COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0557 **Cir. Ct. No. 00-CV-1314**

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

CROSSMARK, INC.,

PLAINTIFF,

GENERAL CASUALTY CO. OF WISCONSIN,

INTERVENING PLAINTIFF-RESPONDENT,

V.

NICK DEGEORGE AND FOOD MARKETING SERVICES, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed*.

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

¶1 PER CURIAM. The issue presented by this appeal is whether the respondent, General Casualty Co. of Wisconsin, has a duty to defend Nick DeGeorge and Food Marketing Services, Inc., in an action brought against them by Crossmark, Inc. The trial court granted summary judgment determining that General Casualty has no duty to defend or indemnify Food Marketing and DeGeorge under the insurance policy issued by General Casualty to Food Marketing. We conclude that the trial court properly granted summary judgment to General Casualty and affirm.

¶2 The material facts are undisputed. DeGeorge was previously a vice-president of sales and marketing for the meat and deli division of Crossmark's Milwaukee office. DeGeorge resigned his position in May 2000, and commenced employment with Food Marketing, Crossmark's competitor. In June 2000, Crossmark filed a complaint against DeGeorge and Food Marketing. Food Marketing, in turn, tendered the defense of the complaint to General Casualty, which insured Food Marketing during the time periods involved in Crossmark's complaint. General Casualty intervened and moved the trial court for declaratory relief determining that it had no duty to defend Food Marketing or DeGeorge against the claims made by Crossmark, and no duty to indemnify them for any liability. Although it initially denied summary judgment to General Casualty, after completion of discovery the trial court granted summary judgment in its favor.

¶3 This court reviews the trial court's decision granting summary judgment de novo, applying the same standards as those employed by the trial court. ***Greene v. Gen. Cas. Co.***, 216 Wis. 2d 152, 157, 576 N.W.2d 56 (Ct. App. 1997). Summary judgment may be granted when there is no genuine issue as to

any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (1999-2000).[1]

¶4 The interpretation of an insurance contract presents a question of law for this court's independent review. ***Greene***, 216 Wis. 2d at 157. Determining whether an insurance company has a duty to defend also presents a question of law which we review de novo. ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992). Whether an insurer has a duty to provide a defense to its insured is determined by the complaint and not by extrinsic evidence. ***Id.*** "If there are allegations in the complaint which, if proven, would be covered, the insurer has a duty to defend." ***Id.***

¶5 Crossmark's complaint alleged ten interrelated claims against DeGeorge and Food Marketing. Crossmark set forth five claims against DeGeorge, including breach of fiduciary duty, conversion, breach of contract, tortious interference with business relations, and unfair competition. The claims were based on allegations that DeGeorge violated his confidentiality and nondisclosure agreement with Crossmark, that he made statements to Crossmark customers which were calculated to undermine Crossmark's relationship with them, that he solicited Crossmark customers to transfer their business to Food Marketing, and that he persuaded several Crossmark employees to resign their positions at Crossmark and join him at Food Marketing. Crossmark further alleged that in the course of his departure, DeGeorge removed Crossmark property, including market and account plans, pricing and promotional information, share data, sales trends, scan data, contracts, employee salary

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

information, retail coverage plans, category management templates, long-term market plans, and client correspondence.

¶6 Crossmark incorporated the allegations against DeGeorge in five claims against Food Marketing, including claims for tortious interference with contract, tortious interference with business relations, unfair competition, civil conspiracy, and unjust enrichment. In the civil conspiracy claim, Crossmark alleged that Food Marketing and DeGeorge conspired to use unlawful means to persuade Crossmark's meat and deli clients to discontinue their longstanding business relationship with Crossmark and begin a new relationship with Food Marketing. With respect to the other claims, Crossmark alleged that Food Marketing was aware of and acquiesced in or actively encouraged DeGeorge's contractual breaches and his wrongful interference with Crossmark's business relationships.

