COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1350 **Cir. Ct. No. 01-CV-2366**

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

TAMMY ANKOMEUS AND MARK ANKOMEUS,

PLAINTIFFS-APPELLANTS,

STATE FARM INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

MARY IRVING AND BRIAN IRVING,

DEFENDANTS,

HERITAGE INSURANCE COMPANY (N/K/A ACUITY),

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LEE S. DREYFUS, Judge. *Affirmed.*

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

¶1 NETTESHEIM, P.J. Tammy and Mark Ankomeus appeal from a summary judgment granted in favor of Heritage Insurance Company n/k/a Acuity (Acuity) and from an order denying their motion for reconsideration. The Ankomeuses purchased a residence from Mary and Brian Irving who held a homeowner's insurance policy with Acuity. Shortly after closing on the residence, the property was damaged by a defect in the septic system. The Ankomeuses sought coverage for the property damage from Acuity. The trial court found that the Ankomeuses were not entitled to coverage because the Irvings had canceled the policy as of the date of closing.

¶2 The Ankomeuses argue that the trial court erred in granting summary judgment because the notice of cancellation was signed only by Mary Irving, not by her husband, Brian, and is otherwise ineffective because it was signed "post-loss." We reject the Ankomeuses' arguments. We conclude that the Ankomeuses have failed to raise a genuine issue of material fact as to whether and when the policy cancellation became effective. The summary judgment record reflects that Mary's cancellation of the policy served to cancel the policy for Brian as well and that the undisputed purpose of the cancellation request form was to cancel the policy effective the date of closing. Because this issue is dispositive, we do not address the remainder of the Ankomeuses' arguments. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶3 We affirm the judgment and order.

FACTS

¶4 The Ankomeuses closed on the sale of the Irvings' residence on April 30, 2001. Prior to closing, the Irvings disclosed that the septic system on the property had a "defect" that required the user to "pump more often (not yearly)."

After the closing, the Ankomeuses took possession of the property on May 5, 2001. Mary Irving contacted Acuity on May 7, 2001, to cancel their homeowner's insurance. On May 8, 2001, the septic system failed, backed up and flooded the basement of the home. Later that day, without knowledge of the flooding, Mary executed a "Cancellation Request/Policy Release" form. Mary dated the form May 1, 2001, and the "effective date and hour of cancellation" was listed by Acuity as April 30, 2001.

¶5 In October 2001, the Ankomeuses filed this action against the Irvings and their insurer, Acuity, seeking coverage for the property damage. Acuity moved for summary judgment arguing that the Ankomeuses had not made a claim of "property damage" and, if they had, the "property damage" did not occur within the policy period because the Irvings had cancelled their policy effective April 30, 2001.[1] Following a hearing on February 11, 2002, the trial court issued an oral decision granting summary judgment in favor of Acuity. The trial court found that the "coverage terminated at the request of the Irvings effective April 30."

¶6 The Ankomeuses subsequently filed a motion for reconsideration. The trial court held a hearing on April 1, 2002, again denying the Ankomeuses' motion. The Ankomeuses appeal.

[1] On February 1, 2002, the Ankomeuses and the Irvings settled the case. Pursuant to a stipulation, the Ankomeuses took judgment against each of the Irvings in the amount of $50,000. The Irvings assigned their claims against Acuity to the Ankomeuses, and the Ankomeuses agreed that they would not execute the judgments against the Irvings.

DISCUSSION

¶7 When reviewing a grant of summary judgment, we apply de novo the standards set forth in WIS. STAT. § 802.08 (1999-2000).[2] ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Pursuant to § 802.08(2), summary judgment must be entered "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."

¶8 The resolution of the issue in this case turns on the agreement reached between Acuity and Mary as to the effective date of the cancellation. The relevant summary judgment evidence on this question consists of the insurance policy, the written cancellation, and Mary's deposition testimony.

