**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 28, 2007**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2006AP579** **Cir. Ct. No. 2004CV10**

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

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**DESIGN 2 CONSTRUCT DEVELOPMENT CORPORATION,**

**PLAINTIFF,**

**V.**

**JOHN C. KUBER, ELLEN M. KUBER AND ACCORD MANUFACTURING INC.,**

**DEFENDANTS-APPELLANTS,**

**UNITED STATES FIRE PROTECTION INC., BRADEN PLUMBING INC., ACUITY AND GRAFF MASONRY INC.,**

**DEFENDANTS,**

**CINCINNATI INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. John and Ellen Kuber and Accord Manufacturing Inc. (collectively the Kubers) appeal from a judgment determining that Cincinnati Insurance Company does not provide coverage for claims against Graff Masonry, Inc. for defects in the concrete floor Graff installed in a commercial production facility owned by the Kubers. We conclude that this case is controlled by ***American Family Mutual Insurance Co. v. American Girl, Inc.***, 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65. We affirm the judgment of the circuit court.

¶2 The Kubers experienced excessive cracking and settling with the concrete floor installed by Graff. They seek to recover the cost of replacing the floor and other financial expenses and losses they will incur while the floor is being replaced. Cincinnati issued a commercial general liability policy (CGL) and contractors umbrella liability policy to Graff when the floor was installed in November 1998. The declarations page lists $1 million in coverage for each occurrence and a $1 million limit for "products-completed operations aggregate." A separate premium was calculated and paid for the products-completed operations limit.

¶3 The parties agree that there is no coverage for the Kubers's damages under the CGL policy because of business risk and impaired property exclusions. *See* ***id.***, 268 Wis. 2d 16, ¶63. The issue is whether the products-completed operation hazard (PCOH) coverage is created by a separate insuring agreement not subject to those exclusions. The circuit court granted summary judgment in favor of Cincinnati concluding that PCOH coverage is not separate coverage and that all policy exclusions are applicable to that coverage.

¶4 Interpretation of an insurance contract presents a question of law that we review de novo. ***Id.***, 268 Wis. 2d 16, ¶23. "Insurance polices are construed as they would be understood by a reasonable person in the position of the insured." ***Id.*** Once a grant of coverage is found, exclusions are analyzed separately and are narrowly or strictly construed against the insurer if their effect is uncertain. ***Id.***, ¶24.

¶5 We reject the Kubers's assertion that section III of the policy pertaining to the limits of insurance creates an insuring agreement distinct from Coverage A. Coverage A is the insuring agreement for property damage or bodily injury caused by an occurrence. The definition section of the policy sets forth that the PCOH includes all bodily injury and property damage "occurring away from premises you own or rent and rising out of 'your product' or 'your work'" except for work that has not been completed or abandoned. The limits of insurance section of the policy provides: "The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of 'bodily injury' and 'property damage' included in the products-completed operations hazard." By reference to "pay under Coverage A" this portion of the policy is not an insuring agreement and designates that PCOH coverage is determinable under Coverage A. The PCOH coverage is tied to Coverage A where the business risk and impaired property exclusions are recited.

¶6 That a separate insuring agreement is not created is illustrated in ***American Girl***. There the court was determining coverage for damages occasioned by defective site engineering and preparation. The court noted that a CGL policy includes a broad statement of coverage and that within that coverage the property damage at issue fell within the PCOH. ***Id.***, ¶¶28, 66. The policy here is the same as that in ***American Girl***. Thus, there is only one insuring agreement

and the PCOH coverage arises under that one agreement. *See* ***id.***, ¶74 ("There is coverage under the insuring agreement's initial coverage grant.").

¶7 After determining that the property damage fell within the PCOH, the ***American Girl*** court proceeded to determine whether the exclusion for "property damage to your work" inside the PCOH applied. ***Id.***, ¶67. The same exclusion is found in Cincinnati's policy:

> This insurance does not apply to:
>
> "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.

¶8 The court held that by its terms the exclusion operates to exclude coverage for the type of property damage occasioned by the defective site preparation. ***Id.*** The only difference between this case and ***American Girl*** is that in ***American Girl*** the work performed was done by a subcontractor and therefore the subcontractor exception operated to restore the otherwise excluded coverage. *See* ***id.***, ¶74. Here the work was performed by Graff and not a subcontractor. There is nothing to restore coverage. Coverage under the PCOH is excluded.

¶9 In their reply brief, the Kubers launch an argument based on an exception to exclusion "j(6)," which provides that the policy does not apply to property damage to that particular part of any property that must be restored, repaired or replaced because the insured's work was incorrectly performed on it except to property damage included in the PCOH. The argument is raised for the first time on appeal and the first time in the reply brief and we do not consider it. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992);

***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).