COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1208

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

TECWYN ROBERTS, SARA H. ROBERTS AND ELIZABETH M. HALKERSTON,

PLAINTIFFS,

V.

JOHN J. WOLF AND LINDA WOLF,

DEFENDANTS-APPELLANTS,

WISCONSIN ELECTRIC POWER COMPANY AND PIEPER ELECTRIC, INC.,

DEFENDANTS,

WEST BEND MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Reversed.*

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

¶1 SNYDER, J. Tecwyn Roberts, Sara H. Roberts and Elizabeth M. Halkerston (collectively, the Robertses) sued John J. Wolf and Linda Wolf alleging intentional trespass to land, injury to real property, unlawful cutting of timber and interference with or declaration of interest in real property. The Wolfs tendered the defense of the Robertses' claims to their homeowner's policy insurer, West Bend Mutual Insurance Company (West Bend). West Bend accepted the tender of defense, denied that coverage existed under the homeowner's policy, requested a declaration pursuant to WIS. STAT. § 806.04 (1999-2000)[1] and filed a motion for summary judgment dismissal. The trial court granted West Bend's summary judgment motion and the Wolfs appeal.

¶2 The Robertses and the Wolfs are adjoining landowners in the Crystal Lake Park subdivision in Sheboygan county. The Robertses and Halkerston own Lots 2 and 3, respectively, and the Wolfs own Lots 76 and 77. The Wolfs hold an easement across Lots 2 and 3 by virtue of an agreement between the previous lot owners.

¶3 The Robertses' complaint alleges that sometime between January 1, 1998, and August 31, 1998, the Wolfs and others caused or directed third parties and their equipment to unlawfully trespass upon Lots 2 and 3 causing damage to an underground sprinkler system, tire damage and compaction to the lawns,

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

removal or damage to trees and shrubs, and removal of a metal railing separating the lots. Specifically, the Robertses' complaint alleges: (1) trespass to land; (2) injury to real property; (3) unlawful cutting of timber; and (4) interference with or declaration of interest in real property. The Robertses' complaint also demands punitive damages for an intentional disregard of their real property rights and statutory double damages for the unlawful cutting of timber.

¶4 Between January 1, 1998, and August 31, 1998, West Bend had in effect a homeowner's insurance policy issued to the Wolfs. The basic policy provides:

> **PART A - HOME AND PERSONAL ACTIVITIES LEGAL LIABILITY**
>
> **We** insure the liability of **you** and **your family** to pay because of **bodily injury** or **property damage** to others in an **accident or incident** *that happens in **your home** or on **your** property*, as listed in the Declarations Page. (Italics added.)

The policy also provides, in part, the following exclusionary language:

> **We** do not cover **property damage** to property rented to, occupied or used by, or in the care, custody or control of **you** or **your family**.… **[W]e** will not pay for **property damage** intentionally done by an **insured person** over twelve years of age, nor to property covered under any other Part of this policy or for **property damage** arising from an **insured person's business**.
>
> **SECTION III – GENERAL EXCLUSIONS**
>
> The following apply to Section I and II of the policy. Any other limitations or exclusions appear in the parts of the policy to which they apply.
>
> ….
>
> **5.** **We** do not cover any liability for **bodily injury** or **property damage** expected or intended by any **insured person**. For this exclusion to apply, any **insured person** need only expect or intend to cause any injury or **damage**.
>
> ….

> **11.** **We** do not cover any punitive or exemplary damages.

¶5 The Wolfs do not claim coverage under the West Bend basic policy, but argue that they are entitled to a defense or indemnification under the Personal Excess Liability Endorsement (PELE) to the West Bend basic policy. The PELE provides as follows:

> **PART II - COVERAGE**
>
> We pay **damages** on behalf of the **insured**, subject to the exclusions.
>
> **PART III – EXCLUSIONS**
>
> We do not cover:
>
> ....
>
> **4.** Acts committed by or at the **insured's** direction with intent to cause **personal injury** or **property damage**.
>
> ….
>
> **10.** Any punitive or exemplary damages. However, if a lawsuit is filed against an insured which alleges both compensatory and punitive/exemplary damages, **we** will defend the entire lawsuit with the understanding that **we** can pay only the compensatory damages.

¶6 The Wolfs contend that coverage under the basic policy is not material to coverage under the PELE as evidenced by the following basic policy statements:

> **PART I – DEFINITIONS**
>
> ....
>
> **7.** **Primary insurance** means insurance collectible by or payable on behalf of the **insured** which covers liability for **personal injury** or **property damage**.
>
> ....
>
> **PART IV – LIMITS OF LIABILITY**
>
> Regardless of the number of **insureds**, claims or injured persons, the most **we** pay as **damages** resulting from one

occurrence shall not exceed the amount shown on the Declarations, subject to the following:

….

