COURT OF APPEALS DECISION DATED AND FILED

December 28, 2010

A. John Voelker
Acting 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. 2009AP2165 **Cir. Ct. No. 2007CV801**

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

HOFFMAN, LLC,

PLAINTIFF,

V.

COMMUNITY LIVING SOLUTIONS, LLC,

DEFENDANT-RESPONDENT,

CHARLIE FREDRICKSON, TOM MARTIN, DOUG SCHACHT, TERRY MCLAUGHLIN AND DUANE HELWIG,

DEFENDANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Acuity, a Mutual Insurance Company, appeals a judgment granted in favor of its insured, Community Living Solutions, LLC. The circuit court concluded that Acuity's policy covered claims made against Community by Hoffman, LLC and that Acuity had a duty to indemnify Community. We disagree and reverse. We remand with directions that the circuit court enter judgment declaring Acuity has no duty to indemnify Community.

BACKGROUND

¶2 This case arises from a business dispute between two construction firms, Hoffman and Community. Community was founded by several of Hoffman's former employees. On May 16, 2007, Hoffman sued Community and five of its employees, alleging deceptive advertising, unfair competition, unfair trade practices, and tortious interference with business relationships.

¶3 Specifically, Hoffman alleged that the "Staff Experience" page of Community's website listed a number of projects Community employees had worked on but did not specify that those projects were completed while the employees worked at Hoffman. For this reason, Hoffman claimed Community's website was "untrue, deceptive and/or misleading."[1] Hoffman's complaint also alleged that Community employees "made untrue, deceptive and misleading statements to Hoffman's employees, clients and/or potential clients for the purpose

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[1] After Hoffman filed its complaint, Community revised its website, adding asterisks next to those projects that were completed at another firm. The website indicated the projects with asterisks were "[e]xperience prior to Community Living Solutions" but did not specifically state they were completed at Hoffman. Hoffman's amended complaint, filed after the website was revised, continued to allege that Community's website was deceptive and misleading.

of harming Hoffman by trying to induce … Hoffman clients and potential clients to terminate their contractual and business … relationships with Hoffman in favor of a relationship with [Community].”

¶4 Community tendered defense of Hoffman’s claims to Acuity, which insured Community under a commercial general liability policy. Acuity’s policy went into effect on May 16, 2007, the same day Hoffman filed its complaint. The policy provided an initial grant of “personal and advertising injury” coverage as follows:

> 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 ….
>
> b. This insurance applies to personal and advertising injury caused by an offense arising out of your business, but only if the offense was committed in the coverage territory during the policy period.

The term “personal and advertising injury” was defined in the policy:

> 14. “Personal and advertising injury” means injury, including consequential bodily injury, arising out of one or more of the following offenses:
>
> ….
>
> d. Oral 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[.[2]]

[2] The policy’s definition of “personal and advertising injury” includes seven enumerated offenses. However, the parties agree that subsection d., reproduced above, is the only enumerated offense that arguably applies to Hoffman’s claims against Community.

¶5 Acuity agreed to pay a portion of Community's defense fees, subject to a reservation of its rights and pending a coverage determination.[3] Acuity subsequently intervened.

¶6 Hoffman then filed an amended complaint on March 20, 2008. The amended complaint alleged several new causes of action, including a federal law claim. Community removed the case to the United States District Court for the Eastern District of Wisconsin. While the federal lawsuit was pending, Hoffman and Community reached a settlement, by which Community agreed to pay Hoffman $300,000. Acuity did not participate in the settlement negotiations. Following the settlement, the district court granted Acuity's motion to remand to state court for a coverage determination.

