

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2006

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 Nos. 2005AP2292
2005AP2293**

**Cir. Ct. Nos. 2004CV11186
2005CV1054**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**NO. 2005AP2292
CIR. CT. NOS. 2004CV11186
2005CV1054**

**3303-05 MARINA ROAD, LLC, AND
RICK A. MICHALSKI, FOR THEMSELVES
AND AS ASSIGNEES OF HENRY AND
DEANN ZENI AND SHOREWEST REALTORS, INC.,**

PLAINTIFFS-APPELLANTS,

V.

**ZENNETT PROPERTIES, LLC,
HENRY ZENI, DEANN ZENI, EUGENE
BENNETT AND SHOREWEST REALTORS, INC.,**

DEFENDANTS,

**WEST BEND MUTUAL INSURANCE
COMPANY,**

DEFENDANT-RESPONDENT,

**AMERICAN FAMILY MUTUAL INSURANCE
COMPANY, AND FEDERAL INSURANCE
COMPANY,**

**INTERVENING DEFENDANTS-
RESPONDENTS,**

**COLUMBIA CASUALTY COMPANY AND
CONTINENTAL CASUALTY COMPANY,**

INTERVENING DEFENDANTS.

**3303-05 MARINA ROAD, LLC, AND
RICK A. MICHALSKI,**

PLAINTIFFS,

V.

**WEST BEND MUTUAL INSURANCE COMPANY
AND FEDERAL INSURANCE COMPANY,**

DEFENDANTS.

**NO. 2005AP2293
CIR. CT. NOS. 2004CV11186
2005CV1054**

**3303-05 MARINA ROAD, LLC AND RICK A.
MICHALSKI,**

PLAINTIFFS,

V.

**ZENNETT PROPERTIES, LLC, AND EUGENE
BENNETT,**

DEFENDANTS-APPELLANTS,

**HENRY ZENI, DEANN ZENI, SHOREWEST
REALTORS, INC., AND WEST BEND MUTUAL
INSURANCE COMPANY,**

DEFENDANTS,

**AMERICAN FAMILY MUTUAL INSURANCE
COMPANY,**

**INTERVENING DEFENDANT-
RESPONDENT,**

**FEDERAL INSURANCE COMPANY, COLUMBIA
CASUALTY COMPANY,**

INTERVENING DEFENDANTS.

**3303-05 MARINA ROAD, LLC, AND RICK A.
MICHALSKI,**

PLAINTIFFS,

v.

**WEST BEND MUTUAL INSURANCE
COMPANY AND FEDERAL INSURANCE
COMPANY,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Rick A. Michalski and his limited liability company, 3303-05 Marina Road, LLC, in appeal number 2005AP2292, appeal the trial court's grant of summary judgment declaring that American Family Mutual Insurance Company's, West Bend Mutual Insurance Company's, and Federal Insurance Company's policies did not cover Michalski's and Marina Road's

claims against Zennett Properties, LLC, and its members Henry Zeni and Eugene Bennett, or Shorewest Realtors, Inc., and its real estate agents Henry and DeAnn Zeni.

¶2 Bennett and Zennett Properties, in appeal number 2005AP2293, appeal that part of the trial court's grant of summary judgment declaring that American Family's policies did not cover Michalski's and Marina Road's claims against Bennett or Zennett Properties.

¶3 We consolidate the appeals for dispositional purposes only and affirm. *See* WIS. STAT. RULE 809.10(3).

I.

