COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2733 **Cir. Ct. No. 2009CV341**

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

MARK YEAGER,

PLAINTIFF-APPELLANT,

V.

POLYURETHANE FOAM INSULATION, LLC AND BIOBASED INSULATION, LLC,

DEFENDANTS,

SOCIETY INSURANCE,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK MANGERSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Mark Yeager appeals a summary judgment granted in favor of Society Insurance. The circuit court determined that a commercial general liability policy Society issued to Polyurethane Foam Insulation, LLC (PFI) did not provide coverage for Yeager's claims against PFI. The court also held that Society had no further duty to defend PFI under an errors and omissions endorsement after Society deposited the endorsement's $10,000 limit with the court. We affirm.

BACKGROUND[1]

¶2 In October 2004, Yeager began construction of a new home in Sugar Camp. In December 2007, Yeager hired PFI to insulate the home's exterior walls using a spray-in foam insulation product manufactured by BioBased Insulation, LLC. About one week after PFI finished its work on the house, Yeager became concerned that the insulation had not been installed correctly. He subsequently sued both PFI and BioBased Insulation. With respect to PFI, Yeager alleged breach of contract, negligent breach of contract, and breach of warranty. He contended PFI "failed to install the insulation according to the specifications of the contract" and "negligently install[ed] the insulation."

¶3 At his deposition, Yeager described the alleged problems with PFI's work. First, he claimed that PFI sprayed the insulation unevenly, causing "frost

[1] Yeager's brief contains no citations to the record; instead, Yeager only cites to his brief's appendix. We admonish Yeager that WIS. STAT. RULES 809.19(1)(d) and (e) require appropriate citations to the record on appeal, and references to a brief's appendix are not in conformity with the rules. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

pockets" to form in some places on the insulation's surface. Second, he contended that PFI allowed liquid resin to leak from a spray hose, staining the floors on the house's first and second stories and leaving behind an oily residue. Third, Yeager alleged that PFI "oversprayed" the insulation, depositing foam on windows, exposed beams, two ladders, a work light, a ceiling fan, and a chimney. Fourth, Yeager claimed that PFI spilled fuel oil in the house during the insulation process. Fifth, Yeager alleged that PFI failed to remove staging material it used while installing the insulation. Sixth, Yeager contended that, because of PFI's failure to install the insulation properly, condensation built up on the house's windows, causing gray staining and water damage.

¶4 Society, which had issued a commercial general liability (CGL) policy to PFI, moved to intervene, and the circuit court granted its motion. The court then granted Society's motion to bifurcate and stay, ruling that it would determine whether Society's policy provided coverage for Yeager's claims against PFI before reaching the merits of Yeager's claims.

¶5 Society's CGL policy provided, in relevant part:

> **A. Coverages**
>
> **1. Business Liability**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies ….
>
> **b.** This insurance applies:
>
> **(1)** To "bodily injury" and "property damage" only if:
>
> **(a)** The "bodily" injury or "property damage" is caused by an "occurrence"

> that takes place in the "coverage territory[.]"

The policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶6 Society had also issued PFI a "Contractors Errors and Omissions" endorsement, which provided that Society would pay "those sums that [PFI] becomes legally obligated to pay for damages covered by this insurance because of 'contractors errors and omissions' to which this insurance applies." However, Society's limit under the endorsement was $10,000. The endorsement also stated that Society's "right and duty to defend end when we have used up that amount in the payment of judgments or settlements for 'contractors errors and omissions.'"

¶7 Society moved for summary judgment. Society conceded that the contractor's errors and omissions endorsement provided coverage for Yeager's claims against PFI. However, Society argued there was no other coverage for the claims under the CGL policy. Society contended the CGL policy did not provide an initial grant of coverage because Yeager had not alleged any property damage caused by an "occurrence," as the policy defined that term. In the alternative, Society argued that certain exclusions in the CGL policy applied.

¶8 Society also asked the court to declare that it had no further duty to defend PFI. Society argued that, because the CGL policy did not provide coverage, Society could not have a duty to defend under that policy. Society conceded that it had a duty to defend PFI under the contractor's errors and omissions endorsement. However, Society offered to pay the endorsement's $10,000 limit to the court "in fulfillment of Society's obligation under that form."

Society argued that, under the language of the endorsement, once Society paid the endorsement's limit, it had no further duty to defend PFI.

