COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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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. 2016AP331 **Cir. Ct. No. 2013CV985**

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

PEOPLES STATE BANK,

PLAINTIFF,

V.

MICHAEL C. DEEDON,

DEFENDANT-APPELLANT,

TRIANGLE INSURANCE COMPANY,

INTERVENING-DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Brennan, JJ.

¶1 PER CURIAM. Michael Deedon appeals a summary judgment declaring that Peoples State Bank's misrepresentation claims against Deedon were not covered by Triangle Insurance Company's insurance policy. We affirm.

¶2 Deedon was chief financial officer for Triangle's insured, Wisconsin Rapids Grain, LLC. Deedon allegedly prepared materially false financial documents in furtherance of a scheme to obtain substantial loans and credit for Rapids Grain from the Bank. He also submitted numerous letters attesting the information was accurate. But for Deedon's material misrepresentations, the Bank alleges it would not have extended credit to Rapids Grain and would not have suffered significant losses that resulted from this extension of credit.

¶3 After the Bank alleged various misrepresentation claims against Deedon under WIS. STAT. § 100.18 (2015-16),[1] Triangle intervened and moved to stay and bifurcate the liability proceedings pending a coverage determination. The circuit court granted summary judgment to Triangle, concluding the Bank's pecuniary losses were not "property damage" under the Triangle policy issued to Rapids Grain. The court also determined Deedon's volitional conduct precluded the claims from qualifying as "occurrences." Deedon now appeals.

¶4 We review a grant of summary judgment using the same standards the circuit court applied in making its initial determination. ***Verdoljak v. Mosinee Paper Corp.***, 200 Wis. 2d 624, 630, 547 N.W.2d 602 (1996). Summary judgment

[1] Deedon's briefs to this court fail to adequately develop any arguments concerning the differences between the various types of misrepresentation, and we therefore will not further address the issue.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Interpretation of a contract is a question of law, which we review independently. ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411.

¶5 The insuring agreement for the property damage coverage in Triangle's commercial general liability (CGL) policy provided in relevant part:

> a. Insuring Agreement
>
> (1) **We** will pay those sums that the **insured** becomes legally obligated to pay as damages because of … **property damage** to which this insurance applies.
>
> ….
>
> (2) This insurance applies to … **property damage** only if:
>
> (a) The … **property damage** is caused by an **occurrence** ….

¶6 The Triangle policy further defined "property" as "tangible possessions, whether real or personal." The policy defined "property damage" as "physical injury to tangible property, including all resulting loss of use of that property; or … [l]oss of use of tangible property that is not physically injured."

¶7 In its decision, the circuit court properly concluded the losses alleged in the complaint were not "property damage," and therefore not covered by the policy, stating:

> As defined by the policy, "property" must be something physical and tangible. Thus, "property damage" must involve physical injury to something tangible or the loss of use of something tangible. But what the complaint alleges

> is that the plaintiff bank suffered a pecuniary loss—it lost money. Not specific, physical, tangible pieces of money (currency, coins), but money in the collective, fungible sense in which a monetary loss equates to red ink on a balance sheet or the transfer of numbers in a ledger. This type of loss is not "property damage" and is thus not covered by the Triangle policy.

¶8 Deedon concedes it is "generally true" that "mere pecuniary loss does not normally constitute property damage under Wisconsin law." However, Deedon insists money "is certainly, at least arguably, a tangible possession." Deedon also cites a provision from the policy's Crime Insurance section, which lists money as a form of "property covered." Deedon contends that because property damage includes loss of use of property, "it seems that a loss of use of one's money would fall within these terms in the policy."

¶9 We reject Deedon's attempts to avoid the terms of the CGL portion of Triangle's policy. The Crime Insurance section is a distinct coverage that clarifies with regard to "loss to money": "[T]his peril does not apply … to loss due to any fraudulent, dishonest or criminal act by the **Named Insured** or any of the **Named Insured's employees**, partners, officers, directors … whether acting alone or in collusion with others."