¶7 Acuity then filed a motion for declaratory judgment, seeking an order declaring that it had no duty to indemnify Community. Acuity argued that, based upon undisputed facts, its policy did not provide an initial grant of "personal and advertising injury" coverage for Hoffman's claims. In the alternative, Acuity argued various exclusions applied. In response, Community filed a "Brief in Opposition to Acuity's Motion for Summary Judgment," in which it conceded that nine of Hoffman's twelve claims were not covered. However, Community argued Hoffman's tortious interference, unfair competition, and false advertising claims were covered as "personal and advertising injury" under Acuity's policy. Community asked the court to deny Acuity's motion and also to find that Acuity

[3] In the circuit court, Community argued Acuity breached its duty to defend by only agreeing to pay a portion of Community's defense fees. Community sought reimbursement for the balance. However, Community ultimately decided not to pursue this argument, and the circuit court never ruled on the issue of whether Acuity breached its duty to defend.

had a duty to indemnify Community for the entire amount of the $300,000 settlement.

¶8 After a hearing, the circuit court denied Acuity's motion. The court determined Acuity had a duty to indemnify Community and entered judgment ordering Acuity to pay Community $300,000. Acuity filed a "Motion for Reconsideration/Clarification," which the court denied without a hearing. Acuity now appeals.

STANDARDS OF REVIEW

¶9 This case requires us to determine whether the circuit court properly concluded that Acuity had a duty to indemnify Community for Hoffman's claims. Liability insurance policies impose two distinct duties on the insurer: the duty to defend and the duty to indemnify. ***Liebovich v. Minnesota Ins. Co.***, 2007 WI App 28, ¶3, 299 Wis. 2d 331, 728 N.W.2d 357. Different standards apply to these two duties.

¶10 The insurer's duty to defend is determined by comparing the allegations in the complaint to the terms of the policy. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. The duty to defend hinges on the nature, not the merits, of the plaintiff's claim. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 266, 593 N.W.2d 445 (1998). "An insurer has a duty to defend an insured in a third-party suit if the allegations contained within the four corners of the complaint, would, if proved, result in liability of the insurer under the terms of the insurance policy." ***Id.*** The duty to defend is based solely on the allegations in the complaint, without resort to extrinsic facts or evidence. ***Fireman's Fund***, 261 Wis. 2d 4, ¶19.

¶11 The insurer's duty to indemnify is narrower than its duty to defend. ***Acuity v. Bagadia***, 2008 WI 62, ¶52, 310 Wis. 2d 197, 750 N.W.2d 817. While the duty to defend arises from allegations contained in the complaint, the duty to indemnify must be supported by fully developed facts. ***Id.***; *see also* ***Employers Mut. Cas. Co. v. Horace Mann Ins. Co.***, 2005 WI App 237, ¶13, 287 Wis. 2d 418, 707 N.W.2d 280 (while the duty to defend only requires arguable coverage, "[t]he duty to indemnify ultimately requires a finding of actual coverage."). Thus, an insurer may have a duty to defend a claim based on the allegations in the complaint, but the facts may ultimately show that the insurer does not have a duty to indemnify. ***Acuity***, 310 Wis. 2d 197, ¶52.

¶12 Here, the circuit court determined Acuity had a duty to indemnify Community. Accordingly, the court denied Acuity's summary judgment motion and granted Community's cross-motion.[4] We independently review a grant of summary judgment, applying the same methodology as the circuit court. ***Wausau Tile, Inc.***, 226 Wis. 2d at 266. A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[5]

[4] The procedural posture of the parties' motions is not altogether clear. Acuity filed a "Motion for Declaratory Judgment," supported by affidavits and deposition testimony. In response, Community filed a "Brief in Opposition to Acuity's Motion for Summary Judgment," also supported by affidavits and deposition testimony. Community's brief asked the court to deny Acuity's motion and instead grant judgment in favor of Community. The trial court apparently treated the parties' motions as motions for summary judgment. Accordingly, we will review the court's decision using summary judgment methodology.

