COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2408 **Cir. Ct. No. 00-CV-562**

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

KINKO'S, INC., A DELAWARE CORPORATION,

PLAINTIFF,

V.

CRAIG SHULER, AN INDIVIDUAL, ROBERT FENBERT, AN INDIVIDUAL, AND DIGICOPY, INC., A WISCONSIN CORPORATION,

DEFENDANTS-APPELLANTS,

NORTHERN INSURANCE COMPANY OF NEW YORK,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Craig Shuler, Robert Fenbert and Digicopy, Inc. (collectively, Digicopy), appeal a summary judgment holding that Northern Insurance Company of New York did not have a duty to defend them in an action that Kinko's, Inc., brought against them. We conclude that, when all doubts and inferences are resolved in favor of the insured, Digicopy has coverage under the "Advertising Injury" provision of its policy and no exceptions apply. We therefore reverse the judgment.

BACKGROUND

¶2 Shuler worked for Kinko's for a number of years before he terminated his employment on June 30, 2000. He incorporated Digicopy on July 21, 2000. Fenbert also worked for Kinko's, but terminated his employment and went to work for Digicopy. Northern issued a liability insurance policy to Digicopy that became effective August 16. On September 2, Digicopy opened two stores allegedly in competition with Kinko's. Both Digicopy and Kinko's are engaged in the business of document creation and duplication.

¶3 Kinko's filed a complaint against Digicopy on September 15. It alleged a number of claims against Digicopy, including that Digicopy had "misappropriated" and "used" "sales and promotion strategies" and "marketing" plans belonging to Kinko's, causing injury. The complaint also contends that "Digicopy is exploiting and profiting from Kinko's trade secrets, as divulged improperly and illegally by Defendants Shuler and Fenbert." Kinko's argues that Digicopy's misappropriation, disclosure and use of Kinko's trade secrets and confidential information violated common law and contractual duties.

¶4 Digicopy provided Northern with notice of the claim on September 26 by faxing a letter and copy of the complaint to Northern's agent.

Digicopy requested a defense and indemnification under the policy, which provided coverage for "[m]isappropriation of advertising ideas or style of doing business." The relevant portions of the Northern insurance policy state:

> This insurance policy applies to:
>
> ….
>
> (2) "Advertising injury" caused by an "offense" committed in the course of advertising your goods, products or services;
>
> but only if the "offense" was committed in the "coverage territory" during the policy period.
>
> ….
>
> SECTION V. DEFINITIONS
>
> 1. "Advertising injury" means injury arising out of one or more of the "offenses" described in subparagraph b. of the definition of "offense".
>
> ….
>
> 13. "Offense" means one or more of the following:
>
> ….
>
> b. With respect to "advertising injury":
>
> ….
>
> (3) Misappropriation of advertising ideas or style of doing business.

Northern declined to provide a defense to Digicopy, contending that the allegations in Kinko's complaint did not trigger coverage under Digicopy's policy.

¶5 Northern filed a motion to intervene in the action on February 1, 2001, which the trial court granted. Northern moved for summary judgment, requesting a declaration that its policy provides no coverage for the allegations made by Kinko's against Digicopy.

¶6 The trial court granted Northern's motion for summary judgment, finding that Northern had no duty to defend or indemnify Digicopy for Kinko's claims and that Northern should be dismissed from the case on the merits. Digicopy appeals.

STANDARD OF REVIEW

¶7 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.[1] Further, the interpretation of words or clauses in an insurance contract is a question of law we review de novo. ***Shorewood Sch. Dist. v. Wausau Ins.***, 170 Wis. 2d 347, 363, 488 N.W.2d 82 (1992).

