COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 01-3343 Cir. Ct. No. 01-CV-103

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

L. W. MEYER, INC., P/K/A L. W. MEYER & SON, INC.,

PLAINTIFF,

SELECTIVE INSURANCE COMPANY,

INTERVENING-PLAINTIFF-RESPONDENT,

V.

ROBERT KOEFERL, ADVANCED FASTENING SUPPLY, LLC, ADVANCED FASTENING SUPPLY, INC., JAMES H. MRAZ, GEORGE RASMUSSEN II, BLAINE NICHOLLS, WILLIAM JANSEN, MARK PLUMMER AND CHRISTOPHER ROMES,

DEFENDANTS-APPELLANTS,

ALL FASTENING & TOOL SUPPLY AND PAULETTE A. GRIGNANO,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

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

¶1 PER CURIAM. The appellants, Advanced Fastening Supply and some of its employees (hereinafter "AFS"), appeal from the judgment of the circuit court which granted Selective Insurance Company's motion for a declaratory judgment that it did not have a duty to defend. The issue on appeal is whether the insurance policy Selective provided to AFS required Selective to defend AFS in the underlying action. We agree with the circuit court that AFS did not have a duty to defend. Therefore, we affirm.

¶2 The underlying action was brought by L.W. Meyer, Inc., against some of its former employees and the company they formed after they left Meyer's employ. The action alleged, among other things, that the employees breached noncompetition agreements they had signed while employed by Meyer. After the action was begun, AFS tendered the defense to Selective. Selective then moved to intervene and filed a motion for declaratory judgment asserting that the policy did not provide coverage. The circuit court held a hearing on the issue, and granted Selective's motion. AFS appeals.

¶3 The policy that Selective provided to AFS covered, among other things, business owner's liability for personal injury or advertising injury. The policy defines "personal injury" as:

> Injury, other than "bodily injury," arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;

> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord, or lessor;
>
> d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication of material that violates a person's right of privacy.

"Advertising injury" is defined as:

> injury arising out of one or more of the following offense:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or styles of doing business; or
>
> d. Infringement of copyright, title, or slogan.

The policy also included a "Broadened Liability Endorsement" which expanded the definition of personal injury to include discrimination claims, and eliminated the policy exclusion for personal and advertising injury that grew out of contracts or agreements. It is this second part of the endorsement which is at issue in this case.

¶4 The second amended complaint asserts a number of causes of action based on the alleged breach by the defendants of the noncompetition agreement they signed with Meyer. The complaint asserts a cause of action for tortious interference with contractual relations, stating that certain defendants "intentionally and improperly interfered with Meyer's prospective contractual relations" with certain customers by inducing them not to contract or do business

with Meyer. It alleges a civil conspiracy to breach the agreements and engage in tortious interference by contacting customers and preparing invoices to make it appear that the defendants were in compliance with the agreements, by paying salary to certain defendants to encourage breach of the agreements, and for other employees for accepting money to breach the agreements. It alleges breach of loyalty to Meyer by conspiring to form a competing business which would "damage Meyer's future ability to make sales to its existing customer base," by remaining on the Meyer payroll while forming the competing company, by resigning en masse from Meyer, by denying to Meyer that they were planning a competing business, and by contacting Meyer's customers and suppliers "to advise the customers and suppliers of the new competing business enterprise and making requests for future business once the new competing enterprise was formed."

¶5 The complaint also alleges claims for civil conspiracy based on allegations that one of the defendants was encouraging customers to do business with AFS before leaving Meyer and was actually employed by AFS before leaving Meyer. It alleges a claim for civil contempt for violation of a court order, against AFS for tortiously interfering with Meyer's contract with certain employees, for conspiracy to "flip" customers and falsify documents so it would appear that the former Meyer employees had not worked with the former Meyer customers, for conspiracy to launder sales through a sham corporation, and for engaging in racketeering activities.

