COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2018

Sheila T. Reiff
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. 2016AP2117

Cir. Ct. Nos. 2015CV001735
2015CV002047

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

SUSAN BLESENER AND RICHARD CHAMPAGNE,

PLAINTIFFS,

V.

WILLIAM LINTON,

DEFENDANT-APPELLANT,

MARY LINTON,

DEFENDANT,

LIBERTY MUTUAL FIRE INSURANCE COMPANY AND LIBERTY MUTUAL INSURANCE COMPANY,

INTERVENORS-RESPONDENTS.

SUSAN BLESENER AND RICHARD CHAMPAGNE,

PLAINTIFFS,

V.

STILLWATER PROPERTY & CASUALTY INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, J.J.

¶1 DUGAN, J. William Linton appeals the trial court's judgment holding that the insurance policies issued to him by Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company (collectively "Liberty") do not afford coverage for misrepresentation and breach of contract claims asserted against him in a civil action. Buyers Susan Blesener and Richard Champagne alleged Linton made untrue statements in a real estate condition report (RECR).

¶2 Linton challenges the trial court's summary judgment determination that, based on the intentional nature of Linton's alleged misrepresentations, there was no "occurrence" under the policies and, therefore, there was no coverage under the Liberty policies. Linton contends that the trial court erred in focusing on his alleged liability-creating conduct and the complaint's theory of liability rather than the alleged factual cause of the property damage.

¶3 Based on our independent consideration of the undisputed facts, the issues presented and the applicable law, we agree with the trial court and, therefore, affirm.

¶4 The following background facts are necessary to understand the issues in this case. Additional relevant facts will be included in our discussion.

BACKGROUND

¶5 Linton built a single-family house on Persimmon Drive in Fitchburg and lived in it for over a decade. He "had nothing to do with the construction …

other than his selection of the architect and builder." Linton sold the house to Blesener and Champagne in July 2009 and, as a part of the sale, Linton provided Blesener and Champagne with a RECR.

¶6 Blesener and Champagne experienced repeated and continuous water intrusions into the house and informed Linton that they believed that he intentionally failed to disclose structural defects in the house that caused rotting and other injury to the house. On July 3, 2015, Blesener and Champagne filed a civil action against Linton.[1] On or about August 1, 2015, Linton tendered the defense and indemnity of the lawsuit to Liberty. By letter dated March 17, 2016, Liberty denied that it had any obligation to defend or indemnify Linton under its policies for the claims pled against him by Blesener and Champagne. However, it accepted Linton's tender under a reservation of all rights.

¶7 The complaint alleges that Blesener and Champagne first experienced water intrusion as early as "late summer or early fall of 2009." The complaint alleges Linton was aware of water infiltration problems before selling the house and that, prior to selling the house, Linton contracted with carpenters and other professionals to repair water leaks on the back of the house and to make masonry repairs. It also alleges that Linton contracted with painters to cover up and conceal interior water stains and damage to the ceilings and drywall in some rooms and to make drywall repairs without repairing the underlying defects.

¶8 The complaint further alleges that Linton prepared and provided Blesener and Champagne with a RECR and failed to disclose any of the alleged

[1] Mary Linton, Linton's wife, was also named as a defendant.

defects and affirmatively stated in the RECR that he was unaware of such defects. In particular, the complaint alleges that the RECR states that Linton was unaware of (1) "defects in the structure of the property," (2) "other defects affecting the property," or (3) "the presence of … window … leaks … that might initiate the growth of unsafe levels of mold." It alleges that Blesener and Champagne relied on the RECR in deciding to purchase the house.

¶9 Additionally, the complaint alleges that because of water infiltration problems, Blesener and Champagne have been advised that "all of the siding should be replaced, all of the stone should be removed, and all of the windows and exterior doors should be replaced" and that the defects alleged "have had a significant adverse effect on the value of the [house] resulting in damages to [them] in an amount not less than $350,000."