¶7 Food Marketing and DeGeorge assert that these allegations compel General Casualty to defend them under the "personal injury" and "advertising injury" coverage provisions of the policy issued to Food Marketing by General Casualty. The policy provided that General Casualty would pay sums that Food Marketing became legally obligated to pay as damages because of "personal injury" or "advertising injury." "Section V-Definitions" of the policy defined these terms as follows:

> 1. "Advertising injury" means injury arising out of one or more of the following offenses:
>
> 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.
>
> ….

> c. Misappropriation of advertising ideas or style of doing business.
>
> ….
>
> 14. "Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:
>
> ….
>
> 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.

¶8 According to Food Marketing and DeGeorge, the heart of Crossmark's claims are allegations that, acting in concert, they schemed to draw away Crossmark's customers by disparaging Crossmark's services and commitment to the meat and deli business. They contend that Crossmark thus alleges offenses within the meaning of the personal injury and advertising injury sections of the policy. They also contend that DeGeorge's alleged misappropriation of a Crossmark organizational chart constituted the misappropriation of Crossmark's "style of doing business," and constituted an "advertising injury" when it was shown to Crossmark clients with a memo and brochure depicting Crossmark employees at positions of responsibility in Food Marketing.

¶9 We need not address whether the acts of "disparagement" and "misappropriation" as alleged by Crossmark are sufficient to establish an advertising or personal injury within the meaning of General Casualty's policy because, as determined by the trial court, coverage is precluded by the doctrine of fortuity. The principle of fortuitousness means that insurance covers fortuitous losses. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 483, 326 N.W.2d 727 (1982). Losses are not fortuitous if the damage is intentionally caused by the

insured. ***Id.*** at 483-84. Even when, as here, an insurance policy contains no language expressly incorporating the principle of fortuitousness, courts read this principle into the 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 484.

¶10 As conceded by Food Marketing and DeGeorge, the gist of Crossmark's allegations is that they acted in concert and schemed, or conspired, to draw customers from Crossmark to Food Marketing. An allegation of conspiracy constitutes an allegation that the parties to the conspiracy knowingly and intentionally committed wrongful acts. *See* ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736-37, 593 N.W.2d 814 (Ct. App. 1999). The offenses allegedly giving rise to liability as alleged by Crossmark are intentional acts. Coverage for them is therefore not provided under the policy issued by General Casualty.

¶11 Food Marketing and DeGeorge contend that the doctrine of fortuity is not applicable here because coverage is not being sought for an "occurrence" or "accident." They contend that an insurer may contract to provide coverage for intentional torts of its insured, and that General Casualty did so here. They point out that General Casualty defined "advertising injury" and "personal injury" in its policy to specifically include injury arising from false imprisonment, malicious prosecution, wrongful eviction, slander, or libel. They contend that these offenses can be characterized in no way other than volitional, intentional and unlawful.

¶12 We need not address whether coverage could ever be provided under General Casualty's policy for an intentional tort of a type different from that

alleged in this case. Our only concern is whether coverage could be provided for the claims alleged by Crossmark. Crossmark did not allege that Food Marketing and DeGeorge negligently disparaged Crossmark, or negligently misappropriated its advertising ideas or style of doing business. Crossmark alleged that in willful, wanton, and reckless disregard of its rights, Food Marketing and DeGeorge conspired to wrongfully take customers from Crossmark, and that they intentionally disparaged Crossmark and misappropriated its advertising ideas or style of doing business to reach this goal. Because the policy issued by General Casualty does not provide that intentional acts of this nature are covered by its terms, we conclude that the trial court properly determined that coverage was precluded by the doctrine of fortuity.

¶13 Since the claims against Food Marketing and DeGeorge are not covered under General Casualty's policy, General Casualty has no duty to defend or indemnify them against Crossmark's claims. *See* ***Atl. Mut. Ins. Co. v. Badger Med. Supply Co.***, 191 Wis. 2d 229, 243, 528 N.W.2d 486 (Ct. App. 1995). Because the fortuity issue is dispositive, we need not address any other issues raised by the parties. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

By the Court.—Judgment affirmed.

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