¶9 The circuit court granted Society's summary judgment motion, holding that the CGL policy did not provide coverage for Yeager's claims because "the exclusions apply here." The court also ruled that Society, having paid $10,000 to the clerk of court, had no further duty to defend PFI under the contractor's errors and omissions endorsement. The court therefore dismissed Society from the case.

DISCUSSION

¶10 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. Coverage for Yeager's claims under the CGL policy

¶11 The interpretation of an insurance policy is a question of law that we review independently. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. In doing so, we give the policy language its ordinary meaning—that is, "'what the reasonable person in the position of the insured would have understood the words to mean.'" ***Id.***, ¶17 (quoting ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 1.1(C) (4th ed. 1998)).

¶12 We employ a three-step procedure to determine whether an insurance policy provides coverage for a claim. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. "First,

we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." ***Id.*** If the claim triggers an initial grant of coverage, we next examine the exclusions in the policy to determine whether they preclude coverage of the claim. ***Id.*** Lastly, if an exclusion applies, we look for an exception to that exclusion that would reinstate coverage. ***Id.***

¶13 Here, we need only reach the first step of this process because we conclude that, aside from the errors and omissions endorsement, Society's CGL policy does not make an initial grant of coverage for Yeager's claims.[2] The CGL policy provides that Society will pay "those sums that [PFI] becomes legally obligated to pay as damages because of … 'property damage[.]'" The policy further states that the insurance only applies if the property damage "is caused by an 'occurrence[.]'" The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶14 Yeager's claims against PFI do not allege property damage caused by an "occurrence," as the CGL policy defines that term. We have previously held that faulty workmanship, in and of itself, is not an "occurrence" and therefore does not give rise to coverage under a standard CGL policy, like the one Society issued in this case:

> We therefore conclude that faulty workmanship in itself is not an "occurrence"—that is, "an accident"—within the

[2] The circuit court concluded there was no coverage for Yeager's claims because certain exclusions in the policy applied. On review of summary judgment, we may affirm based on a theory or reasoning different from that relied upon by the circuit court. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995).

> meaning of the CGL policy. An "accident" may be caused by faulty workmanship, but every failure to adequately perform a job, even if that failure may be characterized as negligence, is not an "accident," and thus not an "occurrence" under the policy.

Glendenning's Limestone & Ready-Mix Co. v. Reimer, 2006 WI App 161, ¶39, 295 Wis. 2d 556, 721 N.W.2d 704.

¶15 All of Yeager's claims against PFI are for faulty workmanship. He contends that PFI improperly installed the spray-in foam insulation, causing frost pockets and condensation; that PFI's equipment leaked liquid resin and fuel oil during the insulation process; that PFI oversprayed insulation onto windows, beams, ladders, light fixtures, and a chimney; and that PFI failed to remove some staging materials from the home. These claims all arise from PFI's failure to install the foam insulation in a professional, workmanlike manner. We agree with Society that

> [w]hen a contractor comes into a house to spray insulation and sprays more than he should, does not protect the areas where he is spraying, allows his hoses to leak, does not properly fill the voids in the wall, or sprays the material on too thin, these are all simply examples of faulty or defective workmanship. … [T]he allegations state that PFI did not do what a careful contractor would have done.

¶16 Yeager contends that, because PFI's conduct led to unexpected or accidental property damage, PFI's conduct must have constituted an occurrence under the CGL policy. However, an unexpected or accidental bad result does not qualify as an "occurrence" for purposes of insurance coverage; instead, it is the act which causes the bad result that must qualify as an "occurrence" or "accident" under the policy. The supreme court has explained:

> [T]he ordinary meaning of the word "accident," as used in accident insurance policies, is "an event which takes place without one's foresight or expectation." *A result, though*

> *unexpected, is not an "accident"; rather it is the causal event that must be accidental for the event to be an accidental occurrence.*

Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 86, ¶40, 311 Wis. 2d 492, 753 N.W.2d 448 (emphasis added).