¶10 Liberty was not a party to the lawsuit. However, Liberty appeared at a March 10, 2016 hearing, and moved to intervene in the action. The trial court granted the motion.

¶11 Liberty filed an answer, affirmative defense, and a cross-claim against Linton. Linton filed an answer and counterclaim against Liberty. Then, Liberty filed a motion for summary judgment with supporting documents requesting that the trial court declare that Liberty's policies do not provide coverage to Linton for the claims asserted against him.

¶12 The trial court heard the oral arguments at an August 11, 2016 hearing, and issued an oral decision granting Liberty's summary judgment motion. The trial court held that based on its review of Blesener and Champagne's complaint against Linton, the alleged conduct at issue in both claims against Linton was misrepresentation and that controlling case law holds that

misrepresentation is not a covered occurrence under the policies. Subsequently, the trial court entered a brief written order memorializing its determination.

¶13 Thereafter, Blesener, Champagne, and Linton settled the case and filed a stipulation and proposed order. The trial court entered an order approving the stipulation.

¶14 This appeal followed.

STANDARD OF REVIEW

¶15 We review a grant of summary judgment using the same standards the trial court applied in making its determination, and "accordingly, we benefit from, but need not give deference to, the analys[is] of the [trial] court[]." *See* ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶12, 275 Wis. 2d 35, 683 N.W.2d 75. When we review a grant of summary judgment, our review is *de novo*. *See* ***id.*** The interpretation of an insurance policy to determine the scope of an insurer's duty to defend also involves a question of law that is subject to our *de novo* review. *See* ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶18, 311 Wis. 2d 548, 751 N.W.2d 845.

¶16 An insurer's duty to defend its insured "'is triggered by the allegations contained within the four corners of the complaint' against the insured." *See* ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶39, 369 Wis. 2d 547, 881 N.W.2d 309 (citation omitted). In analyzing whether an insurer has a duty to defend (1) "allegations in the complaint are construed liberally and all reasonable inferences are assumed," (2) "ambiguity in the insurance policy is construed against the insurer," and (3) "'when an insurance policy provides coverage for

even one claim made in a lawsuit, the insurer is obligated to defend the entire suit.'" ***Id.***, ¶42 (citation omitted).

¶17 "When determining whether an insurance policy provides coverage, a court first looks to the initial grant of coverage." ***Schinner v. Gundrum***, 2013 WI 71, ¶37, 349 Wis. 2d 529, 833 N.W.2d 685. "Normally, if the court determines that the policy was not intended to cover the asserted claims, it is not necessary to examine the policy's exclusions." *See* ***id.*** Courts interpret an insurance contract "as it would be understood by a reasonable person in the position of the insured." ***Id.***, ¶38. Additionally, "when an insured is seeking coverage, the determination of whether an injury is accidental … should be viewed from the standpoint of the insured." *See* ***id.***, ¶52.

DISCUSSION

¶18 Linton argues that the trial court erred by limiting its "occurrence" analysis to his alleged liability-creating conduct, ignoring alleged facts that the water infiltration was the occurrence, and concluding that ***Everson v. Lorenz***, 2005 WI 51, 280 Wis. 2d 1, 695 N.W.2d 298, controlled the facts of this case. He also contends that our supreme court caselaw compels the conclusion that Liberty's policies provide coverage for the Blesener/Champagne claims because an "occurrence" that caused "property damage" was alleged. He argues that the complaint alleges that "water infiltration through defectively installed windows caused physical damage to at least wood framing and stone siding" of the house. He asserts that these allegations constitute an occurrence. He further argues that that "intentional acts" exclusion could not have precluded coverage as a matter of law.

¶19 By contrast, Liberty asserts that the resolution of the coverage issues in this case is controlled by ***Everson***'s holding that misrepresentations in a RECR are volitional acts, not accidents, and thus, do not trigger liability coverage, citing ***id.***, 280 Wis. 2d 1, ¶18. It further argues that Linton is "mistaken" in his attempt to avoid ***Everson***'s application by arguing that the subsequent incidents of water intrusion, not Linton's alleged misrepresentations, are the appropriate focus for determining coverage. Liberty also maintains that if this court reverses the trial court's no-coverage determination, it should remand for additional proceedings on Liberty's remaining coverage defenses because application of the intentional acts exclusion is a highly-fact intensive inquiry.