4. If **primary insurance** does not cover an occurrence which results in **personal injury** or **property damage**, but the occurrence is covered by this endorsement, **we** pay **damages** which exceed the retained limit on the Declarations.

....

PART VII – DEFENSE OF SUITS NOT COVERED BY OTHER INSURANCE

If **primary insurance** does not cover **personal injury** or **property damage** covered by this endorsement, **we**:

1. Defend the **insured** against a claim or suit for **damages**….

The PELE also relates the following definitions:

PART I – DEFINITIONS

....

3. **Damages** means the total of:

a. **Damage** the **insured** must pay (legally or by agreement with **our** written consent) because of **personal injury** or **property damage** covered by this endorsement ….

....

6. **Personal injury** means:

....

b. Injury arising out of:

....

(3) Wrongful entry or eviction, or other invasion of the right of private occupancy ....

....

8. **Property damage** means **damage** to or **loss** of use of tangible property.

¶7 In its brief, West Bend cites to basic policy provisions outside of the PELE as relevant to the coverage provided under the PELE.[2] The PELE, however, is a separate four-page endorsement that begins as follows:

> **AGREEMENT**
>
> **We** provide the insurance in this endorsement in return for the premium and compliance with the provisions of this endorsement.

The Wolfs frame the appellate question as whether there is coverage under West Bend's PELE for the damages claimed by the Robertses.

¶8 The existence of a duty to defend depends solely upon the nature of the claim being asserted against the insured and has nothing to do with the merits of that claim. ***C.L. v. Sch. Dist. of Menomonee Falls***, 221 Wis. 2d 692, 699, 585 N.W.2d 826 (Ct. App. 1998). An insurer who accepts the duty to defend and who claims that the terms of the policy deny coverage for the incident forming the basis of the suit must take steps to seek and obtain a bifurcated trial—litigating coverage first and obtaining a stay of all proceedings in the liability and damages aspects of the case until coverage, or lack of coverage, is determined. ***Keneflick v. Hitchcock***, 187 Wis. 2d 218, 232-33, 522 N.W.2d 261 (Ct. App. 1994) (citing ***Elliott v. Donahue***, 169 Wis. 2d 310, 318, 485 N.W.2d 403 (1992)). An insurer who breaches its duty to defend waives any later challenge to coverage. ***Prof'l Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 584-85, 427 N.W.2d 427 (Ct. App. 1988). Where an insurer disputes coverage, its duty to defend

[2] West Bend cites to coverage and exclusion provisions contained in SECTION II of the extensive HOME AND HIGHWAY policy, entitled "YOUR PERSONAL LIABILITY INSURANCE," which provide definitions and policy language relating to the primary liability coverage rather than to coverage in the PELE, SECTION III, of the policy.

continues only until the issue of coverage is resolved. ***Keneflick***, 187 Wis. 2d at 235.

¶9 As a Wisconsin insurer, West Bend did precisely what was required of it in this case. It accepted defense of the Robertses' claims and sought a bifurcated proceeding to determine coverage issues in advance of the trial on liability and damages. West Bend moved for summary judgment dismissal based upon the West Bend policy excluding coverage for damages resulting from the intentional tort of trespass, injury to real property resulting from the intentional tort of trespass, and for the unlawful cutting of timber claim that arises from the intentional tort of trespass. Further, West Bend contends that it has no duty to defend or indemnify for the interference with declaration of interest in real property claim because the claim arises out of an intentional tort that exceeded the intended usage of the easement running to the Wolfs, and because that claim seeks injunctive relief rather than damages.

¶10 The trial court decided the insurance coverage issue on a motion for summary judgment. Summary judgment should be granted when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Summary judgment is not available if competing inferences might be drawn from the facts. ***Kretchman v. Reid***, 46 Wis. 2d 677, 680-81, 176 N.W.2d 301 (1970). The summary judgment methodology has been comprehensively set forth in ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987), and we apply that methodology here.

¶11 The question of coverage involves the interpretation of an insurance policy and therefore presents a question of law for which we accord no deference. ***Smith v. Atl. Mut. Ins. Co.***, 155 Wis. 2d 808, 810, 456 N.W.2d 597 (1990). The

central purpose of the interpretation of an insurance policy, like any other contract, is to ascertain the parties' intentions as revealed by the contract language. ***Sch. Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 367, 488 N.W.2d 82 (1992). When the terms of a policy are without ambiguity and are plain on their face, we need not resort to rules of construction, nor will we attempt to rewrite the policy to provide coverage not agreed to by the parties. ***Id***.

