COURT OF APPEALS
DECISION
DATED AND FILED

JUNE 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1817-FT

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

FRANK RZEPKOWSKI, D/B/A ZEP CONSTRUCTION,

PLAINTIFF,

V.

ROBERT SCHUENKE, SHARON SCHUENKE AND SCHUENKE ART STUDIO,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

WEST BEND MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT,

CONTRACTORS PLUS, INC. AND DUAL PLUMBING HEATING & REMODELING,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Reversed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Robert Schuenke, Sharon Schuenke and Schuenke Art Studio appeal from the trial court's summary judgment in favor of West Bend Mutual Insurance Company. The issue is whether the "damage to your work" exclusion in the comprehensive general liability (CGL) insurance policy issued to Contractors Plus barred coverage for what they claimed were damages they sustained when work allegedly was improperly performed on their property. Under ***Kalchthaler v. Keller Construction Co.***, 224 Wis.2d 387, 591 N.W.2d 169 (Ct. App. 1999), we conclude that the exclusion did not bar coverage because there is an exception to the exclusion that applies in this case. Therefore, we reverse the trial court's summary judgment in favor of West Bend.

The Schuenkes hired Paul Stanley, an architect, to design an art studio to be added to the garage behind their home. The Schuenkes hired Contractors Plus, a small construction firm, to serve as general contractor for the project. Because Contractors Plus was not licensed by the City of Milwaukee to be a general contractor, Contractors Plus retained Dual Plumbing, Heating & Remodeling to be listed with the city as the general contractor on the Schuenkes' project. Dual Plumbing then entered into a subcontract with Contractors Plus to do all the work on the project, in effect making Contractors Plus the de facto general contractor for the project.

Contractors Plus subcontracted out portions of the work. Among others, Frank Rzepkowski was hired to build a foundation. During the course of

construction, Contractors Plus and its subcontractors allegedly performed defective work and damaged existing property. After reviewing the work, Stanley identified a list of defects and instructed Contractors Plus to make corrections. The Schuenkes retained a different contractor when Contractors Plus failed to make the corrections.

Contractors Plus did not pay Rzepkowski for work he performed. Rzepkowski sued the Schuenkes for payment. The Schuenkes counter-claimed against Rzepkowski and cross-claimed against Contractors Plus, Dual Plumbing, and West Bend, the insurer for Contractors Plus. The trial court granted West Bend's motion for summary judgment, concluding that the damage to the Schuenkes' property was not covered under the insurance policy West Bend had issued to Contractors Plus because the policy excluded property damage caused by defective workmanship performed by the insured.

The Schuenkes argue that an exception to the "damage to your work" exclusion allows recovery for their claims arising from work done by Contractors Plus's subcontractors. We agree.

The policy provides coverage for "property damage." However, the policy excludes coverage for:

> j. **Damage to Property**
>
> "Property damage" to:
>
> ….
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> ….
>
> Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard." [1]
>
> l. **Damage to Your Work**
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Emphasis added). (Footnote added).

In ***Kalchthaler***, we concluded that there was coverage for property damage arising out of the completed work of an insured's subcontractor where the CGL policy contained nearly identical exclusions and exceptions to those exclusions. *See* ***id.*** at 394-95, 591 N.W.2d at 170-72. We explained:

> [The policy] excludes from coverage damage to any part of property "that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." This would appear to exclude coverage in this case. There is, however, an exception to this exclusion: it does not apply to property damage included in the PCOH [products-completed operations hazard]. So the question becomes whether the damage here is so included. We see no reason why it is not. The PCOH includes property damage "occurring away from premises you own or rent and arising out of … 'your work' except … [w]ork that has not yet been completed or abandoned." This claim [that damage occurred when windows were installed] is included in the

[1] The "products-completed operations hazard" includes property damage "occurring away from premises you own or rent and arising out of … 'your work' except … "[w]ork that has not yet been completed or abandoned."

> PCOH. Thus, the exception to the … exclusion restores coverage.
>
> We now turn to [the "'property damage' to 'your work'" exclusion], since this is "property damage" to "your work" included in the PCOH. Clearly, coverage would be denied under this exclusion. However, paragraph two restores coverage if "the work out of which the damage arises was performed on your behalf by a subcontractor." There is no need to construe or interpret this language: it unmistakably applies to the situation in this case.
>
> Our conclusion that the exception applies to situations such as the present is supported by both case law from other jurisdictions and commentators in the liability insurance field. In ***O'Shaughnessy*** [***v. Smuckler Corp.***], 543 N.W.2d 99 [(Minn. Ct. App. 1996)], a general contractor contracted to build a home and then subcontracted out all the actual building, while he performed supervisory functions. Because of improper construction by some of the subcontractors, damage was done to various parts of the home. Smuckler's CGL policy contained the "on your behalf by a subcontractor" exception. The court noted that this exception did not appear in CGL policies prior to 1986, and therefore pre-1986 cases with similar fact patterns no longer applied. Focusing on the "plain language of the exception," the court held that "[i]t would be willful and perverse for this court simply to ignore the exception that has now been added to the exclusion."
>
> For whatever reason, the industry chose to add the new exception to the business risk exclusion in 1986. We may not ignore that language when interpreting case law decided before and after the addition. To do so would render the new language superfluous. We realize that under our holding a general contractor who contracts out all the work to subcontractors, remaining on the job in a merely supervisory capacity, can insure complete coverage for faulty workmanship. However, it is not our holding that creates this result: it is the addition of the new language to the policy. We have not made the policy closer to a performance bond for general contractors, the insurance industry has.

Id. at 397-400, 591 N.W.2d at 173-74 (citations omitted).

Kalchthaler is directly on point. The policy language in ***Kalchthaler*** and this case is, for all practical purposes, identical. Based on ***Kalchthaler***, we conclude that the trial court should not have granted summary

judgment in favor of West Bend because the insurance contract provides coverage for property damage arising out of work done by subcontractors of Contractors Plus.[2]

By the Court.—Judgment reversed.

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

[2] We do not reach the other arguments raised by West Bend. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if decision on one point disposes of the appeal, we will not decide the other issues raised).