¶6 The construction of an insurance policy is a question of law which this court reviews de novo. ***Kaun v. Indus. Fire & Cas. Ins. Co.***, 148 Wis. 2d 662, 667, 436 N.W.2d 321 (1989). "To determine whether a duty to defend exists, the complaint claiming damages must be compared to the insurance policy and a determination made as to whether, if the allegations are proved, the insurer would

be required to pay the resulting judgment. The insurer need only look at the allegations within the four corners of the complaint to make such a determination." ***Sch. Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 364-65, 488 N.W.2d 82 (1992). The allegations in the complaint must state a cause of action for the liability the policy insures, or else there is not a duty to defend. ***Atl. Mut. Ins. Co. v. Badger Med. Supply Co.***, 191 Wis. 2d 229, 242, 528 N.W.2d 486 (Ct. App. 1995). And, when the parties have contracted to limit recovery to specific quantifiable types of remedies, a court should not alter the contract to include types of remedies not contracted for by the parties. *See* ***City of Edgerton v. Gen. Cas. Co. of Wis.***, 184 Wis. 2d 750, 780-81, 517 N.W.2d 463 (1994).

¶7 AFS argues that the Broadened Liability Endorsement removed from its policy with Selective the exclusion of personal or advertising injury arising from contract. AFS further argues that the claims in the complaint, although not designated as such, could constitute claims for "oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." AFS argues that the court must look to allegations of the complaint and assess whether any covered claim could be brought, but that the circuit court improperly assessed coverage solely on the basis of the labels the plaintiff, L.W. Meyer, put on the claims.

¶8 We agree that the law requires the court to look to allegations of the complaint and not just to the labels put on the claims. We also agree with Selective however, that the circuit court did just that. Looking to the allegations of the complaint, we reach the same conclusion as did the circuit court. The complaint does not contain any allegations of any injury based on acts by AFS that disparaged or maligned Meyer. While AFS argues that the allegations asserted

might lead to such claims, Meyer has not alleged any facts which expressly or inferentially suggest claims or injury resulting from acts that malign, disparage or slander. Further, the deadline has passed for the completion of pleadings. If AFS's argument were accepted, insurance companies would always have a duty to defend because the possibility of additional claims always exists.

¶9 AFS argues that the allegations in the complaint are enough to give rise to a claim that Meyer was maligned or disparaged. In ***Towne Realty, Inc. v. Zurich Insurance Co.***, 193 Wis. 2d 544, 555-56, 534 N.W.2d 886 (Ct. App. 1995), *aff'd in part, rev'd in part*, 201 Wis. 2d 260, 548 N.W.2d 64 (1996), the court held that an allegation that the plaintiffs had been "seriously maligned" was sufficient to trigger coverage under a policy containing language similar to the one provided by Selective. The plaintiffs in ***Towne Realty*** alleged that the defendants had "so seriously maligned" their business and personal reputations, that they reasonably believed that they were precluded from "engaging in their chosen professions within the United States." ***Id.*** at 551. The court concluded that the allegation that the plaintiffs could no longer engage in their profession along with the allegation that the defendants had maligned them was sufficiently broad to state a claim within the policy's definition of personal injury. ***Id.*** at 556.

¶10 AFS argues that the allegations in ***Towne Realty*** are comparable to allegations here. We disagree. The complaint Meyer filed does not contain any language either expressly or implicitly suggesting that the defendants "seriously maligned" Meyer. The words "malign, defame, slander, disparage" do not appear in the complaint. Nor is there any allegation which reasonably suggests an intention to prove such a claim. The claims asserted in ***Towne Realty*** are simply not comparable to the claims made here.

¶11 Selective argues, however, that this case is comparable to ***Nichols v. American Employers Insurance Co.***, 140 Wis. 2d 743, 412 N.W.2d 547 (Ct. App. 1987). In ***Nichols***, this court concluded there was no coverage when the complaint contained claims of "arguably defamatory statements" by fellow employees. ***Id.*** at 746. The policies at issue provided coverage similar to that provided here. *See* ***id.*** at 750. The court considered the language of the complaint and concluded that the claims were devoid of any statements that could be considered an allegation of defamation. ***Id.*** at 746-47. The insured argued that the policy did not require that the suit be for defamation, libel or slander, but rather that "the facts within the claim be based upon a libel, slander or defamation." ***Id.*** at 750. This court stated:

> Contrary to Nichols' assertion, we read the insurance policy as contemplating defense of defamation suits, not suits claiming damages where a defamatory statement may be involved. [A policy at issue], for instance, indicates that the insurer will defend "any suit" seeking damages "on account of" libel or slander. The policy does not say that it will defend actions seeking damages other than for defamation but which have some defamatory matter contained within the allegation. Were we to adopt Nichols' interpretation, then this insurer would be obliged to defend such actions as child custody suits, for instance, where one party has allegedly made a defamatory statement about the other. In such a case, although one party would not be claiming damages resulting from defamation, but rather would be seeking custody of the child, the insurance company would still be obliged to defend. This is because the defamatory matter would be "subsumed" within the custody fight.

Id. at 750-51.

¶12 AFS argues that the ***Nichols*** case is not applicable here because the plaintiff was not seeking damages. *See* ***id.*** at 748. This court, however, had two bases for reversing the circuit court; the fact that no compensatory relief was

sought was only one of them. *See* ***id.*** at 746-47. The second basis was that the complaint did not contain any allegations of defamation. ***Id.*** This basis is equally applicable here. Even if the case were distinguishable however, the reasoning from the language quoted above is still applicable to this case.

¶13 AFS argues that there may be allegations which might lead to claims of misappropriation of advertising ideas, which is covered by the policy. But once again, AFS is speculating. In ***Atlantic Mutual***, this court considered a case quite similar to this one. ***Atlantic Mutual***, 191 Wis. 2d at 229. In that case, the complaint asserted claims based on the breach of a noncompetition agreement. ***Id.*** at 233-34. The policy at issue contained language identical to the policy at issue here. *See* ***id.*** at 235. After the defendant tendered the defense to the insurer, the insurer sought a declaratory judgment that it was not required to provide coverage because the complaint did not contain allegations within the policy's definition of "advertising injury." ***Id.*** The circuit court granted the motion.

¶14 In affirming the circuit court, this court stated: "Simply because misappropriation of advertising ideas could involve confidential information, and misappropriation of style of doing business could involve customers, it does not follow that allegations relating to confidential information or customers transform a claim for interference with contract into a claim covered by the policy." ***Id.*** at 242. The court concluded: "The logical result of Badger's argument is that any claim for tortious interference with a restrictive covenant in an employment agreement would be considered a claim for misappropriation of advertising ideas and style of doing business. This is an unreasonable reading of the policy language and we reject it." ***Id.*** at 242-43. As it was unreasonable in ***Atlantic Mutual***, it is unreasonable here.

¶15 AFS asserts that when there is a doubt about whether there is a duty to defend, the court must construe the policy in favor of coverage. However, a doubt is not created merely by the insured arguing that there is coverage. If this were true, then an insurer would almost certainly always have to defend. As previously discussed, the court must look to the language of the policy and the allegations of the complaint to determine whether there is coverage. After so doing, we conclude that the policy does not provide coverage for this case.

¶16 AFS also argues that the Broadened Liability Endorsement lifts the exclusion for this type of injury. The endorsement removes the exclusion for personal or advertising injury resulting from contract. The endorsement still requires, however, that there be personal or advertising injury as defined in the policy. As we have already discussed, this type of injury is not part of this case.

¶17 AFS makes several additional arguments for coverage. It argues that when it purchased the endorsement it expected to be getting coverage for this type of claim. However, we must construe the policy as written. *See* ***City of Edgerton***, 184 Wis. 2d at 780-81. As written, no reasonable insured would expect coverage under these facts. It also argues that there is a "possibility" of coverage for trade secrets violations. There is, however, no coverage provided in this policy for trade secrets violations.

¶18 Finally, AFS argues that the trial court nonetheless had the discretion to order Selective to defend, and should have exercised that discretion to require coverage. We do not know of any law which allows a trial court to order coverage when the insurer has timely raised the coverage issue and the court has determined that the policy does not provide coverage. The trial court did not have such

discretion to exercise. For the reasons stated, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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