COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2214 **Cir. Ct. No. 2003CV3122**

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

EDWARD BAUMANN AND ELITE PROTECTION SPECIALISTS, LLC,

PLAINTIFFS,

V.

MATTHEW F. ELLIOTT AND SECURITY ARTS CORPORATION,

DEFENDANTS-APPELLANTS,

CAPITOL INDEMNITY CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

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

¶1 NETTESHEIM, J. Edward Baumann and Matthew Elliott both own and operate corporations which provide security services. Baumann and his corporation, Elite Protection Specialists, LLC (collectively "EPS"), filed a complaint against Elliott and his corporation, Security Arts Corporation (collectively "SAC"), alleging tortious interference with a contract, defamation and violations of WIS. STAT. § 943.30 (2003-04),[1] which prohibits threats to injure or accuse of a crime. SAC's commercial insurance carrier, Capitol Indemnity Corporation, later intervened in the action as a party defendant.

¶2 The issue on appeal involves Capitol's duty to defend Elliott and SAC against EPS's claims. SAC contends that the trial court erred in its determination that Capitol had no duty to defend or indemnify SAC based on the allegations made by EPS. We conclude that EPS's complaint, viewed in toto, contains allegations couched in terms of intentional, willful or wanton conduct, which is excluded under Capitol's policy. We therefore uphold the trial court's grant of summary judgment in favor of Capitol and affirm.

BACKGROUND

¶3 Baumann is the Chief of Police of the Village of Pewaukee.[2] Baumann formed EPS, which he incorporated as a limited liability corporation. EPS is in the business of providing security services to the public and other various security services. At the time this action was filed, EPS had entered into

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Although the briefs represent that Baumann is the Chief of Police of the City of Pewaukee, we judicially notice that he, in fact, is the Chief of Police of the Village of Pewaukee.

contracts and had prospective contracts with various entities to provide security services for special events, including Summerfest and Harley-Davidson's 100th Anniversary Celebration.

¶4 On December 23, 2003, EPS filed a complaint against Elliott and SAC alleging tortious interference with a contract, defamation and violations of WIS. STAT. § 943.30. EPS requested actual and punitive damages. Capitol sought and received permission to intervene as a defendant in order to seek a judicial declaration that it had no duty to defend or indemnify SAC.[3] Capitol then moved for summary judgment, alleging that no genuine issues as to any material facts existed as to Capitol's duty to defend or indemnify. Relevant to this appeal, Capitol contended that it did not owe SAC coverage under "Coverage B" for "Personal and Advertising Injury Liability" because the "expected or intended injury" exclusion in its policy defeated coverage for the actions alleged by EPS.[4]

¶5 In a written decision, the trial court agreed with Capitol and granted its motion for summary judgment. The court rejected SAC's assertion that the complaint failed to allege that any false statements were made with knowledge of their falsity.[5] The court found that the complaint "alleges malicious, wanton and willful defamation, all supporting the allegation of knowledge." In addition, the

[3] Elliott's homeowner's insurer, Cincinnati Insurance Company, sought a similar declaratory judgment. The resolution of that coverage dispute is the subject of a separate appeal. See ***Baumann v. Elliott***, 2004AP2177.

[4] Capitol additionally argued that there was no coverage under "Coverage A" for "Bodily Injury and Property Damage Liability." SAC does not dispute that the complaint fails to state any cause of action alleging "bodily injury" or "property damage."

[5] If SAC filed a brief in opposition to summary judgment in which these arguments were made, the appellate record does not include it. We therefore rely on the trial court's summary of SAC's position.

court also relied on the doctrine of fortuity.[6] The court entered a written order for judgment on August 6, 2004. SAC appeals.

DISCUSSION

¶6 Our review of a trial court's grant of summary judgment is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). In assessing whether summary judgment is appropriate, we first determine whether the complaint states a claim and, if so, whether there are any genuine issues of material fact for trial. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Summary judgment is not appropriate if the complaint states a claim and there are genuine issues for trial. *See* WIS. STAT. § 802.08(2).