¶4 Marina Road bought an apartment complex from Zennett Properties in October of 2003. The sale was brokered by Shorewest Realtors and its real estate agents, Henry and DeAnn Zeni. Zennett Properties had business-owner's insurance with American Family. Bennett had homeowner's insurance with American Family. Shorewest had business-owner's insurance and commercial umbrella-insurance with West Bend. Shorewest also had commercial excess-umbrella-insurance with Federal.¹

¶5 Marina Road and Michalski sued Zennett Properties for breach of contract, contending that the apartment complex had long-term water leaks and

¹ Columbia Casualty Company also issued a real-estate licensee's errors and omissions insurance policy to DeAnn Zeni, and a real-estate errors and omissions insurance policy to Shorewest. Continental Casualty Company issued a real-estate errors and omissions excess insurance policy to Shorewest. These policies are not at issue on this appeal.

was infested with toxic mold. Marina Road and Michalski also sued Zennett Properties, its members Henry Zeni and Bennett, and Shorewest and its agents, the Zenis, under the following theories: (1) violation of WIS. STAT. § 100.18 (false advertising); (2) fraud in the inducement; (3) strict-responsibility misrepresentation; (4) negligent misrepresentation; (5) intentional misrepresentation; and (6) violation of WIS. STAT. § 709.05 (right to rescind; disclosures by owners of residential real estate) and WIS. ADMIN. CODE § RL 24.07 (inspection and disclosure duties for real estate licensees), claiming that they misrepresented the property's condition. Marina Road and Michalski also sued Shorewest and the Zenis for: (1) negligence, and (2) violation of WIS. STAT. § 452.133 (real estate broker's duties).

¶6 Zennett Properties tendered defense of the suit to American Family. American Family sought from the trial court a summary-judgment declaration that it had no duty to defend or indemnify Zennett Properties, Henry Zeni, or Bennett. Similarly, West Bend and Federal sought summary-judgment declarations that they had no duty to defend or indemnify Shorewest or the Zenis. As noted, the trial court granted summary judgment to the insurance companies. It concluded that they had no duty to defend or indemnify their insureds.

II.

¶7 Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987).

Additionally, unless there are factual disputes, application of insurance policies and their provisions is a legal issue that we also review *de novo*. When an insurance company disputes coverage and asserts that it has no duty to defend

or indemnify the policy holder against certain claims, we are limited to the four corners of the complaint in determining whether there is coverage. When an insurance policy is clear on its face, we apply it, as we do all contracts, as it reads.

Eddy v. B.S.T.V., Inc., 2005 WI App 78, ¶2, 280 Wis. 2d 508, 511–512, 696 N.W.2d 265, 267 (citations omitted).

A. *Appeal Number -2292.*

¶8 In appeal number -2292, Marina Road and Michalski appeal the dismissal of American Family, West Bend, and Federal.² We address each policy in turn.

1. American Family.

¶9 As we have seen, Zennett Properties had business-owner’s insurance with American Family. The trial court concluded that coverage was precluded under the policy’s property-owned-or-controlled exclusion, which provides, as material:

2. **Exclusions.** This insurance does not apply to:

....

² After the Record was filed, Marina Road and Michalski settled with the Zenis, including the Zenis’ fifty-percent interest in Zennett Properties, and with Shorewest. The Zenis and Shorewest then assigned their contribution and indemnification claims against American Family, West Bend, and Federal to Marina Road and Michalski. Marina Road and Michalski requested that this court take judicial notice of the assignment and decide whether the insurance policies provide coverage for the assigned claims. On March 30, 2006, we denied Marina Road’s and Michalski’s request. Accordingly, we do not address whether the insurance policies cover any claims the Zenis, Zennett Properties, or Shorewest may have assigned to Marina Road and Michalski.

k. PROPERTY OWNED OR CONTROLLED. We will not pay for damages due to **property damage** to:

....

(2) premises **you** sell, give away or abandon, if the **property damage** arises out of any part of those premises.

(Bolding and uppercasing in original.) Marina Road and Michalski claim that this exclusion is ambiguous under *Laho v. Century 21 Baltes-Selsberg*, 204 Wis. 2d 483, 555 N.W.2d 149 (Ct. App. 1996), and, accordingly, there should be coverage. We disagree.

¶10 In *Laho*, Michael and Jacqueline Baltes bought vacant land and listed it with their real estate firm, Century 21 Baltes-Selsberg. *Id.*, 204 Wis. 2d at 485–486, 555 N.W.2d at 150. A real estate agent affiliated with Century 21, Donna Jantz, sold the property. *Ibid.* The buyers sued Jantz, the Balteses, and Century 21 because of alleged drainage problems. *Ibid.* Continental Casualty Company, Century 21’s liability insurer, sought a declaration on whether there was coverage. *Id.*, 204 Wis. 2d at 486, 555 N.W.2d at 150.