¶12 Policy language is tested by what a reasonable person in the position of the insured would have understood the words to mean. ***Kozak v. U.S. Fid. & Guar. Co.***, 120 Wis. 2d 462, 466-67, 355 N.W.2d 362 (Ct. App. 1984). Likewise, where ambiguities exist, courts will construe the language against the drafter and in favor of the insured. ***Schroeder v. Blue Cross & Blue Shield***, 153 Wis. 2d 165, 173, 450 N.W.2d 470 (Ct. App. 1989). Because the PELE agreement provides endorsement insurance for a separate premium ("**We** provide the insurance in this endorsement in return for the premium …."), and specifically and independently addresses both coverage and exclusions, we are satisfied that we need not look to other provisions of the homeowner's policy to determine whether an insured would understand whether coverage was provided under the PELE.

¶13 The coverage language in West Bend's PELE is broad, covering damages on behalf of the insured limited only by the express PELE exclusions. Specifically, West Bend addresses the cutting of timber claim in the Robertses' complaint relying on the PELE exclusion of acts with intent to cause personal injury or property damage and punitive or exemplary damages. West Bend's summary judgment motion contends:

> **(c) There is No Coverage for the Third Cause of Action – Unlawful Cutting of Timber.**
>
> This third cause of action cites section 26.09 of the Wisconsin Statutes entitled "civil liability for unlawful

> cutting, removal and transport" of raw forest products. Just as the second cause of action is a further delineation of damages sought as a result of trespass, so is this third cause of action relating to the unlawful cutting of timber. This cause of action alleges all prior allegations of the complaint which has as its genesis, the trespass allegations. For the same reasons stated above, there is no coverage for this cause of action.
>
> Furthermore, West Bend's policy does not provide coverage for any punitive or exemplary damages.

¶14 Based upon the summary judgment record, we are satisfied that the Wolfs could reasonably expect coverage for unlawful cutting of timber damages claimed in the Robertses' complaint. First, the timber was located wholly in the Wolfs' existing access easement. Second, the Robertses' complaint includes the Wolfs' access easement and West Bend acknowledges that the complaint involves the Wolfs' use of the easement as exceeding the easement's intended usage, and that "the use of [the Wolfs' easement interest] is in excess of an easement that was entered many years before and the usage of the [easement] is in contravention of the prior use, scope, intensity and grant of easement previously obtained." Third, as a matter of law, proof of intent or willful trespass are not elements of proof in the Robertses' WIS. STAT. § 26.09 claim. Fourth, as a matter of law, § 26.09 damages are not punitive or exemplary damages excludable in insurance policies and the PELE must specifically exclude statutory double damages awarded under the statute.

¶15 Generally, when an intent to injure is not specifically pled, a factual issue remains to be presented to the jury. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 498, 588 N.W.2d 285 (Ct. App. 1998). However, there are circumstances where courts have inferred intent to injure as a matter of law. ***Id.*** West Bend cites to ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 563 N.W.2d 154 (1997), in support of its contention that an alleged intentional

trespass, an act contrary to the private landowner's right to exclude others from his or her land, allows the trial court to infer "damage from every direct entry upon the land of another [and recognize] actual harm in every trespass." West Bend then relates that the PELE "does not cover acts committed by or at the Wolfs' direction with intent to cause personal injury or property damage." Based on the complaint and the ***Steenberg Homes*** holding, West Bend contends that the cut timber damages were caused by the Wolfs' trespass (defined in part as wrongful entry).

¶16 ***Steenberg Homes*** is distinguishable from this case. ***Steenberg Homes*** was concerned only about the extent of damages after Steenberg Homes admitted to an intentional trespass to Jacque's land. ***Id***. at 612. Here, it is undisputed that the Wolfs had an access easement concerning the property on which the alleged intentional trespass and cutting of timber occurred. Tecwyn Roberts testified that the cut timber was located wholly within the Wolfs' access easement area:

> Q: Any trees cut on your property?
>
> A: [Tecwyn Roberts] You bet.
>
> Q: Where?
>
> A: They were right down the easement here.
>
> ....
>
> Q: Would you say that the trees you're complaining of being gone would have been located in the south portion of that access easement?
>
> A: Right. Yes.

¶17 An easement is an interest on land which is in the possession of another. ***Atkinson v. Mentzel***, 211 Wis. 2d 628, 637, 566 N.W.2d 158 (Ct. App. 1997). An easement creates two distinct property interests: the dominant estate, which enjoys the privileges granted by an easement, and the servient estate, which

permits the exercise of those privileges. ***Id***. Title to the property does not pass to the dominant owner; only the right to pass over it is granted. ***Hunter v. McDonald***, 78 Wis. 2d 338, 344, 254 N.W.2d 282 (1977). The dominant owner does not obtain an estate in the property, but only a right to use the land not inconsistent with the general property rights in the servient owner. ***Id.***

¶18 Every easement carries with it by implication the right of doing whatever is reasonably necessary for the full enjoyment of the easement. The unrestricted grant of an easement gives the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. ***Scheeler v. Dewerd***, 256 Wis. 428, 432, 41 N.W.2d 635 (1950). We look to the easement to construe relative rights of the landowners. ***Hunter***, 78 Wis. 2d at 342-43. "The use of the easement must be in accordance with and confined to the terms and purposes of the grant." ***Id***. at 343. Construction of an easement is a question of law unless there is an ambiguity requiring resort to extrinsic evidence. ***Edlin v. Soderstrom***, 83 Wis. 2d 58, 69, 264 N.W.2d 275 (1978).