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[6] The principle of fortuity was adopted by the supreme court in ***Hedtcke v. Sentry Insurance Co.***, 109 Wis. 2d 461, 326 N.W.2d 727 (1982). The court explained the principle as follows:

> [Under] the "principle of fortuitousness," … insurance covers fortuitous losses[,] and … losses are not fortuitous if the damage is intentionally caused by the insured. Even where the insurance policy contains no language expressly stating the principle of fortuitousness, courts read this principle into the insurance policy to further specific public policy objectives including (1) avoiding profit from wrongdoing; (2) deterring crime; (3) avoiding fraud against insurers; and (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed.

Id. at 483-84. Based on our conclusion that the allegations within the four corners of EPS's complaint preclude coverage under Capitol's policy, we need not reach the merits of the parties' arguments regarding the application of the doctrine of fortuity. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court need address only dispositive issues).

¶7 Our review is also de novo because the issue involves interpretation of an insurance contract. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. We interpret insurance contracts to give effect to the intentions of the parties. ***Trumpeter Devs., LLC v. Pierce County***, 2004 WI App 107, ¶6, 272 Wis. 2d 829, 681 N.W.2d 269.

¶8 The well-established legal analysis for determining when an insurer has a duty to defend was recently reiterated by our supreme court in ***Fireman's Fund Insurance Co. v. Bradley Corp.***, 2003 WI 33, ¶¶19-21, 261 Wis. 2d 4, 660 N.W.2d 666:

> An insurer's duty to defend an insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. "An insurer's duty to defend the insured in a third-party suit is predicated on allegations in a complaint which, if proven, would give rise to the possibility of recovery that falls under the terms and conditions of the insurance policy." The duty to defend is based solely on the allegations "contained within the four corners of the complaint," without resort to extrinsic facts or evidence.
>
> When comparing the allegations of a complaint to the terms of an insurance policy, the allegations in the complaint are construed liberally. The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage. We therefore "assume all reasonable inferences" in the allegations of a complaint and resolve any doubt regarding the duty to defend in favor of the insured.
>
> In addition, a duty to defend is based upon the nature of the claim and not on the merits of the claim. "It is the nature of the claim alleged against the insured which is controlling even though the suit may be groundless, false or fraudulent." Consequently, "an insurer may have a clear duty to defend a claim that is utterly specious because, if it were meritorious, it would be covered." Finally, when an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit. (Footnotes omitted.)

¶9 The declaratory judgment procedure utilized by Capitol in this case was the same as that used by the insurers in ***Smith v. Katz***, 226 Wis. 2d 798, 595 N.W.2d 345 (1999), and ***Fireman's Fund***. In each case, the insurer brought a motion for summary judgment seeking a declaratory judgment that it had no duty to defend *and* no duty to indemnify under the policy. ***Smith***, 226 Wis. 2d at 802; ***Fireman's Fund***, 261 Wis. 2d 4, ¶14. This procedure is in keeping with the instructions of the supreme court in ***Mowry v. Badger State Mutual Casualty Co.***, 129 Wis. 2d 496, 528, 385 N.W.2d 171 (1986), that an "insurer may need to provide a defense to its insured when the separate trial on coverage does not precede the trial on liability and damages." Here, Capitol put the separate question of coverage before any trial of the underlying action via its motion for summary judgment. Although the supreme court in ***Smith*** and ***Fireman's Fund*** decided the issue on the basis of the duty to defend, not the duty to indemnify, the declaratory judgment procedure contemplates that if the insurer's summary judgment evidence establishes no material issue of fact in support of coverage, the insurer owes no duty to defend. In this case, as in ***Smith*** and ***Fireman's Fund***, we need not move to the question of coverage and Capitol's duty to indemnify because a comparison of EPS's complaint against the Capitol policy establishes no duty to defend by Capitol in the first instance.[7]

[7] Besides its insurance policy, Capitol also offered EPS's responses to SAC's interrogatories. However, in resolving Capitol's duty to defend, we need not look to the interrogatory responses since EPS's complaint itself reveals no duty to defend when measured against Capitol's policy.

