COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2124 **Cir. Ct. No. 00-CV-1531**

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

MICHAEL HOOK AND BETTY HOOK,

PLAINTIFFS-APPELLANTS,

V.

WILLIAM A. BONNER AND JUDITH L. BONNER,

DEFENDANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

JANIS B. HUSAK, D/B/A REALTY EXECUTIVES, AND ACCURATE BUILDING CONSULTANTS,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. Michael and Betty Hook bought a house from William and Judith Bonner. The Hooks commenced this action alleging, in part, that the Bonners failed to properly treat or repair fire damage to the house and that the Bonners misrepresented the condition and history of the house. The Hooks appeal from a summary judgment dismissing the Bonners' insurer, American Family Mutual Insurance Company, upon the determination that there is no coverage and no duty to defend. We conclude that issues of material fact exist; we reverse the judgment dismissing American Family, and remand for further proceedings.

¶2 The Hooks bought the home and took up residence there in April 2000.[1] William Bonner had remodeled the home prior to the sale. The Hooks were aware that there had been a fire at the property. However, the Hooks allege that the Bonners represented that the only remains of the fire were charred beams located in the basement. Subsequently the Hooks discovered charred beams on the second floor of the home. They intend to prove that Betty's health deteriorated after moving into the home because the air quality in the home was compromised

[1] Although only a brief statement of the facts is necessary, we note that the appellants' brief merges the statement of facts with the statement of the case. Although WIS. STAT. RULE 809.19(1)(d) (2001-02) provides that the statement of the case shall include a statement of facts, a separate statement for each is preferred. There is an important difference between the statement of the case, which explains the procedural posture of the case, and the statement of the facts, a narrative of the circumstances leading to the controversy. Better appellate practice is to utilize a separate statement for each so that the import of the statement of facts is preserved. *See* Judge William Eich, *Writing the Persuasive Brief*, WISCONSIN LAWYER, February 2003, at 20, 54 (discussing the important role the statement of facts plays in writing a persuasive brief).

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

by mold, odor emitted by charred beams, and carbon monoxide buildup. They contend that American Family provides coverage to the Bonners on negligent construction and misrepresentation claims.

¶3 On American Family's motion for summary judgment, the circuit court concluded that as a matter of law coverage does not exist for the alleged misrepresentations. It further concluded that liability for negligent construction would exist only under a misrepresentation exception to the rule of *caveat emptor* but that would simply be another form of misrepresentation for which no coverage exists. The circuit court declared there was no coverage and therefore American Family owed no duty to defend. It dismissed American Family but did not dismiss any portion of the complaint against the Bonners.

¶4 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2). "Determining whether a given set of facts gives rise to coverage under an insurance policy is a question of law we review de novo."[2] ***Soc'y Ins. v. Town of Franklin***, 2000 WI App 35, ¶5, 233 Wis. 2d 207, 607 N.W.2d 342.

[2] We recognize that the duty to defend is to be determined only by examining the allegations of the complaint and not other summary judgment type materials. ***Atl. Mut. Ins. Co. v. Badger Med. Supply Co.***, 191 Wis. 2d 229, 241, 528 N.W.2d 486 (Ct. App. 1995). Here the circuit court first determined there was no coverage and the declaration of no duty to defend flowed from that determination. Our review is not limited to the complaint.

¶5 We first consider whether coverage exists for the negligence claim alleged in the complaint. American Family points to the policy language providing coverage only for damages for which an insured is "legally liable."[3] It argues that the Bonners are not legally liable for damages for negligent construction or repair because the doctrine of *caveat emptor* bars recovery.[4] The doctrine provides that "a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession." ***Bagnowski v. Preway, Inc.***, 138 Wis. 2d 241, 246-47, 405 N.W.2d 746 (Ct. App. 1987) (quoting RESTATEMENT (SECOND) OF TORTS § 352 (1965)).

¶6 The Hooks concede that *caveat emptor* generally bars recovery. However, they argue that the Bonners are "legally liable" under the following exception to the doctrine:

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land ... for physical harm caused by the condition after the vendee has taken possession, if

[3] The insuring clause provides: "We will pay, up to our limit, compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence covered by this policy."

[4] It appears that superficially the policy provides coverage for the negligence claims. It is problematic to declare that no coverage exists because the insureds are not legally liable while the particular claims remain pending against the insureds. None of the claims against the Bonners were dismissed and yet American Family was relieved of the duty to defend the Bonners. The duty to defend exists without regard to the merits or viability of the claim and cannot be determined by looking at defenses asserted in the insured's answer. *See* ***Loosmore v. Parent***, 2000 WI App 117, ¶18, 237 Wis. 2d 679, 613 N.W.2d 923. Curiously the parties offer no explanation for this inconsistency.

> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
>
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

Id. at 247 (quoting RESTATEMENT (SECOND) OF TORTS § 353 (1965)).

¶7 We agree with the Hooks that the summary judgment record demonstrates that certain elements of the exception can be satisfied. William Bonner remodeled the home, he knew of the presence of charred beams, and he acknowledged he did not repair, treat, or replace the charred beams. William also was aware that many of the charred beams could not be seen from the interior of the house. Thus, the Hooks allege that the Bonners knew of the condition and that the Hooks would not discover it or realize the potential risk.[5]

¶8 A disputed question of material fact is whether the Bonners knew, or should have known, that the untreated charred beams in the upper portion of the house created an unreasonable risk to persons on the land. A few years before remodeling the house, William had observed a professional treat charred beams in some rental property he owned. Whether that observation translates into knowledge that the failure to treat the charred beams could cause persons to become sick is a question of fact. The summary judgment record permits competing inferences about the state of the Bonners' knowledge of likely harm to persons posed by untreated charred beams. Thus, summary judgment is not appropriate because the Hooks are entitled to have the inferences viewed in their

[5] At a minimum, a factual dispute exists whether a hole in the drywall outside the bathroom permitted the Hooks to observe some of the charred beams.

favor. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980) (if the presented materials are subject to conflicting interpretations or reasonable people might differ as to their significance, summary judgment is inappropriate). Although we may view the issue of whether a reasonable person would know of the potential health risks to be a close one, summary judgment is still not appropriate. *See* ***Kemp v. Wis. Elec. Power Co.***, 44 Wis. 2d 571, 582, 172 N.W.2d 161 (1969); ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 669, 574 N.W.2d 250 (Ct. App. 1997).

¶9 Turning to the misrepresentation claim, American Family correctly points out that some of the resulting damages from alleged misrepresentations are economic losses only and are not considered "property damage" as that phrase is defined in its liability policy. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 816-17, 595 N.W.2d 345 (1999); ***Benjamin v. Dohm***, 189 Wis. 2d 352, 360-61, 525 N.W.2d 371 (Ct. App. 1994); ***Qualman v. Bruckmoser***, 163 Wis. 2d 361, 366, 471 N.W.2d 282 (Ct. App. 1991). Yet the Hooks allege that the Bonners' misrepresentations caused Betty's personal injuries because they would not have moved into the house or would have remedied the defects if the true condition of the house had been disclosed. We agree with the Hooks that ***Smith***, ***Benjamin*** and ***Qualman*** do not limit damages caused by misrepresentations in a real estate transaction to economic losses.[6] Those cases do not address whether bodily injury may result from misrepresentations.

[6] Indeed, ***Smith v. Katz***, 226 Wis. 2d 798, 816-17, 595 N.W.2d 345 (1999), leaves open the possibility that misrepresentations can result in actual property damage or bodily injury:

(continued)

¶10 American Family looks to the policy's requirement that for coverage to exist, the alleged bodily injury be "caused by" a covered occurrence. It argues there is no causal nexus between the alleged misrepresentations and bodily injury. It relies on ***Benjamin***, 189 Wis. 2d at 363, 365, which held that the physical destruction and loss of use of the property were caused by the structural defects and not the alleged misrepresentations. Again, ***Benjamin*** is not controlling because it did not involve a claim of bodily injury.

¶11 We conclude that issues of material fact exist with respect to the claim that the Bonners' misrepresentations caused bodily injury. Those issues include not only the extent of the Bonners' knowledge with respect to the risk of harm of nondisclosure but also the type and causation of damages.[7] Those issues cannot be determined as a matter of law. It was premature to dismiss American

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> We are not saying that strict responsibility misrepresentations or negligent misrepresentations can *never* cause "property damage" as defined in the policies, particularly when "property damage" can include "loss of use of tangible property that is not physically injured." But we recognize that the majority view in the cases is that misrepresentations and omissions do not produce "property damage" as defined in insurance policies. They produce economic damage.
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> Given this well established law, a complaint claiming strict responsibility misrepresentation or negligent misrepresentation must contain some statement about physical injury to tangible property, some reference to loss of use, or some demand for relief beyond money damages if the complaint is to satisfy the requirement that "property damage" be alleged within the four corners of the complaint. (Citation omitted.)

[7] Although not argued on appeal, the summary judgment record reflects that the Hooks also seek to recover for relocation expenses for periods when Betty was unable to reside in the house. This may constitute loss of use damages covered by American Family's policy.

Family when disputed material issues of fact exist about potential liability under the policy.

By the Court.—Judgment reversed and cause remanded.

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