DISCUSSION

¶8 At issue is whether Northern has a duty to defend Digicopy.[2] Digicopy argues that (1) Northern has a duty to defend because Kinko's has alleged a claim that falls under coverage for "misappropriation of advertising ideas or style of doing business," (2) the breach of contract exclusion does not apply because Digicopy had no contracts with Kinko's and Kinko's makes common-law

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] We consider only the duty to defend because it is broader than the duty to indemnify. ***Red Arrow Prods. Co. v. Employers Ins.***, 2000 WI App 36, ¶17, 233 Wis. 2d 114, 607 N.W.2d 294. While the trial court considered both duties, the parties' briefs address only the duty to defend.

misappropriation claims, and (3) the fortuity doctrine does not apply because it is speculative. We agree that Northern has a duty to defend Digicopy. We also conclude that neither the breach of contract exclusion nor the fortuity doctrine apply.

A. DUTY TO DEFEND

¶9 We agree with Digicopy that Northern has a duty to defend Digicopy under the "Advertising Injury" provision of the policy. Northern contends that the complaint does not allege that Digicopy advertised and that for there to be coverage, the complaint must allege that Digicopy used Kinko's "advertising ideas" in Digicopy's own advertising. However, the policy defines advertising injury to include "[m]isappropriation of advertising ideas," and Kinko's complaint alleges that Digicopy used Kinko's trade secrets, including sales, promotion and marketing strategies. We conclude that, under the applicable rule of law, the complaint alleges a claim for advertising injury.[3]

¶10 The principal benefits provided under an insurance policy are indemnification and defense. ***Red Arrow Prods. Co. v. Employers Ins.***, 2000 WI App 36, ¶17, 233 Wis. 2d 114, 607 N.W.2d 294. The duty to defend is broader than the separate duty to indemnify and exists even when it is merely arguable that the policy provides coverage. ***Id.***

¶11 In determining an insurer's duty to defend, we apply the factual allegations in the complaint to the terms of the disputed insurance policy. ***Doyle v.***

[3] We therefore need not address Digicopy's argument that the complaint states a claim for misappropriation for a "style of doing business."

Engelke, 219 Wis. 2d 277, 284, 580 N.W.2d 245 (1998). We "liberally construe those allegations and assume all reasonable inferences." ***Id.*** Moreover, we resolve any doubt about the duty to defend in favor of the insured. ***Shorewood***, 170 Wis. 2d at 364. The insurer must defend the entire action "if just one theory of liability appears to fall within the coverage of the polic[y]." ***Id.*** at 366.

¶12 Here, the policy provides coverage for "misappropriation of advertising ideas." In ***Atlantic Mut. Ins. v. Badger Med. Supply***, 191 Wis. 2d 229, 238-39, 528 N.W.2d 486 (Ct. App. 1995), the court specifically addressed the meaning of "misappropriation" and "advertising idea." First, ***Atlantic Mutual*** described the tort of misappropriation as:

> [T]he defendant's use of the plaintiff's product, into which the plaintiff has put time, skill, and money; and the defendant's use of the plaintiff's product or a copy of it in competition with the plaintiff and gaining an advantage in that competition because the plaintiff, and not the defendant, has expended the energy to produce it.

Id. The court concluded that "misappropriation" is not ambiguous and that its meaning is defined by case law and common usage. ***Id.*** at 239. ***Atlantic Mutual*** also discussed the meaning of the term "advertising" in a commercial general liability policy and held that "advertising" is a non-technical word that should be given its ordinary meaning. ***Id.***

¶13 Kinko's alleges in the complaint that Digicopy misappropriated, disclosed and used Kinko's trade secrets in violation of common law and contractual duties, thereby causing damages. Kinko's defines its trade secrets to include sales and promotion strategies and marketing plans. We are satisfied that the ordinary meaning of "advertising" is broad enough to encompass "sales and promotion strategies" and "marketing."

¶14 Digicopy concedes that the word "advertising" does not appear in the complaint, but even Northern admits that the complaint need not use the actual word "advertising." We conclude that the allegations in the complaint are more than sufficient to create a claim that would arguably be covered under the "[m]isappropriation of advertising ideas" coverage.

¶15 Further, Wisconsin is a notice pleading state. The complaint must put the defendants on notice of what the claims are, but "the resolution of the precise facts which sustain the claim is left to discovery." ***Anderson v. Cont'l Ins. Co.***, 85 Wis. 2d 675, 683, 271 N.W.2d 368 (1978). The dearth of evidentiary facts in the complaint can be met by pursuing discovery.

