

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2007

David R. Schanker
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. 2007AP1094

Cir. Ct. No. 2005CV93

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SANDRA LEROY,

PLAINTIFF,

V.

GAIL HAACK,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

STATE FARM INSURANCE COMPANY,

INTERVENOR,

V.

COMMUNITY INSURANCE CORPORATION,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Kewaunee County: D. TODD EHLERS, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gail Haack appeals a summary judgment in favor of Community Insurance Company (CIC) and an order denying her motion for reconsideration. She argues CIC has a duty to defend her in this suit under a policy insuring the Algoma School District and its employees. We agree, reverse the judgment and order, and remand with directions to enter summary judgment in favor of Haack.

BACKGROUND

¶2 Sandra LeRoy filed this defamation lawsuit in June 2005. Haack was the only defendant. The complaint alleged Haack had drafted a disparaging letter about LeRoy at the request of a person named Cynthia Smits. According to the complaint, Smits then gave copies of the letter to the University of Wisconsin and the Department of Public Instruction.

¶3 A copy of Haack's letter was attached to the complaint. The letter was addressed "To Whom It May Concern" and began by stating Haack "would like to have documented with the Wisconsin Department of Public Instruction the unstable and dangerous behavior of Sandra LeRoy, a school psychologist in the Sevastopol School District." The letter accused LeRoy of spreading a rumor that Haack was having an affair with Haack's boss. It also indicated LeRoy had stopped by Haack's office to meet with "our high school principal" and had identified herself using a fictitious name. Finally, the letter stated:

I believe Mrs. LeRoy has psychological problems and needs to seek treatment. It scares me to think that a woman so unstable is working with children in a school district. I believe the Wisconsin Department of Public Instruction licensing department needs to investigate Mrs. LeRoy's stability for the safety of children in her school district and all children in the state of Wisconsin that she could come in contact with.

The letter was signed by Haack personally and included her home address in Algoma, Wisconsin, and her home phone number. It was not written on official letterhead.

¶4 Haack filed a third party complaint against CIC, alleging CIC had a duty to defend her under a policy issued to the Algoma School District. In the complaint, she alleged she was administrative assistant to the superintendent of the Algoma School District, Mark Smits. The complaint alleged Haack had composed the letter at the request of both Mark Smits and his wife Connie Smits,¹ and Mark Smits had given the letter to the University of Wisconsin.

¶5 The parties filed cross-motions for summary judgment based on CIC's duty to defend. The circuit court concluded nothing in LeRoy's complaint indicated Haack had been acting within the scope of her employment with the Algoma School District when she wrote the letter, and granted CIC summary judgment. Haack then filed a motion for reconsideration, which the court denied.

¹ It appears the "Cynthia Smits" referred to in LeRoy's complaint is the same person as the "Connie Smits" referred to in Haack's third-party complaint.

DISCUSSION

¶6 Whether summary judgment is appropriate is a question of law reviewed without deference to the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); *Green Spring Farms*, 136 Wis. 2d at 315. Here, the facts are undisputed, and the only question is whether CIC has a duty to defend Haack. Whether a duty to defend exists is a question of law reviewed without deference. *Grube v. Daun*, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992).

¶7 To determine whether a duty to defend exists, we compare the allegations in the complaint to the terms of the insurance policy. *Fireman's Fund Ins. Co. v. Bradley Corp.*, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. A duty to defend exists when the allegations in the complaint, if proven, “give rise to the possibility of recovery” under the policy. *Id.* The complaint is construed liberally in favor of the insured; the insured is entitled to the benefit of all reasonable inferences from the facts pled in the complaint. *Id.*, ¶20. In addition, doubts over whether coverage exists due to incomplete or ambiguous information in the complaint are resolved in favor of the insured. *Monfils v. Charles*, 216 Wis. 2d 323, 331, 575 N.W.2d 728 (Ct. App. 1998).

¶8 The parties dispute whether the complaint gives any indication that Haack is an “insured” under the CIC policy. The CIC policy defines an “insured,” as relevant here, as:

[The school district's] past or present employees ... while acting within the scope of their employment or authority,

authorized volunteers while acting for [the district] or on [the district's] behalf....

CIC argues nothing in the complaint or letter indicates Haack is an employee of the Algoma School District.

¶9 We disagree. The letter indicates a principal's office is in the same building as Haack's office. From that fact, one could reasonably infer that Haack is employed in a school in some capacity. Haack's letter and LeRoy's complaint also include Haack's home address in Algoma. Having established that Haack is likely employed by a school district, the most likely candidate is the school district in her hometown.²

¶10 CIC next contends nothing in the complaint or letter indicates Haack was acting within the scope of her employment with the school district when she wrote the letter. An employee may be acting within the scope of his or her employment if the employee is "at least partially actuated by a purpose to serve the employer." *Olson v. Connerly*, 156 Wis. 2d 488, 499, 457 N.W.2d 479 (1990). If the employee acted in part to serve the employer, the employee acts within the scope of his or her employment so long as the employee's activity is not "different in kind from that authorized [or] far beyond the authorized time or space limits...." *Scott v. Min-Aqua Bats Water Ski Club*, 79 Wis. 2d 316, 321, 255 N.W.2d 536 (1977). Whether the employee acted within the scope of

² CIC argues the only school district identified in the letter is the Sevastopol School District, and therefore the only reasonable inference from the letter is that Haack is employed by that district. However, the letter identifies the Sevastopol School District as LeRoy's employer, not Haack's employer. At best, this makes the Sevastopol School District a second reasonable potential employer. Doubts created by ambiguous or incomplete information—here, ambiguous and incomplete information indicating Haack's employer—are resolved in favor of the insured. See *Monfils v. Charles*, 216 Wis. 2d 323, 331, 575 N.W.2d 728 (Ct. App. 1998).

employment, especially an employee's purpose, is generally a question of fact to be decided by a jury. *Stephenson v. Universal Metrics, Inc.*, 2001 WI App 173, ¶14, 247 Wis. 2d 349, 633 N.W.2d 707.

¶11 The letter and complaint indicate Haack wrote the letter intending it to reach the Department of Public Instruction, and the letter expresses concern for the safety of children in LeRoy's proximity. From those two facts, one could infer that Haack's purpose in writing was to further her employer's interest in keeping schoolchildren safe. See *Olson*, 156 Wis. 2d at 499. The complaint does not include any information indicating Haack's duties or the limits placed on her work. See *Scott*, 79 Wis. 2d at 321. However, doubts created by this missing information are to be resolved in Haack's favor. See *Monfils*, 216 Wis. 2d at 331 (citation omitted).

¶12 CIC focuses on the numerous indications in the letter and complaint that Haack in fact drafted the letter for use in a personal squabble of some sort. That may well have been Haack's true intent; however, the only question for purposes of CIC's duty to defend is whether the allegations in the complaint, if proven, "give rise to the possibility of recovery" under the policy. *Fireman's Fund*, 261 Wis. 2d 4, ¶19. A possibility of recovery exists here. On remand, the court shall grant summary judgment to Haack as to CIC's duty to defend and conduct further proceedings to determine Haack's damages.³

³ When an insurer breaches its duty to defend, its insured's damages include the amount of any judgment, the costs of defending the suit, and additional damages caused by the breach. *Professional Office Bldgs., Inc. v. Royal Indem. Co.*, 145 Wis. 2d 573, 584, 427 N.W.2d 427 (Ct. App. 1988). Here, Haack requests only her attorney fees and expenses, apparently because LeRoy dismissed her claims on her own accord without recovering any damages from Haack.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