¶11 In determining whether there was insurance coverage, we looked at two clauses in the Continental policy. The first clause, from the definitions section, defined “you” and “your” as:

- A. the entity named on the Declarations of this policy as the Named Insured;
- B. any of **your**:
 - 1. partners, if **you** are a partnership; or
 - 2. executive officers, directors, administrators, or stockholders if you are a corporation;
 - 3. brokers, agents, employees, salespersons, or common law or statutory independent contractors.

Id., 204 Wis. 2d at 487, 555 N.W.2d at 150–151 (bolding in **Laho**). The second clause, from the exclusions section, provided:

We will not defend or pay under this policy for:

....

O. any **claim** arising from the purchase, sale or property management of property developed, constructed or owned by:

1. **you**; or
2. any entity in which **you** have a financial interest or has a financial interest in **you**; or
3. any entity coming under the same financial control as **you**.

Id., 204 Wis. 2d at 487–488, 555 N.W.2d at 151 (omission and bolding in **Laho**).

¶12 **Laho** concluded that Continental’s policy covered Jantz, the real estate agent, because the “financial interest” language made exclusion O ambiguous as it applied to Century 21’s real estate agents and employees:

We agree with the argument that the additional language in exclusion “O” invites its readers to ask whether they, or something they have a “financial interest” in, own the property. Thus, hypothetically, one of the firm’s real estate agents who is covered under this policy would ask, “Do I, or any of my related enterprises, own this property?” When the answer is “no,” this curious insured would feel secure knowing that this exclusion does not apply to him or her.

Id., 204 Wis. 2d at 489, 555 N.W.2d at 151. **Laho** also concluded that Continental’s policy did not cover the Balteses, as individuals, or Century 21 because the exclusion was not ambiguous as it applied to them: “The language describing ‘financial interest’ would not create ambiguity for the Balteses (and their firm) because they are the named insured[s] on the policy. A reasonable

person in this position would interpret this clause to exclude coverage for incidents involving his or her property and the property of any related enterprises in which he or she has a ‘financial interest.’” *Id.*, 204 Wis. 2d at 491, 555 N.W.2d at 152.

¶13 Marina Road and Michalski argue that the property-owned-or-controlled exclusion in American Family’s policy is ambiguous because, as in *Laho*, the word “you,” creates a distinction between liability coverage for owners and employees. Marina Road and Michalski point to the policy’s definition of “insured,” which provides that “employees” are only covered for “acts within the scope of their employment by **you**,” and claim that this definition, when read in conjunction with the property-owned-or-controlled exclusion, “makes it fairly clear that ‘employees’ are not ‘you’ as that term is used in the American Family Policy.” (Bolding in original.) We disagree.

¶14 The property-owned-or-controlled exclusion in American Family’s policy is clear. The first paragraph on “Page 1 of 18” of the policy provides that “**you**” and “**your**” “refer to the person(s) or organization showed as the named insured[s] in the declaration.” (Bolding in original.) “Zennett Properties LLC” is the “named insured” on the declarations page. (Some uppercasing omitted.) Accordingly, the word “you” in the property-owned-or-controlled exclusion unambiguously refers to Zennett Properties. Marina Road’s and Michalski’s amended complaint alleges that Zennett Properties sold the apartment complex. Thus, looking at the four corners of the complaint, as we must, any “property damage” to the apartment complex is precluded under the property-owned-or-controlled exclusion. As with Century 21 and the Balteses in *Laho*, the property-owned-or-controlled exclusion in American Family’s business-owner’s policy here excludes coverage for Zennett Properties and its members, Henry Zeni and

Bennett. Whether employees of Zennett Properties, if any, are also excluded is immaterial. No employee has been named in this lawsuit or sought coverage. Accordingly, the property-owned-or-controlled exclusion in the American Family business-owner's policy applies.

