COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1041 **Cir. Ct. No. 2009CV636**

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

THOMAS S. TABOR,

PLAINTIFF,

V.

PETER KRONICH, D/B/A DEFIANT CONSULTING & SURVEY, DONALD STITT AND MARY STITT,

DEFENDANTS,

GUNNAR VAGENIS, D/B/A GUNNAR'S YACHT AND SHIP,

DEFENDANT-APPELLANT,

CINCINNATI INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Gunnar Vagenius,[1] d/b/a Gunnar's Yacht and Ship, appeals from an order granting summary judgment in favor of his insurer, Cincinnati Insurance Company, declaring that Cincinnati has no duty either to defend or to indemnify Vagenius. We agree with the circuit court that this case is squarely governed by ***Qualman v. Bruckmoser***, 163 Wis. 2d 361, 471 N.W.2d 282 (Ct. App. 1991). We affirm.

¶2 The material facts are undisputed. Vagenius brokered the sale of a semi-custom sailboat between sellers Donald and Mary Stitt and buyer Thomas Tabor. Tabor intended to use the boat for sailing races and regattas. Peter Kronich, hired by Tabor to inspect the boat before purchase, deemed it in satisfactory condition. Tabor claims he later discovered the hull had serious moisture problems that made the boat structurally unsafe and unsuitable for racing.

¶3 Tabor filed suit against the Stitts, Vagenius and Kronich, asserting that prior to his purchase they all were aware of, but failed to disclose, the boat's compromised integrity. The claims against Vagenius—a violation of WIS. STAT. § 100.18 (2009-10),[2] intentional misrepresentation, theft by fraud and

[1] The appellant's surname is spelled "Vagenis" in the complaint and in the case caption. Since he spells his name "Vagenius" in the affidavit he submitted in support of his motion for summary judgment and in his brief on appeal, we will do likewise.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

negligence—are the only ones relevant to this appeal. Cincinnati, through which Vagenius had a commercial general liability policy, moved to intervene.

¶4 Cincinnati then moved for summary judgment seeking a declaration that its CGL policy provides no coverage to Vagenius for the claims made against him.[3] Cincinnati first argued that the complaint does not allege an "occurrence," which the policy generally defines as "an accident." The circuit court agreed that the claims against Vagenius based on WIS. STAT. § 100.18, intentional misrepresentation and theft by fraud each contain an element of intent, and thus are not "accidents." It rejected Cincinnati's position with regard to the negligence claim, however, because that claim arguably asserts liability against Vagenius for accidental conduct. The court rightly concluded that, since the policy provides coverage for one claim, Cincinnati could not use the "occurrence" argument to escape its obligation to defend the entire suit. *See* ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶21, 261 Wis. 2d 4, 660 N.W.2d 666.

¶5 Cincinnati also argued that the complaint did not state a claim for "property damage," defined in the policy as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

[3] Vagenius and the Stitts also moved for summary judgment but only the decision on Cincinnati's motion is before us on this appeal.

Tabor's complaint, Cincinnati contended, asserted only economic damages. Sua sponte looking to ***Qualman***, the circuit court agreed that the damages were economic in nature for which there was no coverage under the policy and that Cincinnati therefore had no duty to defend. It granted Cincinnati's motion for summary judgment, and Vagenius appeals.

¶6 We review a circuit court's grant of summary judgment de novo, using the same familiar methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there are no disputed issues of fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The construction or interpretation of an insurance policy is a question of law we review de novo. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

¶7 In relevant part, Tabor's complaint alleges the following:

> 55. The significant delamination and moisture contamination of the Boat's hull has caused it to be defective, not fit for its particular purpose, and structurally unsafe and unsailable.
>
> ….
>
> 74. Sellers, by knowingly selling a deficient, not seaworthy, unsafe, unsound, and unfit for its particular purpose boat in need of considerable repair, breached the contract.
>
> ….
>
> 83. The Boat, due to the major structural defects, was not suitable nor safe for the particular purpose of sailing, much less the high structural demands of racing.
>
> ….

> 85. Buyer has suffered significant direct and consequential damages including, but not limited to the inability to compete in prestigious sailing races and regattas, and boat storage and maintenance fees that continue to accrue. Said damages are properly to be determined at trial.

¶8 Vagenius argues that the circuit court erred by finding that these loss-of-use allegations did not constitute "property damage" under the terms of the policy. We disagree.

¶9 Neither party cited ***Qualman*** to the circuit court. The court nevertheless relied on ***Qualman***, observing that it was the reported decision most analogous to the facts here. In that case, the Qualmans bought a house from the Bruckmosers. ***Qualman***, 163 Wis. 2d at 363. The Qualmans later sued the Bruckmosers for allegedly misrepresenting the true condition of the basement walls and the plumbing and for breach of contract, resulting in the buyers' pecuniary damage. ***Id.*** at 363-64, 366. The Bruckmosers' homeowners' insurance policy defined "property damage" as "injury to or destruction of tangible property, including the loss of its use." ***Id.*** at 366. This court held that allegations of pecuniary loss resulting from structural damage did not constitute property damage under the policy because "[a]ny property damage that existed in the home existed before the making of the alleged misrepresentations which are the theory of recovery in the complaint. Simply because the underlying facts deal with defects in the property sold does not change the nature of the claim asserted." ***Id.*** at 367.

¶10 And so it is here. The claimed defects in the boat existed before Vagenius allegedly made the misrepresentations that are Tabor's theory of recovery. Vagenius suggests that the Cincinnati policy's bifurcated definition of "property damage"—setting out "loss of use of tangible property that is not

physically injured" in its own paragraph—changes the analysis under ***Qualman***. We do not see how. The misrepresentations Tabor alleged did not cause the loss of use. Rather, it is the claimed "significant delamination and moisture contamination" that allegedly are the cause of the boat being "not seaworthy, unsafe, unsound, and unfit for its particular purpose," and that prevent Tabor from participating in races and regattas.

¶11 We also are not persuaded by Vagenius' argument that ***Qualman*** has been "superseded" or "rejected" by our supreme court. He points out that, in ***Smith v. Katz***, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), for example, the supreme court observed: "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.'" ***Id.*** at 816. Two things strike us, however. First, as Vagenius acknowledges, the court says in the very next sentence: "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." ***Id.*** at 816-17.

¶12 Second, by way of illustrating an instance of "loss of use of tangible property that is not physically injured," the court offers a "compare" citation to ***Sola Basic Industries, Inc. v. United States Fidelity & Guaranty Co***., 90 Wis. 2d 641, 280 N.W.2d 211 (1979). There, the insurer was ordered to cover economic damages a purchaser of a product from its insured suffered due to the insured's negligent repair of the product. ***Id.*** at 644. While the product, a transformer, was being repaired, the client lost the use of a functional electric furnace and incurred expenses to keep its manufacturing processes going by some alternate means. ***Id.***

¶13 In no way does ***Smith*** stand for the proposition that simply pleading "loss of use" triggers coverage when, as here, the "loss of use" is due to preexisting damage and the theory of recovery is misrepresentation. ***Qualman*** controls. Accordingly, we affirm the order of the circuit court.[4]

By the Court.—Order affirmed.

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

[4] We do not address Cincinnati's request to address the circuit court's finding that the complaint alleges an occurrence. Cases should be decided on the narrowest grounds possible. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989). If a decision on one point disposes of the appeal, we will not decide the other issues raised. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).