The Liberty Policies Require an Occurrence Caused by an Accident.

¶20 Analysis of the coverage issue begins with consideration of the policy terms. The homeowners policy that Liberty Mutual Fire Insurance Company issued to Linton states, in part, that it covers property damage claims caused by an occurrence:

> COVERAGE E – PERSONAL LIABILITY
>
> If a claim is made or a 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: …

(Italics added; bolding omitted.) The homeowners policy defines "property damage" as "physical injury to, destruction of, or loss of use of tangible property." Further, it defines an "occurrence" as follows:

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

> . . .
>
> b. "Property damage".

(Italics added.) Thus, as relevant to the allegations of the instant case, in order to establish coverage the homeowners policy requires allegations of property damage caused by an occurrence which is an "accident." The policy does not define the term "accident."

¶21 The umbrella policy that Liberty Mutual Insurance Company issued to Linton also states,

> II. COVERAGE – PERSONAL EXCESS LIABILITY
>
> We will pay all sums in excess of the retained limit and up to our limit of liability for damages because of personal injury or property damage to which this policy applies and for which the insured is legally liable.

(Bolding omitted.)

"Retained limit," as referenced above, is defined by the umbrella policy as follows:

> 9. "retained limit" means as to each *occurrence* to which this policy applies the sum of:
>
> a. all amounts payable under an underlying policy, if any, or which would be payable under such a policy but for breach of policy conditions, and …

(Bolding omitted.)

The umbrella policy provides the following definition of "occurrence:"

> 11. "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
>
> . . .

> b. "Property Damage".

(Bolding omitted.) The umbrella policy defines "property damage" as

> injury to or destruction of tangible property; (b) injury to intangible property sustained by an organization as the result of false eviction, malicious prosecution, libel, slander or defamation.

Thus, as applied to this case, coverage under the umbrella policy for sums in excess of the retained limit would be for "property damage" due to an "occurrence"' that is an "accident." As with the homeowners policy, the umbrella policy does not define "accident."

¶22 In ***Everson***, the Wisconsin Supreme Court interpreted language identical to that used in Liberty's policies, stating that the insurer would cover liability for property damage if it resulted from an occurrence, which the policy defined as "'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'" *See* ***id.***, 280 Wis. 2d 1, ¶15. As is the situation here, the court noted that the term "accident" was not defined by the policy, and it had often relied on dictionary definitions for assistance. *See* ***id.*** Therefore, ***Everson*** turned to the *Black's Law Dictionary* definition of "accident" as "'[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.'" *See* ***id.*** (citation omitted). It also noted that previously it had defined accident as "'[a]n unexpected, undesirable event'" or "'an unforeseen incident'" which is characterized by a "'lack of intention.'" *See* ***Everson***, 280 Wis. 2d 1, ¶15 (citations and multiple sets of quotation marks omitted).

¶23 We next address whether there was an "occurrence," based on the factual allegations in the complaint.

Based on the Factual Allegations in the Complaint, There was no Occurrence.

¶24 The complaint alleged that Linton (1) intentionally concealed interior water stains and damage to the drywall by contracting with painters to the paint and repair drywall, prior to the sale of the house, and (2) in completing the RECR form he failed to disclose his knowledge of structural defects, other defects in the house and his knowledge of window leaks that might "initiate unsafe mold levels." The complaint also alleged that he made these statements knowing "that they were untrue or recklessly without caring whether they were true or false and with the intent to deceive and induce" Blesener and Champagne "to purchase the [house.]"