¶17 Thus, the mere fact that Yeager can point to an unexpected bad result or unexpected property damage does not mean that an "occurrence" has taken place. Instead, the event that caused the damage—here, PFI's conduct—must be an occurrence. PFI's conduct constitutes faulty workmanship, and faulty workmanship is not an "occurrence" for purposes of a standard CGL policy like the one in this case. *See* ***Glendenning's***, 295 Wis. 2d 556, ¶39. Consequently, Yeager has not alleged any property damage caused by an "occurrence." The CGL policy therefore does not provide coverage for his claims.[3]

II. Society's duty to defend under the contractor's errors and omissions endorsement

¶18 Yeager also contends the circuit court erred by holding that Society had no further duty to defend PFI after Society deposited $10,000—the coverage limit of the contractor's errors and omissions endorsement—with the clerk of court. However, we conclude Yeager does not have standing to challenge the circuit court's ruling on Society's duty to defend PFI. "A right to appeal from a

[3] Yeager cites ***1325 North Van Buren, LLC v. T-3 Group, Ltd.***, 2005 WI App 121, ¶¶28-29, 284 Wis. 2d 387, 701 N.W.2d 13, *aff'd in part, rev'd in part on other grounds by* 2006 WI 94, 293 Wis. 2d 410, 716 N.W.2d 822, and ***Kalchthaler v. Keller Construction Co.***, 224 Wis. 2d 387, 396-97, 591 N.W.2d 169 (Ct. App. 1999), two cases that held that bad results caused by contractors' faulty workmanship could constitute occurrences under standard CGL policies. However, these cases were decided before ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶40, 311 Wis. 2d 492, 753 N.W.2d 448, which reflects our supreme court's current view that the causal event, not the bad result, must be the occurrence for coverage purposes.

judgment or order, irrespective of statute, is confined to parties aggrieved in some appreciable manner by the court action." ***Tierney v. Lacenski***, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983). In other words, "the judgment or order appealed from must bear directly and injuriously upon the interests of the appellant; he must be adversely affected in some appreciable manner." ***Id.***

¶19 Yeager has not been adversely affected by the circuit court's ruling that Society had no further duty to defend PFI under the contractor's errors and omissions endorsement. Under the endorsement, Society owed a duty of defense only to its insured, PFI, and the duty to defend benefits PFI alone. Yeager was not a party to the insurance contract, and, to the extent he argues he is a third-party beneficiary of that contract, we reject his contention:

> In the absence of express provisions in the policy or statutory provisions which can be read into the policy, a standard liability policy does not make the injured party a third-party beneficiary. The general rule on third-party beneficiaries in Wisconsin is that one claiming such status must show that the contract was entered into by the parties directly and primarily for his benefit. The benefit must be more than merely incidental to the agreement.

Mercado v. Mitchell, 83 Wis. 2d 17, 28, 264 N.W.2d 532 (1978) (footnotes omitted). Yeager does not argue that Society and PFI entered into an insurance contract directly and primarily for his benefit, nor does he contend that any benefit to him was more than merely incidental to the agreement.

¶20 Yeager nevertheless argues that he was adversely affected by the circuit court's decision because it "will affect [his] ability to recover from PFI." We disagree. Before the court ruled that Society had no further duty to defend PFI under the contractor's errors and omissions endorsement, the court had already determined that Society's CGL policy, aside from the endorsement, did not cover

Yeager's claims against PFI. Because of the court's ruling that there was no coverage under the CGL policy, the most Society would have had to pay for Yeager's claims was $10,000—the limit of the errors and omissions endorsement. Society conceded coverage under the endorsement and deposited $10,000 with the clerk of court to fulfill its obligation to indemnify PFI. The circuit court's ruling on Society's duty to defend PFI has not adversely affected Yeager's ability to recover the $10,000 that Society concedes it is obligated to pay on PFI's behalf. Yeager therefore lacks standing to challenge the circuit court's ruling on Society's duty to defend.

¶21 Moreover, even if Yeager had standing, we would conclude that, under the language of the endorsement, the court properly relieved Society of its duty to defend PFI. The endorsement provides that Society will pay no more than $10,000 for damages for "contractors errors and omissions." Society's duty to defend ends "when [Society has] used up that amount in the payment of judgments or settlements for 'contractors errors and omissions.'" Here, Society sought summary judgment on the coverage issues and asked the circuit court for a judgment declaring that the endorsement's $10,000 limit was the only coverage available to PFI for Yeager's claims. The court granted Society's motion, and the summary judgment "declar[es] that the policy of insurance issued by Society does not provide coverage for the claims asserted in this action, with the exception of $10,000.00 in coverage under the policy endorsement for 'Contractors Errors and Omissions' …." Society deposited $10,000 with the clerk of court in payment of this judgment. Society therefore "used up" the endorsement's $10,000 limit in payment of a judgment for contractor's errors and omissions. Accordingly, Society had no further duty to defend PFI under the endorsement.

By the Court.—Judgment affirmed.

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