[5] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶13 We examine the moving party's affidavits or other proof to determine whether they present a prima facie case for summary judgment. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If so, we examine the opposing party's affidavits to determine whether they present disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn. ***Id.*** The party who opposes a summary judgment motion must set forth specific facts demonstrating that a genuine issue of material fact exists. ***Helland v. Kurtis A. Froedtert Mem'l Luth. Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). "It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Id.***; *see also* WIS. STAT. § 802.08(3).

¶14 The summary judgment in this case involved interpretation of an insurance policy, which is an issue of law that we review independently. ***Sass v. Acuity***, 2009 WI App 32, ¶4, 316 Wis. 2d 752, 765 N.W.2d 582. Insurance policy interpretation requires a three-step process. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. First, we examine the facts to determine whether the policy's insuring agreement makes an initial grant of coverage. ***Id.*** Second, if there is an initial grant of coverage, we examine the exclusions to determine whether any of them preclude coverage. ***Id.*** Third, we determine whether any exception to the applicable exclusions reinstates coverage. ***Id.*** We construe the policy so as to give effect to the parties' intentions. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. "[W]hen the terms of an insurance policy are plain on their face, the policy must not be rewritten by construction." ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597 (1990).

DISCUSSION

¶15 Acuity's policy promises to indemnify Community for sums it becomes legally obligated to pay as damages because of "personal and advertising injury" caused by an offense committed during the policy period. The policy defines personal and advertising injury as injury arising out of any of seven enumerated offenses. As relevant here, personal and advertising injury arises 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." (Emphasis added.)

¶16 Both in the circuit court and on appeal, Acuity has argued there is no evidence that Community or any of its employees actually slandered, libeled, or disparaged Hoffman during the policy period. Acuity therefore contends that, based on the undisputed facts, Hoffman's claims do not constitute personal and advertising injury, as defined by the policy. For this reason, Acuity asserts that the policy does not provide an initial grant of coverage for Hoffman's claims and that Acuity has no duty to indemnify Community.

¶17 We agree with Acuity. In the circuit court, Community only presented evidence of one specific act during the policy period that allegedly slandered, libeled, or disparaged Hoffman. Specifically, Community argued that its website slandered, libeled, or disparaged Hoffman by listing projects Community's employees had worked on without indicating that Hoffman was the

firm that completed those projects.[6] However, we agree with Acuity that the information on Community's website did not libel, slander, or disparage Hoffman.

¶18 First, Community's website did not libel or slander Hoffman. Acuity's policy does not define the terms "libel" and "slander." Because these are legal terms of art, we look to Wisconsin case law for guidance in determining their meaning. Both libel and slander are forms of defamation, the distinction being that libel involves a written defamatory statement, while slander is oral. *See* ***Freer v. M & I Marshall & Ilsley Corp.***, 2004 WI App 201, ¶9, 276 Wis. 2d 721, 688 N.W.2d 756. The elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct, or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. ***Ladd v. Uecker***, 2010 WI App 28, ¶8, 323 Wis. 2d 798, 780 N.W.2d 216.

¶19 The information on Community's website did not meet these requirements. The representations on the website were not false. The website listed projects on which Community employees had previously worked and used asterisks to indicate that those projects were "[e]xperience prior to Community Living Solutions." Thus, the website accurately described the relationship

[6] Acuity argues Community's website was first published before the policy went into effect and therefore does not constitute an offense committed during the policy period. In response, Community contends it revised the website after the policy went into effect by adding asterisks next to those projects which were completed while Community employees worked at other firms. Community argues the publication of the revised website during the policy period constitutes a "fresh wrong" or a new publication triggering coverage. *See* ***Taco Bell Corp. v. Continental Cas. Co.***, 388 F.3d 1069, 1073-74 (7th Cir. 2004). For purposes of this appeal, we assume without deciding that the revision of the website was a new publication, making the second website an act committed during the policy period.

between Community, its employees, and the listed projects. It simply failed to note that Community employees were working at Hoffman when they completed those projects.

