COURT OF APPEALS
DECISION
DATED AND RELEASED

March 5, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to § 808.10, STATS., within 30 days hereof, pursuant to RULE 809.62(1), STATS.

NOTICE

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

No. 95-3411

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

RYAN TENNESSEN, DANIEL TENNESSEN and DARLENE TENNESSEN,

Plaintiffs,

v.

COMMERCIAL UNION INSURANCE COMPANY, a/k/a EMPLOYERS FIRE INSURANCE COMPANY,

Defendant-Appellant,

THRESHERMENS MUTUAL INSURANCE COMPANY,

Defendant-Respondent,

OPEN PANTRY FOOD MARTS OF WISCONSIN, INC., AMY R. YUNKER, BADGER MUTUAL INSURANCE COMPANY, GOLDMINE CORPORATION, GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, EMPLOYERS HEALTH INSURANCE COMPANY and BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendants.

APPEAL from a judgment of the circuit court for Racine County: DENNIS FLYNN, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Commercial Union Insurance Company appeals from a judgment declaring that under a liquor liability exclusion in an insurance policy issued by Threshermens Mutual Insurance Company, no coverage exists for the sale of intoxicants to a minor by Threshermens' insureds, Goldmine Corporation and Open Pantry Food Marts of Wisconsin, Inc. Commercial Union argues that an issue of fact exists as to whether Open Pantry is engaged in the business of selling alcohol. We conclude that under the Threshermens policy that factual question is of no consequence. We affirm the judgment.

While a passenger in a vehicle operated by Amy Yunker, Ryan Tennessen was injured. Yunker was a minor and allegedly intoxicated by alcohol she purchased at an Open Pantry convenience store. The store was operated by Goldmine Corporation under a franchise granted by Open Pantry Food Marts of Wisconsin.

Threshermens insures Goldmine Corporation. Open Pantry is listed as an additional insured on the Threshermens policy. The policy covers Open Pantry "only with respect to their liability as grantor of a franchise" to Goldmine. Threshermens moved for and was granted a declaratory judgment that there is no coverage for any claims against Goldmine and Open Pantry and

that it has no duty to indemnify or defend those parties. Threshermens' liquor liability exclusion reads:

This insurance does not apply to:

....

(c) "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1)Causing or contributing to the intoxication of any person;

(2)The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3)Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

Commercial Union insures Open Pantry. Its answer asserts a cross-claim against Goldmine and Threshermens for contribution. The Commercial Union policy contains the same liquor liability exclusion as the Threshermens policy.

We first clarify what is not subject to review on this appeal. Commercial Union's motion for a declaratory ruling that it owes no coverage under its liquor liability exclusion was denied. By its appeal of the final order

dismissing Threshermens, Commercial Union seeks review of the nonfinal order denying it summary judgment.[1]

The nonfinal order of which Commercial Union seeks review was entered after the October 24, 1995 final order dismissing Threshermens but before the filing of the December 8, 1995 notice of appeal. RULE 809.10(4), STATS., provides that only prior nonfinal judgments and orders are reviewable in an appeal from the final judgment. We are without jurisdiction to review the nonfinal order denying Commercial Union's motion for summary judgment entered after the final judgment. *See* ***Ford Motor Credit Co. v. Mills,*** 142 Wis.2d 215, 220, 418 N.W.2d 14, 16 (Ct. App. 1987).

Threshermens argues that Commercial Union lacks standing to appeal from the judgment dismissing Threshermens because it is not in contractual privity as an insured and has no right of contribution or subrogation. A party aggrieved in some appreciable manner by the judgment has standing to appeal. *See* ***Koller v. Liberty Mut. Ins. Co.***, 190 Wis.2d 263, 266, 526 N.W.2d 799, 800 (Ct. App. 1994). The law of standing is not to be applied narrowly. *See* ***Town of Eagle v. Christensen***, 191 Wis.2d 301, 316, 529 N.W.2d 245, 251 (Ct. App. 1995). "A party has standing when its claims are no more than a 'trifle.'" ***Id.*** (quoted source omitted).

[1] Commercial Union's petition for leave to appeal the nonfinal order was denied on April 5, 1996. Open Pantry's appeal taken from the final order dismissing Threshermens was dismissed on February 28, 1996, as an untimely co-appeal.

We need not decide whether Commercial Union has a viable claim for contribution or subrogation. Commercial Union filed a cross-claim against Threshermens and sought a declaration that Threshermens provides Open Pantry with primary coverage.[2] Dismissal of Threshermens precludes consideration of that cross-claim and is adverse to Commercial Union. Further, we recognized in our order of February 28, 1996, that in the absence of coverage from Threshermens, Commercial Union arguably faces a diminished pool of resources available to satisfy any judgment in favor of the plaintiffs. *See* ***Weina v. Atlantic Mut. Ins. Co.***, 177 Wis.2d 341, 345, 501 N.W.2d 465, 467 (Ct. App. 1993). There is little doubt that traditional notions of standing become obscured in multi-defendant actions. *See* ***Koller***, 190 Wis.2d at 269, 526 N.W.2d at 801. We conclude that the judgment is adverse to Commercial Union's interest so as to confer standing to appeal.

We turn to the merits of the judgment appealed. Commercial Union argues that an issue of fact exists as to whether Open Pantry was in the business of selling liquor. If not, the liquor liability exclusion in Threshermens' policy would not apply as to Open Pantry.[3]

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[2] Both the Threshermens and Commercial Union policies have "other insurance clauses" making both insurers potentially jointly and severally liable for a judgment against Open Pantry. *See* § 631.43, STATS.

[3] Commercial Union claims that because this same issue of fact precluded summary judgment in its favor, judgment in favor of Threshermens is also precluded. Commercial Union contends that it is illogical to find that an issue of fact exists as to its motion but not as to Threshermens'. We have already indicated that Commercial Union's motion for declaratory judgment is not before us.

With regard to Threshermens' policy, it does not matter whether or not Open Pantry was engaged in the business of selling alcohol. Open Pantry was only an additional insured on the Threshermens policy. Open Pantry was not insured by Threshermens for all liability but only for liability as a "grantor of a franchise." There was no allegation in the amended complaint regarding negligence in the granting of the franchise.

Additionally, because the Threshermens policy only covers Open Pantry in its capacity as a franchiser and additional insured, coverage is not provided to Open Pantry independent of liability for the acts of Goldmine. There is no coverage for Goldmine's acts in the sale of intoxicants to a minor and consequently no coverage as to Open Pantry.[4]

By the Court.—Judgment affirmed.

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

[4] The difference between Threshermens' and Commercial Union's liability is thus illustrated. Commercial Union is responsible for the alleged negligent conduct of Open Pantry related to direct involvement, if any, in operating the convenience store, which may or may not result in a finding that Open Pantry was engaged in the sale of intoxicants. Coverage under Threshermens' policy is related only to the conduct of Goldmine.