2. West Bend and Federal.

¶15 As noted, Shorewest had business-owner's and umbrella-insurance with West Bend, and excess-umbrella-insurance with Federal. The trial court determined that coverage was precluded under the professional-services exclusions in the West Bend policies. The professional-services exclusion in the West Bend business-owner's policy provides:

j. Professional Services

“Bodily injury”, “property damage”, “personal injury” or “advertising injury” due to rendering or failure to render any professional service. This *includes but is not limited to*:

- (1) Legal, accounting or advertising services;
- (2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;
- (3) Supervisory, inspection or engineering services;
- (4) Medical, surgical, dental, x-ray or nursing services treatment, advice or instruction;
- (5) Any health or therapeutic service treatment, advice or instruction;
- (6) Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming;
- (7) Optometry or optical hearing aid services including the prescribing, preparation, fitting,

demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;

(8) Body piercing services; and

(9) Services in the practice of pharmacy; but this exclusion does not apply to an insured whose operations include those of a retail druggist or drugstore.

(Emphasis added; bolding in original.) The professional-services exclusion in West Bend’s umbrella policy provides, as material: “This insurance does not apply to ‘bodily injury’, ‘property damage’, ‘personal injury’, or ‘advertising injury’ arising out of the rendering or failure to render any professional services for others, in your capacity as real estate agent or broker, or to any liability assumed by you in any contract or agreement for such services.”

¶16 Federal’s excess-umbrella policy incorporates by reference the “terms and conditions of the controlling underlying insurance policy,” except where they are inconsistent with each other. The controlling underlying insurance is the West Bend umbrella policy, and, accordingly, the trial court concluded that Federal’s excess-umbrella policy did not apply because under *Eddy* the underlying West Bend policy’s professional-services exclusion governed.

¶17 In *Eddy*, home buyers sued Reality Executives and its agent, Bruce Kirchoff, for allegedly failing to discover and disclose to them that the house they bought through Reality Executives was contaminated with mold. *Id.*, 2005 WI App 78, ¶1, 280 Wis. 2d at 510, 696 N.W.2d at 266–267. American Family and Indiana Insurance Company, Reality Executive’s insurers, argued that they were not required to cover Reality Executives under the professional-services exclusions in their policies. *See id.*, 2005 WI App 78, ¶¶1, 4, 280 Wis. 2d at 510, 513, 696 N.W.2d at 267, 268.

¶18 The professional-services exclusion in Indiana Insurance’s policy provided, as material: “This insurance does not apply to: ... ‘Bodily injury’, ‘property damage’, personal injury’, or ‘advertising injury’ due to rendering or failure to render any professional service. This includes but is not limited to: ... Services while you are acting in a fiduciary or representative capacity including but not limited to, Real Estate Agents.” *Id.*, 2005 WI App 78, ¶5, 280 Wis. 2d at 513–514, 696 N.W.2d at 268 (omissions in *Eddy*). The professional-services exclusion in the American Family policies provided, as material: “This insurance does not apply to: ... PROFESSIONAL LIABILITY. We will not pay for damages due to bodily injury or property damage arising out of the rendering or failure to render professional services by any insured who is a(n) ... insurance agent or real estate agent.” *Id.*, 2005 WI App 78, ¶7, 280 Wis. 2d at 514, 696 N.W.2d at 268 (omissions and capitalization in *Eddy*).

¶19 *Eddy* concluded that the professional-services exclusions applied because Reality Executives and Kirchoff were “being sued precisely because of what they did or did not do *qua* real-estate professionals”:

The core of the [home buyers]’ complaint against Reality Executives and Kirchoff is that they sold the [home buyers] a home that they knew or should have known was infested with mold contamination. Both Reality Executives and Kirchoff are in the home-selling business. They are “real estate agents” as that phrase is used in all the policies. Thus, their sale to the [home buyers] of a contaminated home was in the course of their “rendering ... professional services” as real estate agents.

