COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1807

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

DONALD L. MULDER AND MICHELE M. MULDER,

PLAINTIFFS-APPELLANTS,

V.

ECONOMY PREFERRED INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Donald and Michelle Mulder appeal from the trial court's grant of summary judgment in favor of Economy Preferred Insurance Company. The trial court concluded that the Mulders' homeowners insurance policy did not provide coverage under the "Backup of Sewer or Drain Coverage" endorsement for damage to a drain tile system. The Mulders claim that the trial

court improperly restricted its interpretation of the policy and erroneously concluded that the drain tile system was not covered. We affirm.

I. BACKGROUND

¶2 The insureds purchased a homeowners insurance policy from Economy. Although the policy provided coverage for the insured dwelling "against risks of direct loss," the policy excluded coverage for losses caused by water damage:

> **SECTION 1 – EXCLUSIONS**
>
> **1.** We do not insure for loss caused directly or indirectly by any of the following:
>
> ….
>
> c. **Water damage,** meaning:
>
> ….
>
> (2) water which backs up through sewers or drains or water which enters into and overflows from within a sump pump, sump pump well or other type system designed to remove subsurface water which is drained from the foundation area;

¶3 For an additional premium, however, the insureds purchased a "Backup of Sewer or Drain Coverage" endorsement to the main policy. The pertinent portions of the endorsement provide:

> **BACK-UP OF SEWER OR DRAIN COVERAGE**
>
> For an additional premium, we cover direct loss caused by water which backs up through sewers or drains or water which enters into and overflows from within a sump pump, sump pump well or other type system designed to remove subsurface water which is drained from the foundation area.
>
> ….
>
> Under SECTION 1 – EXCLUSIONS, the following paragraph of the Water Damage exclusion is deleted:

> "water which backs up through sewers or drains or water which enters into and overflows from within a sump pump, sump pump well or other type system designed to remove subsurface water which is drained from the foundation area;"

¶4 The insureds' basement subsequently flooded. After pumping the water out of the basement and opening up the basement floor, it was discovered that the drain tile system was brittle and deteriorated. The insureds repaired the drain tile system at a cost of $8,325.00 and filed a claim with Economy seeking damages for this repair. Economy denied the claim. The insureds then sued, alleging breach of contract and bad faith. Economy moved for summary judgment, claiming, among other things, that the policy did not provide coverage under the endorsement for the repair of a failed drain tile system. The trial court agreed, concluding that the policy endorsement did not cover the damages to the drain tile system and, therefore, granted summary judgment to Economy. The trial court noted:

> [T]here [is] nothing in this record that suggests that the drain tile system damage was *caused by* this water. I understood your experts to say that it was plugged up. There was a plug there. That [is] not *caused by* water backing up. That [is] the source of the backup.
>
> There [is] nothing in this record to support what you'd have to prove at trial; namely, that the damage was *caused by* this water, not that damage *then caused* the water to backup and hurt the basement.

(Emphasis added.)

II. DISCUSSION

¶5 This appeal involves the interpretation of an insurance policy and, therefore, presents a question of law that we review without deference to the conclusions of the trial court. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 810, 456 N.W.2d 597, 598 (1990). Here, the trial court's interpretation of the

insurance policy was decided on a motion for summary judgment. Our review of the trial court's grant of summary judgment is also *de novo*, and we apply the same standards and methods as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). First, we examine the pleadings to determine whether a proper claim for relief has been stated. ***Id.*** If the complaint states a claim and the answer joins the issue, our inquiry then turns to whether any genuine issues of material fact exist. ***Id.*** WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged:[1]

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

¶6 On appeal, both parties argue that the policy language is clear and unambiguous and that it supports their respective position—the insureds believe the damage to the drain tile system is covered by the policy language and the insurance company does not. "The objective in interpreting and construing a contract is to ascertain and carry out the true intention of the parties." ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156, 163 (1984). Policy language is to be construed "in accordance with the principle that the test is not what the insurer intended the words to mean but what a reasonable person in the position of the insured would have understood the words to mean. ***Id.*** If the terms of a policy are "'plain on their face,'" however, "we will not go beyond them." ***Richie v. American Family Mut. Ins.***, 140 Wis.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

2d 51, 54, 409 N.W.2d 146, 147 (1987) (quoted source omitted). Instead, we will "apply the contract as written to the facts of the case." ***Budget Rent-A-Car Sys. v. Shelby Ins.***, 197 Wis. 2d 663, 669, 541 N.W.2d 178, 180 (Ct. App. 1995).

¶7 The insureds claim that the trial court improperly restricted its interpretation of the policy by allegedly considering only one phrase in the endorsement and "ignor[ing] all of the language in the rest of the policy." The insureds further claim that if the trial court had read the policy and endorsement together, it would have concluded that coverage applied to repair of the drain tile system. We disagree on both counts. The trial court fully considered the entire policy. The record reflects that the trial court discussed various portions of the main policy, as well as the endorsement, with the insureds' lawyer during the summary judgment motion hearing.

¶8 After considering the entire policy, the trial court correctly determined that "this comes down to the interpretation of that one lengthy sentence … [in] the endorsement." The insured simply disagrees with the trial court's conclusion. The trial court explained its reasoning:

> The plaintiff contends that this phrase "direct loss" is important here. I don't think that that's the issue – whether it's an indirect or direct loss. It has to be caused by the water described. And the important question is whether the damage to the drain tile system was caused by the water … and there [is] clearly no evidence that suggests that this damage was and what evidence I have in the affidavits suggests to me that it wasn't.
>
> There was a failure because it was plugged up. There [is] … nothing to suggest that whatever was wrong with the drain tile system was caused by the water overflowing from the drain tile system … It's the water that has to cause the damage. So while there would be coverage for water damage after it's backed up, there [is] not coverage for repairing the system that failed unless there is proof that the

> system's failure was caused by the water described, and there [is] clearly no evidence of that.

¶9 We agree with the trial court's interpretation of the policy. Irrespective of the fact that the endorsement deleted the main policy's water-damage exclusion, as set forth in (1)(c)(2), the first sentence of the endorsement clearly states, "For an additional premium, we cover direct loss *caused by water*." (Emphasis added). The insureds did not present any evidence that water damage somehow caused the drain tile system to fail, thereby triggering the eventual back up and basement flooding.[2] Indeed, the insureds' lawyer admitted at the motion hearing that "the water only gets into the basement if the drain tile system fails." As the trial court correctly pointed out, the failed drain tile system did not result from the water backing up but, rather, was the *source* of the back up of water. Therefore, the trial court properly determined that the damage to the drain tile system was not covered by the homeowners policy. Accordingly, we affirm the grant of summary judgment to Economy.

By the Court.—Judgment affirmed.

---

[2] In support of their claim for insurance coverage, the insureds submitted the affidavit and report of an insurance expert, who gave his opinion that the policy coverage included the repair of the drain tile system. This opinion on what the contract language means, however, is not admissible "evidence." *See* WIS. STAT. § 802.08(3) ("supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence"); *see also* ***Leszczynski v. Surges***, 30 Wis. 2d 534, 538-539, 141 N.W.2d 261, 264-265 (1966) (evidentiary facts must be presented by affidavit or other proof by one having personal knowledge of those facts or be based on evidence that would be admissible at trial); ***Wisconsin Patients Comp. Fund v. Physicians Ins. Co.***, 2000 WI App 248, ¶8, n.3, 239 Wis. 2d 360, 367 n.3, 620 N.W.2d 457, 460 n.3 ("experts" may not give opinions on issues involving domestic law, which are within the exclusive province of the court).

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