COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2103 **Cir. Ct. No. 2006CV292**

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

RUSSELL OBERMEIER,

PLAINTIFF,

V.

ROBERT TOONEN AND SSAPTS, LLC, P/K/A SAMST, LLC,

DEFENDANTS-APPELLANTS,

WEST BEND MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Robert Toonen and SSAPTS, LLC (collectively Toonen) appeal a summary judgment dismissing West Bend Mutual Insurance Company from an action brought against Toonen by his neighbor, Russell Obermeier. Toonen contends the circuit court misinterpreted his insurance contract with West Bend and that there were genuine issues of material fact precluding summary judgment. We reject Toonen's arguments and affirm.

BACKGROUND

¶2 Toonen and Obermeier are real estate developers who own neighboring pieces of property in the Town of Grand Chute in Outagamie County. Obermeier purchased his parcel of property in 1995. Toonen bought the lots comprising his parcel in 1996 and 1997.

¶3 Sometime in 1998 or 1999, as Toonen was developing his property, Obermeier informed Toonen that Toonen's construction was causing water to back up on Obermeier's property. Obermeier also informed Toonen that water from Obermeier's property historically drained through a swale on Toonen's property. Toonen was aware of the dangers of accumulating water, having previously warned Obermeier about cattails growing on Obermeier's property and suggesting he fill in his property.

¶4 In response to Obermeier's concern about Toonen's construction causing water to pool on Obermeier's property, Toonen dug a ditch designed to permit water to drain off Obermeier's property. According to Obermeier, the ditch failed to remedy the problem.

¶5 West Bend first issued a commercial general liability policy to Toonen effective June 20, 2001. Sometime after 2002, the Department of Natural

Resources delineated a portion of Obermeier's property as wetlands.[1] Obermeier sued Toonen, and West Bend moved for summary judgment, asserting it had no duty to defend the suit or indemnify Toonen. The circuit court granted West Bend's motion based on an endorsement in the policy regarding "Known Injury or Damage," which provided Toonen would not be insured for damage or a continuation of damage if he knew, prior to the policy period, that the damage had occurred, in whole or in part.

DISCUSSION

¶6 We review grants of summary judgment de novo, applying the same methodology as the circuit court. ***Park Bancorp., Inc. v. Sletteland***, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.[2]

¶7 When interpreting an insurance policy, a court first looks to the plain language of the policy to determine its meaning. ***Budget Rent-A-Car Sys., Inc. v. Shelby Ins. Group***, 197 Wis. 2d 663, 669, 541 N.W.2d 178 (Ct. App. 1995). If the policy's terms are unambiguous, we simply apply the policy's terms to the facts of the case. ***Id.***

[1] It is unclear when the DNR delineated a portion of Obermeier's property as wetlands, but Obermeier testified it was sometime around 2002 to 2004.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶8 Toonen claims he did not know he caused damage to Obermeier's property. He also claims there is a genuine issue of material fact regarding when any property damage occurred.

¶9 An endorsement to the West Bend policy provides:

> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> (2) The "bodily injury" or "property damage" occurs during the policy period; and
>
> (3) Prior to the policy period, no insured … and no "employee" authorized … to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

¶10 The record establishes Toonen knew he caused damage to Obermeier's property before the West Bend policy became effective. Toonen is an experienced real estate developer. Given Toonen's warning to Obermeier about the presence of cattails, a wetland vegetation, and his suggestion that Obermeier fill in his property, Toonen was clearly aware that water had a damaging effect on Obermeier's property. Toonen's warnings were an obvious reference to the danger of forming wetlands.

¶11 It is undisputed that Obermeier informed Toonen that water from Obermeier's property historically drained through Toonen's property and that Toonen's construction had caused, and continued to cause, water to pool on

Obermeier's property. Toonen's knowledge of this damage is confirmed by the fact that he attempted to remedy it by digging a ditch. These events occurred in 1998 and 1999, before the West Bend policy became effective in 2001.

¶12 Toonen's claim that when property damage occurred is a genuine issue of material fact also fails. Toonen asserts the property damage was the DNR wetlands delineation in 2003 or 2004, not the construction causing the build up of water on Obermeier's property in 1998 and 1999. However, any damage resulting from the wetlands delineation was a "continuation, change or resumption" of the pooling water allegedly caused by Toonen's construction, and brought to Toonen's attention by Obermeier, before the policy period. While the wetlands delineation damaged Obermeier, it did not negate the damage occurring beforehand and allegedly culminating in the wetlands delineation.

By the Court.—Judgment affirmed.

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