Id., 2005 WI App 78, ¶¶8, 14, 280 Wis. 2d at 514, 518, 696 N.W.2d at 268–269, 270 (omission in *Eddy*).

¶20 Marina Road and Michalski contend that this case is distinguishable from *Eddy* because, unlike the professional-services exclusions in *Eddy*, the professional-services exclusion in the West Bend business-owner’s policy does not specifically refer to “real estate agents,” and the exclusion in the umbrella-policy “contains only a generalized definition of professional services.” We disagree.

¶21 In *Eddy*, we held that the professional-services exclusions applied because there was a causal relationship between the alleged harm and the complained-of professional act. *Id.*, 2005 WI App 78, ¶14, 280 Wis. 2d at 518, 696 N.W.2d at 270. The allegations in Marina Road’s and Michalski’s amended complaint, from which we quote, show a similar causal relationship:

- Shorewest “sells real estate and conducts substantial business in Milwaukee County.”
- Henry and DeAnn Zeni are real estate agents for Shorewest. They “act[ed] with Shorewest’s authority and under Shorewest’s supervision. Mr. Zeni and Ms. Zeni had Shorewest’s permission to hold themselves out as Shorewest’s agents for the sale of the Property.”
- “Shorewest, through its agents, Mr. Zeni and Ms. Zeni, listed the Property for sale.”
- Shorewest, Zennett Properties, the Zenis, and Bennett “participated in the preparation of a Real Estate Condition Report for the Property.” *See* WIS. STAT. § 709.03.
- “The Condition Report states that there are no defects affecting the property.”

- Zennett Properties, Henry Zeni, and Bennett knew that water had leaked into apartment units and common areas at the property, and that the apartment complex was infested with toxic mold.
- “The existence of water damage, substantial water leaks or toxic mold were not disclosed by any of the Defendants prior to closing.”
- “[A] tenant had vacated the Property prior to the closing because the tenant’s unit was contaminated with toxic mold. Defendants did not disclose this information to Plaintiffs.”
- “On December 9, 2004, [a soils and foundations specialty consultant] advised [Marina Road] that the majority of the units were not suitable for human occupancy due to microbial contamination.”
- Under WIS. STAT. § 452.133(1)(a), Shorewest and the Zenis “owed separate duties to prospective buyers, including Plaintiffs, to provide brokerage services honestly, fairly, and in good faith.”
- Under WIS. STAT. § 452.133(1)(b), Shorewest and the Zenis “owed separate duties to prospective buyers, including Plaintiffs, to diligently exercise reasonable skill and care in providing brokerage services to all parties.”
- Under WIS. STAT. § 452.133(1)(c), Shorewest and the Zenis “owed separate duties to prospective buyers, including Plaintiffs, to disclose all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation.”
- Under WIS. ADMIN. CODE § RL 24.07(1)(a), Shorewest and the Zenis “were each obligated to conduct a reasonably competent and diligent inspection of

accessible areas of the structure and immediately surrounding areas of the Property to detect observable, material adverse facts.”

Like Reality Executives and Kirchoff in *Eddy*, Shorewest and the Zenis are being sued in connection with services they provided as real estate agents. Although “real estate agents” are not, *in haec verba*, mentioned in the business-owner’s policy’s professional-services exclusion, a reasonable insured would read the “included but not limited to” language in the exclusion as including real estate agents when they are acting in their professional capacity. Under *Eddy*, the exclusion applies.

B. *Appeal Number -2293.*

¶22 In appeal number -2293, Zennett Properties and Bennett appeal the dismissal of American Family. As we have seen, Zennett Properties had business-owner’s insurance with American Family, and Bennett had homeowner’s insurance with American Family. We address each policy in turn.

1. American Family’s Business-Owner’s Policy.

¶23 As noted, the trial court concluded that coverage was precluded under the policy’s property-owned-or-controlled exclusion. Zennett Properties and Bennett argue that because the exclusion is in the business-liability and medical payments part of the policy, Section II, it is ambiguous because it is “inconsistent with the policy language in Section I[, which insures property owned by the business,] and the insured’s expectation of coverage.” They thus claim that “[t]he easiest way to determine who provides coverage would be to determine when the damage occurred and which policy was in effect. Since there are

allegations that the damage occurred during the Zennett's [*sic*] ownership, American Family should not be dismissed." We disagree.