EPS's Complaint

¶10 We begin the comparison analysis of ***Fireman's Fund*** by first looking to the allegations as set forth in EPS's complaint. With respect to the first claim of tortious interference with a contract, the complaint alleges:

> 15. The Defendant, Elliott interfered with the said contracts and prospective contracts, by intentionally interfering with the relationship between EPS and their prospective clients. Further, Defendant, Elliott acting as an agent for SAC intentionally interfered with the relationship between EPS and their prospective clients.
>
> 16. That the intentional interference by Elliott and SAC resulted in EPS suffering damages for unrealized revenues and profits, along with damages suffered to its reputation and marketability in the marketplace.

¶11 As to defamation, the complaint alleges:

> 20. That Defendants, Elliott and SAC made false, defamatory statements to persons other than the Plaintiff, Baumann, that were not privileged, that directly and proximately harmed Baumann's reputation, thereby deterring third parties [from] associating and conducting business with Baumann and EPS.
>
> ….
>
> 22. That the Defendants' false defamatory comments include, but are not limited to, allegations that Plaintiff Baumann abused his public office, as police chief of Pewaukee. That EPS and Baumann personally, were taking cash payments for rendering security services. And that, EPS and Baumann was having its employees perform their EPS duties in police issued uniforms.

¶12 Finally, EPS alleged that SAC violated WIS. STAT. § 943.30 which makes it a Class H felony to verbally or through written communication maliciously threaten to accuse or accuse another of a crime or offense or threaten or commit any injury to a person or business with the intent to extort a pecuniary advantage:

> 28. The Defendant, SAC, through its agent, Elliott, maliciously threatened and accused Plaintiff, Baumann of a crime and threatened injury to Baumann's profession, intentionally and specifically for his own pecuniary advantage, contrary to WIS. STAT. § 943.30.

Capitol's Policy

¶13 We continue the ***Fireman's Fund*** comparison analysis by next looking at the Capitol insurance policy. The issue is whether Capitol owes SAC a duty to defend under its "personal and advertising injury" coverage provisions in its policy. The insuring agreement of the Capitol policy provides:

> **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply.

The Capitol policy defines a "personal and advertising injury" as an "injury, including consequential 'bodily injury' arising out of … [o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

¶14 However, Capitol's Coverage B excludes coverage for the following:

> **a. Knowing Violation Of Rights Of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act

> would violate the rights of another and would inflict "personal and advertising injury."
>
> **b. Material Published With Knowledge Of Falsity**
>
> "Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.
>
> ….
>
> **d. Criminal Acts**
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured."

Application of Capitol's Personal and Advertising Injury Liability Exclusion Liability Exclusion Against EPS's Complaint

¶15 As we have noted, the duty to defend is determined by comparing the allegations of the complaint to the terms of the insurance policy. ***Fireman's Fund Ins.***, 261 Wis. 2d 4, ¶19. This exercise requires that we confine our analysis to the "'four corners of the complaint,' without resort to extrinsic facts or evidence." ***Id***.

¶16 SAC contends Capitol's duty to defend should be measured only by the allegations in the complaint pertaining to the defamation claim. Noting that this portion of the complaint does not recite that the defamation was intentional, SAC argues that Capitol has a duty to defend as to this claim. We deem SAC's argument too narrow and too artificial under the facts of this case. We first note that the underlying conduct in support of all of EPS's allegations is the same. EPS's allegations pertaining to the tortious interference with a contract and the violations of WIS. STAT. § 943.30 clearly assert that SAC's actions were intentional. Second, and more importantly, we note that the prayer for relief pertaining to the defamation claim alleges that such defamation was "malicious, wanton and willful." Such allegations are the functional equivalent of intentional

conduct. *See* ***Ervin v. City of Kenosha***, 159 Wis. 2d 464, 483, 464 N.W.2d 654 (1991) (quoting WIS JI—CIVIL 1707 (1990)) ("[A]cts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where insult or injury is intended."). EPS's prayer for relief states:

> D. For a judgment [from] this Court against Defendants, Elliott and SAC, awarding Plaintiffs, Baumann and EPS, punitive damages, for the Defendants' malicious, wanton and willful, defamation of Baumann and EPS.

