COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3021 **Cir. Ct. No. 2004CV9**

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

JUDSON MOELLER AND CAROL MOELLER,

PLAINTIFFS-APPELLANTS,

V.

MAPLE VALLEY MUTUAL INSURANCE COMPANY, TRUYMAN-HAASE INSURANCE AGENCY, INC. AND MARK VON BREVERN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Forest County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Judson and Carol Moeller appeal those portions of a declaratory judgment[1] establishing insurance policy limits applicable to their claim for the destruction of their home. In essence, they argue the policy allows them to stack the coverage of undamaged property to increase the amount recoverable for their damaged property and it was error for the circuit court to hold otherwise. We reject the Moellers' arguments and affirm the judgment.

Background

¶2 The Moellers own two adjacent lots in Wabeno. "Location 1," as that term is used in the policy, is the location of their primary residence. The main structure on "Location 2" is a seasonal guest cottage. On May 9, 2003, the primary residence was burned to the ground following a lightning strike. There was no damage to the guest cottage or other structures on location 2.

¶3 The Moellers had a homeowners' policy issued by Maple Valley Mutual Insurance Company through an agent. The declarations page identifies both locations, listing four forms of coverage and three options for each location. Coverage A is for the residence on each lot, coverage B is for related private structures, coverage C is for personal property, and coverage D is for additional living costs. Options 1, 3, and 5 provide additional coverage if purchased. Option 1 adds special coverage terms to coverage A and B and is not at issue in this appeal. Option 3 adds replacement costs terms to coverages A and B, and option 5 does the same for coverage C.

[1] The Moellers' petition to file an interlocutory appeal was granted December 10, 2004. *See* WIS. STAT. RULE 809.50(3).

¶4 The declarations page further lists the limits for each of the four coverages. At location 1, the limits were: coverage A, $250,000; coverage B, $25,000; coverage C, $125,000; and coverage D, $50,000. At location 2, the limits were: coverage A, $75,000; coverage B, $7,500; coverage C, $37,500; and coverage D, $15,000. The page also states that options 1 and 3 were purchased to supplement coverages A and B at both locations, and option 5 was purchased to supplement both locations' coverage C.

¶5 Following the fire, Maple Valley paid the Moellers $250,000 plus certain other sums. The Moellers, however, claimed damages in excess of $600,000 and sought to stack the policy limits for the guest cottage on top of those for their home. When Maple Valley refused, the Moellers sued, alleging breach of contract, bad faith, reformation, and agent/broker negligence.[2] Both the Moellers and Maple Valley sought declarations regarding Maple Valley's obligations.

¶6 As applicable to the appeal, the circuit court determined that the four coverages could not be stacked from location 2 to provide additional coverage for location 1. Moreover, the court determined that options 3 and 5 do not provide additional coverage beyond the limits stated for the main coverages on the declarations page and a provision called the "Tenant's Improvements" clause does not apply. Thus, the limits stated on the declarations page for location 1 represented the maximum amount of Maple Valley's obligation. The Moellers appeal.

[2] The agency and broker, although captioned, have not participated in the appeal.

Discussion

¶7 The decision whether to grant summary judgment is committed to the circuit court's discretion. *See* ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665. However, when the exercise of discretion turns on a question of law, we review it de novo, benefiting from the circuit court's analysis. ***Id.*** Here, we are asked to interpret an insurance policy, a question of law. ***Id.*** The same rules of construction governing contracts generally are applied to the language of an insurance policy. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. "An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." ***Id.***

¶8 Thus, the first question in construing an insurance policy is whether an ambiguity exists. ***Id.***, ¶13. When the policy language is unambiguous, we enforce the contract as written, without resort to rules of construction.[3] ***Id.***

¶9 While we discern that the Moellers present seven issues and eight subissues, we conclude their argument can be distilled to three main points.[4] The issues presented here are: (1) whether the policy allows coverage for location 2 to be stacked with location 1; (2) whether options 3 and 5 provide coverage exceeding the policy limits on the declarations; and (3) whether the "Tenant's Improvements" clause applies.

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[3] Indeed, our decision is driven by the policy's clear language despite obfuscating and confusing contentions contained within the Moellers' brief.

[4] "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal." ***State v. Waste Mgmt.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

Stacking

¶10 "'Stacking' is just another word to denote the availability of more than one policy in the reimbursement of the losses of the insured." ***West Bend Mut. Ins. Co. v. Playman***, 171 Wis. 2d 37, 39-40 n.1, 489 N.W.2d 915 (1992) (citation omitted). It "refers to a situation where an insured attempts to collect reimbursement for the same loss under multiple policies." ***Carrington v. St. Paul Fire & Marine Ins. Co.***, 169 Wis. 2d 211, 223, 485 N.W.2d 267 (1992). However, a commonsense, plain language reading of the Maple Valley policy reveals no basis for triggering coverage from location 2, much less stacking it onto the policy for location 1.

¶11 On the declarations page, each location is described by address.[5] There is a dollar limit clearly listed for each type of coverage on each location. For example, "250,000 COV A – RESIDENCE LOC #1." Then, the principle property coverage section states "Each Principle Property Coverage applies only if a 'limit' is shown on the 'declarations' and is a *direct physical loss* by a listed peril and not excluded."[6] (Emphasis added.)