¶24 As we have seen, the property-owned-or-controlled exclusion in American Family's policy is clear: the American Family policy did not cover property damage in connection with premises Zennett Properties sold. The exclusion is not ambiguous simply because Section I of the policy covers property damage to premises Zennett Properties owns but does not sell. As noted, Marina Road's and Michalski's amended complaint alleges that Zennett Properties sold the apartment complex to Marina Road and that Michalski suffered loss because of the sale. Accordingly, the property-owned-or-controlled exclusion applies.

2. American Family's Homeowner's Policy.

¶25 In its motion for summary judgment, American Family argued that coverage for Zennett Properties and Bennett under Bennett's homeowner's policy was precluded under the policy's business-pursuits exclusion, which provides, as material:

4. **Business.** We will not cover **bodily injury** or **property damage** arising out of **business** pursuits or the rental or holding for rental of any part of any premises except:

a. activities which are normally considered non-**business**;

b. the rental or holding for rental of an **insured premise**:

(1) on an occasional basis if used only as a residence;

(2) in part, for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders;

(3) in part, as an office, school, studio or private garage;

c. the additional premises of a one or two family dwelling when specifically insured under Option 7 – Additional Premises Coverage; or

d. the occasional or part-time **business** activities of any self-employed **insured** under 19 years of age.

(Bolding in original.) In a three-sentence argument, Zennett Properties and Bennett claim that summary judgment is inappropriate because a material issue of fact exists as to “whether Bennett’s involvement with Zennett falls under this exclusion since no testimony has been received.” Again, we disagree.

¶26 An activity falls under the business-pursuits exclusion if it satisfies two elements: (1) continuity, and (2) profit motive. *Bertler v. Employees Ins. of Wausau*, 86 Wis. 2d 13, 21, 271 N.W.2d 603, 607 (1978). Continuity requires a showing of a customary engagement or a stated occupation. *Ibid.* Profit motive requires that the activity ““must be shown to be such activity as a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements.”” *Ibid.* (quoted source omitted).

¶27 As noted, we are limited to the four corners of the complaint when determining whether there is coverage. *Eddy*, 2005 WI App 78, ¶2, 280 Wis. 2d at 511, 696 N.W.2d at 267. Marina Road’s and Michalski’s amended complaint alleges, as material:

- “Mr. Bennett and Mr. Zeni are owners and principles of Zennett. ... Mr. Bennett and Mr. Zeni both handled the day to day management of the Property.”

- “Mr. Zeni and Mr. Bennett were involved in the day to day operation of the Property and the sale of the Property. On information and belief, Mr. Bennett maintained the rent roll for the Property and handled day to day issues involving the Property, including tenant complaints.”
- “Zennett, Mr. Zeni and Mr. Bennett provided a rent roll for the Property prior to closing in order for Plaintiffs to determine whether the Property was economically viable.”
- “The Rent Roll reflected the name of each tenant and the rent that the tenant was paying, as well as general information regarding the rental history for each tenant.”
- “Zennett, Mr. Zeni and Mr. Bennett ... made representations regarding the desirability and profitability of the building.”
- “After the closing, Mr. Bennett provided Mr. Michalski and Marina a new rent roll for the Property which showed that a number of tenants were behind in their rent payments, or had never made rent payments after the first month’s rent. It also showed that other units at the Property were vacant which had been listed on the rent roll as occupied prior to closing.”

The complaint establishes that the sale of the apartment complex was as a result of Bennett’s business-pursuits activity. *See Williams v. State Farm Fire & Cas. Co.*, 180 Wis. 2d 221, 226–232, 509 N.W.2d 294, 296–299 (Ct. App. 1993) (business-pursuits exclusion applies to even “passive investment” in apartment enterprise). Accordingly, the business-pursuits exclusion applies.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