¶10 The section further states, "Coverage shall be deemed cancelled as to any **employee** immediately upon discovery by the **Named Insured** of any fraudulent or dishonest act of such **employee**." The complaint alleged Deedon was Rapids Grain's CFO and that he participated in a fraudulent scheme. As the circuit court stated:

> [T]he complaint does not allege that a coin collection was stolen or that a mattress full of money was damaged; the bank's claim is not about specific pieces of tangible currency, which is what it would need to be in order to qualify as "property damage." Moreover, the Crime

> Insurance section is a different part of the policy, providing different coverage; it does not help illuminate the meaning of separate provisions in the CGL coverage.

¶11 Deedon also argues that by overstating warehouse receipts, Rapids Grain actually deprived the Bank of the grain that would otherwise have been available as collateral for the company's loans. According to Deedon, the loss of use of the grain would "absolutely be considered property damage."

¶12 However, Deedon's argument ignores the fact that the grain never existed. As the circuit court observed, the Bank sought recovery for pecuniary losses it suffered on credit advanced to Rapids Grain, not recovery of some phantom grain, or the loss of use of phantom grain, existing only on fraudulently overstated inventory receipts. According to the circuit court, with which we agree:

> This is not a case involving a warehouse full of grain that was damaged or that the plaintiff was somehow prevented from using. There was no grain. And, in any event, the loss alleged here was not a loss of grain, it was a loss of money. The bank alleged that it lost money because Rapids Grain failed to repay its loans, and that monetary loss is the only reason why the bank would have needed the phantom grain.

¶13 The circuit court also correctly concluded the complaint does not allege an "occurrence" within the meaning of the Triangle policy. The policy defines "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." To determine whether an act is accidental within the meaning of a CGL policy, we need only determine whether the occurrence giving rise to the claims was an unintentional act in the sense that it was not volitional. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶37, 311 Wis. 2d 492, 753 N.W.2d 448.

¶14 The complaint in the present case does not allege Deedon inadvertently sent false reports to the Bank or was careless with the business accounting. To the contrary, the complaint alleged Deedon acted volitionally when he sent documents to the Bank, together with the numerous letters attesting the information was accurate, as part of a scheme to fraudulently obtain bank loans and credit. These allegations remove the claims from the realm of accident.

¶15 Deedon insists the "occurrence" in this case was an unforeseen and unintended event. He claims he merely provided to the Bank the information he received from the owners of Rapids Grain, and he "was being duped." However, during his deposition, Deedon did not claim he was duped or that he failed to understand the accuracy of the financial information he provided to the Bank. Rather, over the course of approximately sixty-five pages of deposition transcript, with the exception of stating his name and address, Deedon declined to answer any question concerning his intent or knowledge, stating only "I take the Fifth."

¶16 Deedon contends we must instead consider the general denials in his answer to the complaint as evidence that he unknowingly submitted false financial documents. However, it is axiomatic that when a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of the pleadings but the response, by affidavit or otherwise, must set forth specific facts showing there is a genuine issue for trial. WIS. STAT. § 802.08(3).

¶17 Deedon also points to the following response to an interrogatory as evidence of his unintended "failure to discover the owner's fraud":

> Interrogatory No. 18: State the complete legal and factual basis for, and identify all witnesses and documents which support, each of your affirmative defenses set forth in your Answer and Affirmative Defenses filed in the matter.

> RESPONSE: Peoples State Bank was contributorily negligent in that it kept advancing funds based upon the warehouse receipts, without doing its due diligence. Additionally, Doug and Dixie Weinkauf were providing me all of the relevant financial information. They fooled me, like they fooled the bank.

¶18 As the circuit court correctly noted, however, it was not relevant whether Deedon knew the financial information was correct. The act of giving information to another is a volitional act even if the actor made a mistake of fact and/or judgment when giving the information. *See* ***Everson v. Lorenz***, 2005 WI 51, ¶22, 280 Wis. 2d 1, 695 N.W.2d 298. Deedon's isolated and vague discovery response failed to include any admissible evidence concerning whether the cause of the Bank's damage was accidental in the sense that it was not volitional. *See* ***Stuart***, 311 Wis. 2d 492, ¶40.

¶19 Quite simply, there was no initial grant of coverage in this case because there was no "property damage" caused by an "occurrence" within the meaning of Triangle's policy. We need not reach additional issues concerning policy exclusions. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).