¶20 Moreover, the representations on Community's website did not harm Hoffman's reputation. The website did not even mention Hoffman. It simply gave Community employees credit for projects they completed at Hoffman, without listing Hoffman as the supervising firm. This information may have improved Community's reputation, but it did not directly harm Hoffman's reputation.

¶21 Second, Community's website did not disparage Hoffman. Acuity's policy does not define the term "disparage," but WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 653 (1993)[7] defines "to disparage" as: "to lower in esteem or reputation; diminish the respect for." The information on Community's website did not meet this definition. Again, the website did not say anything about Hoffman directly. It merely gave Community employees credit for jobs done while at Hoffman, without specifically attributing those jobs to Hoffman. It is difficult to see how the website could have diminished Hoffman's esteem, reputation, or respect by including information that did not reference Hoffman in any way.

¶22 We conclude Community's website did not libel, slander, or disparage Hoffman. Thus, the publication of the website did not qualify as

[7] When a term in an insurance policy is not defined, we may look to a recognized dictionary for guidance in interpreting its common meaning. ***Weimer v. Country Mut. Ins. Co.***, 216 Wis. 2d 705, 722-23, 575 N.W.2d 466 (1998).

"personal or advertising injury" under Acuity's policy. As a result, Acuity's policy does not provide an initial grant of coverage for claims stemming from Community's website.

¶23 Community contends Hoffman's claims were not based solely on the website, but also on oral statements made by Community employees. Community points out that Hoffman's amended complaint accused Community employees of making "untrue, deceptive and misleading statements to Hoffman's employees, clients, and/or potential clients for the purpose of harming Hoffman by trying to induce Hoffman employees to leave Hoffman and trying to induce Hoffman clients … to terminate their contractual and business … relationships with Hoffman[.]" Community argues this allegation establishes that Community libeled, slandered, or disparaged Hoffman. According to Community, Hoffman's complaint alleges "personal and advertising injury" as defined by Acuity's policy and therefore triggers Acuity's duty to indemnify.

¶24 However, the duty to indemnify is not determined by the allegations in the complaint. To determine whether an insurer has a duty to indemnify, we look beyond the four corners of the complaint and consider whether the fully developed facts of the case establish that covered claims occurred. ***Acuity***, 310 Wis. 2d 197, ¶52; ***Employers Mut. Cas. Co.***, 287 Wis. 2d 418, ¶13. Here, the undisputed facts do not establish that Community committed personal or advertising injury after Acuity's policy went into effect. Community has not presented any evidence beyond mere speculation that its employees libeled, slandered, or disparaged Hoffman during the policy period.

¶25 On summary judgment, the circuit court had evidence that two Community employees made disparaging remarks about Hoffman. First, Randy

Bremhorst, a Hoffman employee, testified that he heard Community's president tell a group of colleagues Hoffman would be out of business within six months. Second, Lisa Cohen, Hoffman's risk manager, testified that another Community employee made a statement she believed was "deceptive, misleading, or untrue." However, at the hearing on Acuity's motion, Community conceded that both of these statements occurred before May 16, 2007, the effective date of Acuity's policy. Thus, even if these statements libeled, slandered, or disparaged Hoffman, they did not occur during the policy period and, therefore, are not covered.

¶26 On appeal, Community contends there is additional evidence that its employees libeled, slandered, or disparaged Hoffman during the policy period. Community directs us to the testimony of Pat Del Ponte, a Hoffman employee. Del Ponte testified that, sometime after May 16, 2007, several clients "raised questions about Hoffman's viability or financial stability." For instance, Del Ponte testified that one client said he heard Hoffman had been sold. Del Ponte asked the client where he heard that rumor, but the client could not remember. Del Ponte testified that another client inquired about Hoffman's affiliation with "Alberici" after looking at Hoffman's website. Del Ponte stated, "[I]t just seemed rather strange that after an 18-month working relationship that he would have decided to look at our website."