¶9 The Ankomeuses argue that the cancellation was ineffective because Mary's signature was not witnessed, there are variations in dates, and the box checked on the "Cancellation Request/Policy Release" form indicates that Mary requested a "policy release" and not "cancellation." We reject the Ankomeuses' argument. Despite the inconsistencies in the "Cancellation Request/Policy Release" form, the intent of the parties was clearly to cancel the policy as of the date of closing.

¶10 Mary testified at her deposition that she called Acuity on May 7, 2001, to request a cancellation of her homeowner's policy as of the date she

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

moved out of the residence, April 30, 2001, and a refund for any unused premiums. Consistent with Mary's request, the "Cancellation Request/Policy Release" form completed by Acuity and signed and submitted by Mary indicated the "effective date and hour of cancellation" as April 30, 2001. Thus, while there may be some ambiguity due to the fact that the signatures on the form bear inconsistent dates, it is clear that both the Acuity agent and Mary understood and intended the date of cancellation to be April 30, 2001, after which the Irvings no longer had any insurable or legal interest in the residence.

¶11 Given the parties' clear intention that coverage be canceled as of the date of closing, April 30, 2001, there is no genuine issue of material fact as to whether the inconsistencies in dates and lack of a witness served to render the cancellation request ineffective.

¶12 We turn next to the question of Brian's intent. The Ankomeuses argue that the cancellation signed only by Mary does not serve to cancel coverage for Brian. The Acuity policy provides: "You may cancel this policy at any time by returning it to us or by letting us know in writing of the date cancellation is to take effect." The policy defines "you" as "the 'named insured' shown in the Declaration and the spouse if a resident of the same household."

¶13 It is undisputed that Brian and Mary are both a "named insured" on the Acuity policy. Based on this, the Ankomeuses argue that the insurance coverage for Brian, as a "named insured," could not be canceled without Brian's signature. The Ankomeuses also point to the "severability" provision in the Acuity policy which provides that the "insurance applies separately to each insured." Finally, the Ankomeuses cite to ***Hedtcke v. Sentry Insurance Co.***, 109 Wis. 2d 461, 488-89, 326 N.W.2d 727 (1982), for the proposition that the

severability provision is designed to protect innocent insureds against the wrongful acts or conduct of another insured.

¶14 The summary judgment record reflects that Brian and Mary were divorced prior to the sale of the residence. Brian did not occupy the residence at the time of the closing. The trial court noted that pursuant to the parties' judgment of divorce, Mary, as the occupier of the home, was obligated to pay the insurance premiums and protect Brian's financial interest in the home until such time as she vacated the premises and it was sold. Brian's involvement in this action is limited to his pro se answer to the complaint that states, "I deny all claims against us in this case," and his execution of the settlement stipulation. Brian did not oppose Acuity's motion for summary judgment, and there is no evidence that he objected to the cancellation of the policy. In summary, there is no material issue of fact suggesting that Brian desired to continue coverage on a residence he no longer owned.

¶15 Alternatively, the Ankomeuses argue that they are entitled, in their own right, to litigate the meaning of the cancellation under the Declaratory Judgments Act, WIS. STAT. § 806.04(2), which provides in relevant part:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

¶16 We have no quarrel with the Ankomeuses' right to litigate the meaning of the cancellation agreement between Acuity and Mary under the Declaratory Judgments Act. However, that is exactly what the trial court afforded

the Ankomeuses. The court determined at summary judgment that Acuity and Mary agreed to cancel the policy as of the date of the closing. The Ankomeuses fully participated and were fully heard on that question. Based on the summary judgment record, we uphold the trial court's ruling.[3]

CONCLUSION

¶17 We conclude that the Ankomeuses have failed to establish a genuine issue of material fact as to whether and when the cancellation of the Irvings' homeowner's policy with Acuity became effective. As such, we uphold the trial court's grant of summary judgment in Acuity's favor.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[3] Because we hold that the cancellation was effective as of the date of the closing, it follows that we must reject the Ankomeuses' related argument that Acuity violated its duty to defend under the policy.