¶16 Finally, Northern, in advancing its argument, turns the applicable legal standard on its head. For example, it argues that the lack of reference to "advertising" in the complaint is a "very strong indication" that the complaint does not allege advertising misconduct. This suggests that we should draw inferences and resolve doubts *against*, not for, the insured.

B. "ARISES OUT OF CONTRACT" EXCLUSION

¶17 We reject Northern's argument that the "arises out of contract" exclusion applies. The trial court found that exclusionary language in the Northern policy precluded a duty to defend the Digicopy defendants. Northern distorts the applicable legal standard when it asserts that the "arises out of contract" exclusion should be interpreted broadly. To the contrary, as Digicopy points out, "[e]xclusions are to be narrowly construed against the insurer …." ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis. 2d 375, 382, 480 N.W.2d 1 (1992).

We conclude that the "arises out of contract" exclusion does not apply because Digicopy has no contracts with Kinko's.[4]

¶18 The exclusionary language referenced by the trial court states that:

> This insurance does not apply to:
>
> ….
>
> a. "Personal injury" or "advertising injury":
>
> ….
>
> (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in absence of the contract or agreement;
>
> ….
>
> b. "Advertising injury" arising out of:
>
> (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract.

¶19 The exclusions exempt Northern from its duty to defend claims based on contractual liability. Although Shuler and Fenbert had employment contracts with Kinko's, the contract excluding coverage must be made with the insured. *See* ***Callas Enters., Inc. v. Travelers Indem. Co.***, 193 F.3d 952, 955-56 (8th Cir. 1999). Here, the insured is Digicopy, not the two former Kinko's employees. Digicopy never had any type of contract with Kinko's. Northern cannot argue for purposes of identifying its insured that Digicopy is an

[4] Digicopy also argues that an insurer is obliged to defend the entire action "if just one theory of liability appears to fall within the coverage of the policy." ***Atlantic Mut. Ins. v. Badger Med. Supply***, 191 Wis. 2d 229, 242, 528 N.W.2d 486 (Ct. App. 1995). It therefore contends that because Kinko's makes a common-law misappropriation claim against all three defendants, Northern must provide a defense. Because we conclude that Northern has a duty to defend Digicopy on other grounds, we need not resolve this argument.

independent entity, and then turn around in the context of its duty to defend and argue that Digicopy is an alter ego for two former Kinko's employees.

C. DOCTRINE OF FORTUITY

¶20 Finally, Northern argues that the doctrine of fortuity applies to excuse it from a duty to defend. Insurance covers fortuitous losses, and losses are not fortuitous if the damage is intentionally caused by the insured. ***Haessly v. Germantown Mut. Ins. Co.***, 213 Wis. 2d 108, 116, 569 N.W.2d 804 (Ct. App. 1997). Northern contends that Digicopy's business was reliant upon its use of misappropriated information to gain a competitive advantage over Kinko's. Northern urges that permitting Digicopy to insure against the results of its wrongful conduct would violate the doctrine of fortuity.[5]

¶21 However, Northern relies purely on speculation when it argues what Digicopy may have done with what Kinko's alleges were its misappropriated advertising ideas. The only summary judgment proofs were the complaint and the policy. With only these two documents in the record, Northern's fortuity argument is too fact intensive and speculative to be resolved on summary judgment.

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[5] ***Haessly v. Germantown Mut. Ins. Co.***, 213 Wis. 2d 108, 117, 569 N.W.2d 804 (Ct. App. 1997), stated:

> 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. (Citation omitted.)

CONCLUSION

¶22 We conclude that Northern has a duty to defend Digicopy in Kinko's suit against it and therefore reverse the judgment. We remand for the trial court to consider, in light of ***Reid v. Benz***, 2001 WI 106, 245 Wis. 2d 658, 629 N.W.2d 262, Digicopy's request for attorney fees incurred defending against Kinko's claim and litigating this coverage question.

By the Court.—Judgment reversed and cause remanded.

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