty Co.***, 90 Wis.2d 641, 280 N.W.2d 211 (1979), where a damaged transformer, the insured's product, rendered the plaintiff's furnaces useless. *See* ***Trio's***, 151 Wis.2d at 384, 444 N.W.2d at 445. Because only the sign itself was defective and there was no damage to other property, Trio's' consequential economic damages were excluded from coverage. *See* ***id.*** at 384-85, 444 N.W.2d at 445.

¶10 Here, we have a situation parallel to that in ***Jacob***. First, we acknowledge that American Family's policy excludes recovery for damage to either Gillis's product or his work. We agree with the Fenners that the kit was not Gillis's product. But that fact, in and of itself, does not doom American Family's position. This is because we are dealing with Gillis's *work*. However, what ultimately dooms American Family's argument is that Gillis's work caused damage not just to the work he himself had done—the assembly of the kit—but also to the components of the kit itself which were not part of Gillis's work. Additionally, his negligence caused damage to others' work on the cabin, specifically plumbing and electrical work that had to be redone. As a result of

Gillis's walking off the job and the Fenners' consequent need to hire a new contractor to finish the cabin, the Fenners lost the use of their homestead both as a rental property and as collateral for a favorable loan. The loss of use and cost of refinancing were foreseeable consequences of Gillis's negligent act. As such, they represent "collateral damage to … other property," which is covered under a standard CGL policy.

*By the Court.*—Judgment affirmed.

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