¶25 We hold that ***Everson*** is controlling. ***Everson*** involved allegations of strict liability misrepresentation and/or negligent misrepresentation against a real estate developer brought by a buyer who intended to build a home on property he had purchased from the developer. *See* ***id.***, ¶4. The buyer alleged that the developer misrepresented that no portion of the property lay within a 100-year flood plain and that, as a result of the misrepresentation, construction of the home was not possible at the location where the buyer intended to build. *See* ***id.***, ¶5. The court held that to be liable, the developer "must have asserted a false statement, and such an assertion require[d] a degree of volition inconsistent with the term accident." *See* ***id.***, ¶19. The court concluded that "where there is a volitional act involved in such a misrepresentation, that act removes it from coverage as an 'occurrence' under the liability insurance policy." *See* ***id.***, ¶20. *See also*, ***Stuart v. Weisflog's Showroom Gallery, Inc.*** (***Stuart II***), 2008 WI 86, ¶¶26-40, 311 Wis. 2d 492, 753 N.W.2d 448 (holding that no coverage existed for the insured's misrepresentations; "defendants' intent to induce at the time they

engaged in misrepresentations, … is the key to determining whether their conduct was accidental"); ***Doe 1 v. Archdiocese of Milwaukee***, 2010 WI App 164, ¶10, 330 Wis. 2d 666, 794 N.W.2d 468 (applying ***Everson*** and ***Stuart II*** and holding that the Archdiocese's negligent misrepresentations that children were safe in the presence of priests with a history of child sexual abuse "constituted volitional acts that are not subject to coverage").

¶26 By contrast, Linton relies on ***United Cooperative v. Frontier FS Cooperative***, 2007 WI App 197, 304 Wis. 2d 750, 738 N.W.2d 578, to support his arguments. However, in ***United Cooperative***, this court expressly distinguished ***Everson*** and a related line of real estate fraud cases that centered around alleged misrepresentations. We explained as follows:

> The key to understanding why the analyses in ***Everson*** [and that line of cases] focused on an alleged misrepresentation by an insured, rather than on some other event that arguably caused the alleged property damage, is that the insureds in those cases were not responsible, or apparently not responsible, for the true cause of the alleged property damage. So far as the decisions in those cases reveal, the insureds' misrepresentations were the only hooks on which the insureds seeking coverage could hang their hats if they hoped to obtain coverage.

United Coop., 304 Wis. 2d 750, ¶19.

¶27 In this case, Blesener and Champagne alleged that the water infiltration and subsequent damage were caused by "substantial and material defects" in existence "since construction." However, Linton himself played no role in the designing, building or supervision or control of the house's construction. Thus, the only hook on which Linton can hang his hat in hopes of obtaining coverage is his alleged misrepresentations. *See* ***id.*** Under ***Everson***, and

the related line of cases, those misrepresentations were not accidents and, therefore, there is no "occurrence."

¶28 As was the situation in ***Everson***, based on the allegations of the complaint, "[t]o be liable, [Linton] must have asserted a false statement, and such an assertion requires a degree of volition inconsistent with the term accident." *See* ***id.***, 280 Wis. 2d 1, ¶19. Since Linton's misrepresentations were not an accident, they are not an occurrence under the Liberty policies. *See* ***id.***, ¶¶19-20 (stating that when there is a volitional act involved in a misrepresentation, that act removes it from coverage as an "occurrence" under the liability policy.)

CONCLUSION

¶29 Based on our independent consideration of the record, the issues, and the applicable law, we affirm the trial court's judgment holding that the Liberty insurance policies do not afford coverage for Blesener and Champagne's claims against Linton based on the factual allegations that Linton made intentional misrepresentations regarding the house.[2]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[2] We note that, if coverage were found, the parties disagree on other issues including whether "intentional acts" exclusion is applicable and whether that issue could be resolved as a matter of law. However, we do not address those issues or the parties' remaining arguments on appeal since we conclude that summary judgment was properly granted because the factual allegations regarding Linton's misrepresentations do not constitute an occurrence under the policies. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 295 n.6, 507 N.W.2d 136 (Ct. App. 1993).