¶12 The circuit court held, and we agree, that none of the coverages A-D are triggered without a direct physical loss. Simply, and unambiguously, location 2 suffered no direct physical loss and its coverage provisions are not triggered.

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[5] Evidently, the street address listed for location 1 is actually a mailing address for the Moellers and not the property's physical address, but the parties do not dispute that the two parcels are separately defined.

[6] The parties agree that this clause is missing some words and should read more to the effect of "and [there] is a direct physical loss [caused] by a listed peril and [is] not excluded." As will be revealed, however, the missing words ultimately do not create ambiguity in this case.

¶13 Following the descriptions of the coverage types, incidental coverage, perils, and exclusion, is the "How much 'we' pay for loss or claim—property" section. There are two applicable sections to the "how much we pay" section. These sections state in relevant part, with emphasis added:

> 1. Insurable Interest and "Our" "Limit" – Even if more than one person has an insurable interest in the property covered, "we" pay no more than the amount of "your" interest in the property *or the "limit" that applies*.
>
> 2. Deductible – …
>
> "We" pay that part of the loss over the deductible *up to the "limit" that applies*.

¶14 Both sections thus state that Maple Valley will pay for damages up to the applicable limit.[7] Those limits are clearly stated on the declarations page. Nothing in this section hints at the possibility of stacking policies.[8]

[7] Regarding the "amount of 'your' interest" portion, the Moellers rely on this section to argue their "interest" is the full value of the house. However, it is unambiguous that this section applies when multiple owners have insurance interest in the property. Thus, someone owning 50% of a $200,000 home will only be covered for his half-interest, or $100,000, even if the policy limit is greater. It is also evident that regardless of the value of someone's partial interest, Maple Valley will never pay more than the policy limits.

[8] To the extent the Moellers argue "limit" means something other than the dollar amounts stated on the declarations page, the policy defines "limit" as the amount of coverage that applies. Even if that phrase were susceptible to ambiguity, the column heading on the declarations page that says "limit" and then has numerical figures underneath it dissolves any questions.

Options

¶15 The Moellers contend the additional coverage options 3 and 5 are meant to apply above and beyond the policy limits on the declarations. This argument, however, ignores the introductory paragraphs:

> The Additional Coverages listed below is coverage that "you" are provided, but only if the specific Optional Extension Of Coverage listed is described on the "declarations."
>
> The following Additional Coverages are subject to all the "terms" in this policy and *Additional Coverages do not increase the "limits" stated on the "declarations."* (Emphasis added.)

¶16 Nonetheless, the Moellers focus specifically on paragraph four of option 3 to seek payment for their full loss. This paragraph says:

> 4. If the "limit" on the damaged building is less than 80 percent of its replacement cost at the time of loss, "we" pay the larger of the following:
>
> a. the actual cash value at the time of the loss; or
>
> b. that part of the replacement cost of the damaged part which "our" "limit" on the building bears to 80 percent of the full replacement cost of the building.

¶17 However, this language is still subject to the language stating the limits are not increased above what is stated on the declarations page. Moreover, the circuit court and Maple Valley both demonstrate how, mathematically, this section can increase an insured's recovery without exceeding the policy limits.

¶18 The Moellers make a similar argument regarding option 5. The relevant paragraph there states, in part:

> 4. Subject to the "terms" shown under How Much We Pay for Loss or Claim, "we" pay the lesser of the following amounts for each covered item:
>
> a. the applicable "limit[.]"

Without citation or exposition, the Moellers claim the "applicable limit is the sum of applicable coverage." This is impossible. First, option 5 is part of the section prefaced by the "Additional Coverages do not increase the 'limits' stated on the 'declarations'" language. Second, the paragraph on which the Moellers rely is also expressly subject to the terms of the "how much we pay" section, which states coverage will not exceed the policy limits.

Tenant's Improvements

¶19 Finally, the Moellers contend that the "Tenant's Improvements" section allows them to recover an additional ten percent of their coverage C limits based on their assertion that the dictionary definition of "tenant" is a "property holder by any right." Maple Valley asserts that "tenant" more properly refers to a renter or lessee.

¶20 The circuit court concluded that section does not apply because while "tenant" is not defined in the policy, people do not typically speak of owners as tenants in their own homes. We agree. Moreover, the Moellers' hypotheticals undermine their argument. Their first hypothetical starts: "Suppose an insured purchases a $1,250 holiday display to place on a vacant nonfarm lot *he rents each year* for that purpose." (Emphasis added.) The second hypothetical says, "Assume an insured purchases a vacant lot and pays for pre-closing occupancy … the Circuit Court would hold Tenant's Improvements Coverage applies *because the lot is rented*." (Emphasis added.)

¶21 Quite simply, the Moellers never really demonstrate any ambiguity. A plain reading of the policy terms reveals that there is no basis for stacking, coverage for location 2 was never triggered, optional coverage is not meant to increase the policy limits in this case beyond the limits on the declarations page, and the Moellers are not tenants. It is true, as the Moellers assert, that if there is ambiguity in an insurance policy, we construe it against the drafters. But we will not "torture ordinary words until they confess to ambiguity." ***Western States Ins. Co. v. Wisconsin Wholesale Tire, Inc.***, 184 F.3d 699, 702 (7th Cir. 1999). The Moellers have, frankly, tortured the words of this policy.

By the Court.—Judgment affirmed.

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