¶17 Relying on our decision in ***Midway Motor Lodge of Brookfield v. Hartford Insurance Group***, 226 Wis. 2d 23, 593 N.W.2d 852 (Ct. App. 1999), SAC contends that we may not look to the prayer for relief because that provision is not a substantive part of the complaint. We conclude that the complaint, including the prayer for relief, in this case is distinguishable from that in ***Midway Motor Lodge***.

¶18 In ***Midway Motor Lodge***, the plaintiff, Midway, filed a complaint alleging negligence but failed to plead what actual loss or damage it suffered as a result of the defendant's breach of its duty, thereby failing to satisfy the fourth element of a negligence claim. *See* ***id***. at 35. Instead of making specific allegations as to property damage—or a "loss of use of tangible property"—the complaint made the conclusory statement that "as a result of the negligence of [the defendant], Midway has suffered damages in an amount to be determined by the trier of fact." ***Id***. Looking to the ad damnum clause, the court stated, "Similarly, a demand in the ad damnum clause for 'incidental and consequential damages suffered as a result of [the defendant's] negligence' is unsatisfactory [to allege property damage] because the ad damnum clause is not a substantive part of the complaint." ***Id***. at 35-36. The court rejected Midway's argument that "insurers

must speculate beyond the written words of the complaint and imagine what kinds of claims for damages the plaintiffs are actually making." ***Id***. at 36.

¶19 In addressing the issue in ***Midway Motor Lodge***, the court's concerns were clearly aimed at providing the defendant with notice of the plaintiff's claims. The court stated:

> [T]he complaint must give the defendant fair notice of not only the plaintiff's claim but "the grounds upon which it rests" as well. "[I]t is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." The objective of viewing a complaint in a liberal light cannot be used by a party to supply the missing or forgotten elements needed to trigger a particular insurance policy's coverage.

Id. at 35 (citations omitted).

¶20 Here, the body of the EPS complaint does not invite SAC (or anyone else for that matter) to speculate as to the claims alleged, including defamation, and the conduct which supports those claims. Instead, EPS's complaint alleged specific "false defamatory comments" made by Elliott and SAC, including allegations that Baumann abused his public office, was taking cash payments for rendering security services and that EPS and Baumann were having employees wear their police-issued uniforms. Similarly, the ad damnum clause does not leave doubt as to the nature of the alleged offending defamatory conduct. To the contrary, the clause specifically alleges that SAC's defamatory conduct was

"malicious, wanton and willful."[8] Unlike the conclusory prayer for relief in ***Midway Motor Lodge***, which was based on an incomplete claim made in the complaint, the ad damnum clause in this case makes specific factual allegations regarding a valid and complete claim set forth in the body of the complaint.

¶21 We conclude that EPS's defamation allegations, viewed in the context of the entire complaint, fall under Capitol's "personal and advertising injury" exclusions, which preclude coverage for injury resulting from oral or written material published with knowledge of falsity and the knowing violation of another's rights.

CONCLUSION

¶22 Based on a comparison between the allegations within the four corners of EPS's complaint and the coverage and exclusion provisions of the Capitol policy, we uphold the trial court's ruling that Capitol did not have a duty to defend SAC against the allegations of EPS's complaint.

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[8] "The elements of a defamation claim are: (1) a false statement, (2) communicated by speech, conduct, or in writing to a person other than the person defamed, and (3) the communication is unprivileged and is defamatory, that is, tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." ***Hart v. Bennet***, 2003 WI App 231, ¶21, 267 Wis. 2d 919, 672 N.W.2d 306.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.