¶19 The Wolfs' access easement over the Robertses' property is set forth within the complaint, as well as a judicial order clarifying the easement. The original easement, dated March 29, 1984, was "for driveway purposes." The March 11, 1993 clarification order granted the dominant estate "the right to ingress and egress … for the purpose of loading or unloading of their vehicles" and "to park not more than two motor vehicles on this easement." Neither the original easement nor the clarifying order addresses the dominant estate's right to remove timber to allow the reasonable and proper enjoyment of the easement. Clearing obstructions that wrongfully interfere with an easement privilege is allowable unless otherwise constrained by the easement in question or the proper use of the servient owner, and the servient owner "may not unreasonably interfere

with the use by the easement holder." ***Hunter***, 78 Wis. 2d at 343. We conclude that an ambiguity exists in the Robertses' complaint as to whether the timber alleged to have been unlawfully cut challenges the Wolfs' reasonable and proper use of the easement, or whether the cutting was inconsistent with the servient ownership. In either case, the cutting of timber was within the easement area and raises sufficient competing inferences as to the Wolfs' intent as dominant easement owners to preclude summary judgment release for PELE coverage on the WIS. STAT. § 26.09 claim.

¶20 The Robertses' unlawful cutting of timber claim itself rests directly upon a violation of WIS. STAT. § 26.09, the unlawful cutting of "raw forest products" growing on land. Section 26.09(2)(a) states that "an owner of raw forest products that were harvested without the consent of the owner may bring a civil action against the person who harvested the raw forest products to recover the damages caused by the harvesting." However, an owner may not recover damages under § 26.09(2)(a) "if the person harvesting the raw forest products or the person giving consent for the harvesting reasonably relied on a written agreement among adjacent owners" that the harvest was with consent. Sec. 26.09(2)(b). We are satisfied that reliance upon a recorded easement, a written agreement among adjacent land owners, would raise a competing inference that the cutting of timber was for other reasons than an intent to cause damage to the servient estate.

¶21 West Bend's contentions have also been addressed in ***Hartland v. Cicero Mutual Insurance Co. v. Elmer***, 122 Wis. 2d 481, 363 N.W.2d 252 (Ct. App. 1984). WISCONSIN STAT. § 26.09 provides for only one rule of damages for all timber trespass regardless of mistake or bad faith. ***Hartland***, 122 Wis. 2d at 486; *see also* ***Swedowski v. Westgor***, 14 Wis. 2d 47, 53, 109 N.W.2d 549 (1961). Proof of intent or willful trespass need not be shown. ***Hartland***, 122 Wis. 2d at

486. Double damages under § 26.09 are not the equivalent of punitive damages. ***Id.*** Unless the insurance policy language expressly and unambiguously excludes coverage for § 26.09 statutory double damages, a reasonable insured would understand the insurance policy to cover any mistaken or accidental acts committed. ***Hartland***, 122 Wis. 2d at 487.

¶22 We hold that the Wolfs could reasonably understand the PELE, an endorsement which stands on its own terms, to provide coverage for damages caused to trees located in the access easement, an easement acknowledged in the Robertses' complaint, that occurred during the exercise of easement rights. The Robertses' complaint seeks damages under WIS. STAT. § 26.09 solely within the easement area. Proof of intent or willful trespass is not necessary to the claim as a matter of law, and, therefore, the Wolfs could reasonably understand that the PELE exclusion for intentional causing of property damage would not apply to the cut timber claim. In effect, they could be held liable for damages for the mistaken and unintentional cutting of trees in the easement, a prospect that they can reasonably conclude is covered under the PELE. The PELE does not specifically exclude § 26.09 double damages and, as a matter of law, § 26.09 double damages are not excludable in coverage matters as punitive and exemplary damages.

¶23 We conclude that the PELE exclusions relied upon by West Bend are not applicable to the WIS. STAT. § 26.09 claim in the Robertses' complaint. Therefore, there are allegations in the complaint that would fall within the broad coverage (the duty to indemnify) afforded by the PELE for damages arising out of that claim and the Wolfs could reasonably understand that coverage for damages existed. If some coverage exists, the insurer must defend the entire action, even though certain allegations may fall outside the scope of coverage. *See* ***U.S. Fire***

Ins. Co. v. Good Humor Corp., 173 Wis. 2d 804, 819, 496 N.W.2d 730 (1993). We therefore reverse the summary judgment.

By the Court.—Judgment reversed.

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