

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2001

Cornelia G. Clark
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. 01-0195

Cir. Ct. No. 99-CV-152

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WILLIAM TROMBELLO AND PATRICIA TROMBELLO,

PLAINTIFFS,

v.

**BLUE SKY HARBOR LIMITED PARTNERSHIP, BAILEY'S
HARBOR YACHT CLUB LODGE CONDOMINIUM OWNERS'
ASSOCIATION, PAULA LUDWIG, JOE SCHMITZ, SHIREEN
WEDLOCK, DENNIS GORDON, STEPHAN KASE, DAN VAN
BELLINGER, KENNETH SEMMANN, JON MASSAD, L & I
HOSPITALITY, BHYC RENTAL SERVICE, INC. AND
RESORT MANAGEMENT GROUP, INC.,**

DEFENDANTS,

RUSSELL SCHMEISER,

DEFENDANT-APPELLANT,

CINCINNATI INSURANCE COMPANY,

INTERVENING DEFENDANT,

STATE FARM FIRE & CASUALTY COMPANY.

**INTERVENING DEFENDANT-
RESPONDENT.**

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Russell Schmeiser appeals a summary judgment concluding that State Farm Fire & Casualty Company has no duty to defend or indemnify him in a lawsuit commenced by William and Patricia Trombello. Schmeiser argues that the trial court failed to follow appropriate summary judgment procedure and improperly placed the burden of proof on Schmeiser. He also argues that the Trombellos' complaint is so vague as to damages that Schmeiser's personal liability umbrella policy might cover the loss.¹ We reject those arguments and affirm the summary judgment.

¶2 Whether an insurer has an obligation to defend is determined by examining the complaint. *See School Dist. of Shorewood v. Wausau Ins. Co.*, 170 Wis. 2d 347, 364-65, 488 N.W.2d 82 (1992). The duty to defend arises if the complaint alleges facts that, if proven, would obligate the insurer to indemnify the insured. *Id.*

¹ State Farm further argues that the policy's Business Pursuits Exclusion applies. The trial court did not rule on that question. Likewise, we conclude that it is unnecessary to review that issue because the policy does not cover the Trombellos' claims for other reasons.

¶3 The Trombellos, owners of a condominium, allege improper conduct by the condominium owners' association and its officers and directors, including Schmeiser. The complaint alleges breach of fiduciary duty, violation of WIS. STAT. ch. 703,² intentional, strict liability and negligent misrepresentation, violation of WIS. STAT. § 100.18, and conversion. The Trombellos claim that the defendants violated the condominium by-laws and statutes when the association acquired a rental service to assist owners who wished to rent their units. They also allege that the association misappropriated income from vending machines, improperly filed a consolidated tax return with the rental agency, made substantial loans to the agency and individual unit owners, improperly assumed expenses of the developer and others, kept improper records, failed to capitalize the condominium reserve fund, failed to hold elections as required by law, and permitted nonmembers to use condominium facilities. The Trombellos seek removal of the current officers and directors, appointment of a receiver, an accounting of payments made from the association funds, damages, and a declaration of the association's rights and duties.

¶4 Schmeiser's umbrella policy provides that State Farm will indemnify and defend Schmeiser if he is sued for damages "for a loss." The policy endorsement defines a "loss" as

an accident ... which results in bodily injury or property damage ... or the commission of an offense ... which results in personal injury during the policy period.

....

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

... “bodily injury” means physical injury, sickness, disease, emotional distress or mental injury to a person.

....

... “property damage” means physical injury to or destruction of tangible property. This includes the loss of use caused by the injury or destruction.

....

... “personal injury” means injury caused by one or more of the following offenses: ... invasion of rights of privacy.

¶5 The trial court appropriately applied summary judgment methodology and correctly allocated the burden of proof when it granted State Farm’s motion for summary judgment. Summary judgment is appropriate when, after sufficient time for discovery has passed, the party asserting a claim on which it bears the burden of proof at trial, fails to demonstrate the existence of an element essential to that party’s case. *See Transportation Ins. Co. v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1979). Here, the action had been pending for more than one year. State Farm adequately explained the basis for its motion for summary judgment, demonstrating that the complaint did not seek recovery for any “loss” as defined in the policy. At that stage, Schmeiser had the burden of identifying specific facts that would defeat State Farm’s motion. *See id.*

¶6 The facts alleged in the complaint do not meet the definition of “loss” as defined in the insurance policy. Even if any of the activities described could be viewed as “an accident,” there is no allegation and no evidence of bodily injury, property damage or personal injury. Schmeiser contends that paragraph 66 of the complaint, which alleges that the association and its officers “have seriously interfered with the Trombellos’ right to use, enjoy and possess their interest in the condominium,” arguably pleads an invasion of privacy rights, which is a “personal

injury" as defined in the policy. "Invasion of privacy" is defined in WIS. STAT. § 895.50(2) as an intrusion upon the privacy of another in a manner that is highly offensive to a reasonable person, or use of a person's name or image for advertising without consent, or publicity concerning a person's private life.³ Nothing in the complaint remotely suggests a violation of privacy rights and, in the absence of any evidence that the Trombellos seek recovery for any "bodily injury," "property damage" or "personal injury," the trial court properly concluded that State Farm has no obligation to defend or indemnify Schmeiser in this action.

By the Court.—Judgment affirmed.

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

³ State Farm argues that Iowa law governs this dispute because Schmeiser is an Iowa resident and the policy was sold and delivered to him in Iowa by an Iowa agent. The parties agree, however, that there is no difference between Iowa and Wisconsin law on any matter of significance to this appeal. Iowa has adopted a similar definition of invasion of privacy. *See Stressman v. American Black Hawk Broad.*, 416 N.W.2d 685, 686 (Iowa 1987).