¶27 Community suggests these client concerns are evidence that Community employees made libelous, slanderous, or disparaging remarks about Hoffman during the policy period. We disagree. While Del Ponte's testimony arguably implies that Hoffman's clients were concerned about Hoffman's viability, it does not provide any evidence that Community caused these client concerns. Any causal connection between Community and Hoffman's concerned clients would be purely speculative, if based on Del Ponte's testimony alone.

¶28 Community also directs us to additional testimony from Lisa Cohen's deposition. According to Community, Cohen "testified that *none* of [Community's] acts that Hoffman complained about occurred before the Complaint[.]" Because the complaint was filed the same day Acuity's policy went into effect, Community argues Cohen's testimony shows that covered acts occurred during the policy period. However, the record citation Community provides for Cohen's testimony is incorrect. It is not our responsibility to locate references in the record. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964). The pages of Cohen's deposition that are included in the record do not support Community's reading of her testimony. Furthermore, the assertion that *none* of Community's bad acts occurred before Hoffman filed its complaint is nonsensical. If all of Community's acts occurred after the complaint was filed, Hoffman would have had no basis to file a complaint in the first place.

¶29 Community has not presented any other evidence that its employees made libelous, slanderous, or disparaging statements about Hoffman during the policy period. As a result, we agree with Acuity that the undisputed facts do not establish that Community or its employees committed covered personal or advertising injury against Hoffman. Acuity has made a prima facie case for summary judgment on the coverage issue, and Community has not set forth facts demonstrating that a disputed issue of material fact exists. *See* ***Lambrecht***, 241 Wis. 2d 804, ¶22. We therefore conclude the circuit court erred by determining Acuity had a duty to indemnify Community and by entering judgment in favor of Community.

¶30 We have resolved this case by applying the ordinary standard for determining an insurer's duty to indemnify—examining the fully developed facts of the case and comparing them to the policy language. *See* ***Acuity***, 310 Wis. 2d

197, ¶52; ***Employers Mut. Cas. Co.***, 287 Wis. 2d 418, ¶13. However, Community argues that applying the ordinary duty to indemnify standard is untenable in this case because it would force Community to prove its own guilt. Based on cases from other jurisdictions, Community contends that an insured who has settled a case does not need to prove actual facts establishing coverage to show that the insurer has a duty to indemnify. Instead, Community asserts the insured need only show that it settled an otherwise covered loss in "reasonable anticipation of liability." *See* ***United States Gypsum Co. v. Admiral Ins. Co.***, 643 N.E.2d 1226, 1244 (Ill. App. Ct. 1994); *see also* ***Luria Bros. & Co. v. Alliance Assur. Co.***, 780 F.2d 1082, 1091 (2d Cir. 1986).

¶31 While other jurisdictions may hold that a different duty to indemnify standard applies when the underlying case has settled, no Wisconsin court has adopted this rule. Furthermore, even if we were to accept Community's invitation to adopt a new duty to indemnify standard for cases that have settled, we would find Community has not met that standard.

¶32 The facts do not show that Community settled Hoffman's claims in "reasonable anticipation of liability" for an otherwise covered loss. *See* ***United States Gypsum Co.***, 643 N.E.2d at 1244. "[T]he nature of the pleadings, the pretrial discovery, evidence and testimony … [are] relevant to establish the reasonableness of the insured's anticipation of liability." ***Id.*** Here, although the complaint arguably alleged conduct that, if proven, would be covered under Acuity's policy, it does not appear Community ever had any evidence that this conduct actually occurred. Without any evidence that its employees committed personal or advertising injury against Hoffman, Community's settlement could not have been based on "reasonable anticipation" that it would be liable for a covered loss.

¶33 Under either the ordinary duty to indemnify standard or Community's proposed standard, Acuity did not have a duty to indemnify Community for Hoffman's claims. As a result, the circuit court erred by denying Acuity's motion for summary judgment and by granting Community's cross-motion. We therefore reverse the circuit court's judgment and remand with directions to enter judgment declaring Acuity has no duty to indemnify Community.

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

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