

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 1, 2003

Cornelia G. Clark
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. 02-3322
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-2518

**IN COURT OF APPEALS
DISTRICT II**

LAURA K. HANSON,

PLAINTIFF,

v.

**MASSACHUSETTS BAY INSURANCE COMPANY,
THE HANOVER INSURANCE COMPANY,
WOLF PAVING COMPANY, INC. AND
STATE OF WISCONSIN,**

DEFENDANTS,

**DESIGN PROFESSIONALS INSURANCE COMPANY
AND RUEKERT & MIELKE, INC.,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-PETITIONERS-APPELLANTS,**

v.

INTEGRITY MUTUAL INSURANCE COMPANY,

**THIRD-PARTY DEFENDANT-
RESPONDENT.**

APPEAL from an order of the circuit court for Waukesha County:
DONALD J. HASSIN, JR., Judge. *Affirmed.*

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

¶1 PER CURIAM. Ruckert & Mielke, Inc. (Ruckert) and Design Professionals Insurance Company have appealed from an order which dismissed their third-party complaint against Integrity Mutual Insurance Company, and determined that Integrity had no duty to defend or indemnify Ruckert in a negligence action brought by Laura K. Hanson. Hanson sued Ruckert and its insurer, Design Professionals, along with Wolf Paving Company, Inc., and several other defendants, based on injuries she suffered while driving through a road construction project on Waterville Road in the town of Ottawa.

¶2 Ruckert alleged that Integrity had a duty to defend it under two policies issued by Integrity—one, a business owner’s liability policy, and the other a commercial umbrella insurance policy. Because we conclude that the trial court correctly determined that Integrity had no duty to defend based upon a professional services exclusion contained in both policies, we affirm its order granting summary judgment to Integrity and dismissing the third-party complaint.

¶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) (2001-02).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).

¶5 When determining whether an insurer has a duty to defend, this court must compare the allegations contained within the four corners of the complaint with the terms of the insurance policy. *C.L. v. Sch. Dist. of Menomonee Falls*, 221 Wis. 2d 692, 699, 585 N.W.2d 826 (Ct. App. 1998). The duty to defend is determined solely from the allegations contained in the complaint, and extrinsic facts may not be considered. *Atl. Mut. Ins. Co. v. Badger Med. Supply Co.*, 191 Wis. 2d 229, 236, 528 N.W.2d 486 (Ct. App. 1995). If there are allegations in the complaint which fall within the policy coverage, the insurer has a duty to defend, even if some of the other allegations would not be covered. *Grube*, 173 Wis. 2d at 73.

¶6 In her second amended complaint, Hanson alleged that prior to the date of her accident, Ruekert contracted with the town of Ottawa

to develop means; methods; techniques; sequences; procedures of construction and safety precautions and programs incident thereto; practices and specifications for the construction and repair of highways and highway shoulders in the Town of Ottawa Said contract also provided that defendant Ruekert & Mielke, Inc., would

¹ All references to the Wisconsin Statutes are to the 2001-02 version.

make site visits to highway construction sites at intervals appropriate to the various stages of construction to observe the work being performed. Pursuant to said contract, defendant Ruekert & Mielke, Inc. developed a project manual setting forth standard general conditions of the construction contract including means; methods; techniques; sequences; procedures of construction and safety precautions and programs incident thereto; practices and specifications for the construction and repair of highways and highway shoulders in said Town.

¶7 Hanson further alleged that Wolf Paving was engaged in the business of building highways, and manufacturing and selling asphalt to be used in highways and highway shoulders. She alleged that pursuant to the Ruekert project manual, the town of Ottawa contracted with Wolf Paving to perform construction, repair and resurfacing of Waterville Road. She alleged that Wolf Paving sold the town asphalt concrete which Wolf used in resurfacing the road, and sold it asphalt shoulder material which it applied to the shoulder. She alleged that after the asphalt shoulder material was put into position by Wolf, loose gravel and dust emanating from it migrated from the shoulder area to the traveled portion of the road, creating a defective and unreasonably dangerous condition for motor vehicle operators driving on the road. She alleged that while rounding a turn on the road on October 23, 1998, she encountered the loose gravel and dust which were on the roadway in the construction area, and skidded out of control, hitting a tree.

¶8 Hanson alleged several negligence claims against Wolf Paving arising from its design, manufacture, and application of the asphalt shoulder material, and in its performance of the road work. She alleged that Ruekert was negligent as follows:

In failing to develop and carry out reasonably appropriate means; methods; techniques; sequences; procedures of construction and safety precautions and programs incident thereto; practices and specifications for the construction

and repair of highways and highway shoulders in the Town of Ottawa.

¶9 After Integrity refused Ruekert’s tender of the defense of Hanson’s claim, Ruekert and Design Professionals² filed a third-party complaint against Integrity. The trial court granted summary judgment determining that Integrity had no duty to defend or indemnify Ruekert. It relied on the professional services exclusions contained in both policies issued by Integrity to Ruekert.

¶10 The Businessowners Liability Policy issued by Integrity provided:

This insurance does not apply to:

...

j. “Bodily injury,” “property damage,” “personal injury” or “advertising injury” due to rendering or failing to render any professional service. This includes but is not limited to:

...

(2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;

(3) Supervisory, inspection or engineering services.

¶11 The umbrella policy issued by Integrity contained a contractors’ limitation endorsement, which provided that the policy did not apply to

any liability for **personal injury, bodily injury, or property damage** arising out of any professional services performed by or on behalf of the **insured**, including the preparation of approval of maps, plans, opinions, reports, surveys, designs or specification, and any supervisory, inspection or engineering services.

² Design Professionals provided a professional liability policy to Ruekert, and accepted Ruekert’s tender of the defense of this action.

¶12 The umbrella policy also contained a professional liability exclusion which provided:

It is agreed that this policy does not apply to any liability for **bodily injury, personal injury, advertising injury, or property damage** because of any act or omission of the **insured**, or of any other person for whose acts or omissions the **insured** is legally responsible, and arising out of the performance of any professional service.

¶13 The allegations of Hanson's complaint fall squarely within the professional services exclusions of the Integrity policies. Hanson's allegations as to Ruekert are that it contracted with the town of Ottawa to provide engineering services for the construction and repair of roads, including developing construction methods and procedures, developing safety programs, developing a project manual setting forth the construction methods and procedures, and providing periodic on-site observation of the construction work being performed. She alleged that Ruekert was negligent in failing to develop and carry out reasonably appropriate construction procedures, safety precautions, and practices and specifications for the construction and repair of highways in the town. However, she also specifically alleged that, pursuant to the Ruekert project manual, the town contracted with Wolf Paving to do the actual construction, repair, and resurfacing work on Waterville Road, and that Wolf Paving performed the road repair and resurfacing work that led to her injuries.

¶14 The only reasonable reading of Hanson's complaint is that the alleged negligence of Ruekert pertained to its role as engineer on the Waterville Road project. The negligence alleged as to Ruekert includes its preparation and approval, or failure to prepare and approve, appropriate designs and specifications, and its alleged negligence in its performance of supervisory, inspection or engineering services for the Waterville Road project. Contrary to Ruekert's

arguments, Hanson's complaint cannot reasonably be understood to allege that Ruckert negligently performed actual construction work.³ The allegations therefore fall within the specific exclusions for professional services.

¶15 Because the claims against Ruckert are excluded under Integrity's policies, the trial court properly determined that Integrity had no duty to defend or indemnify it against Hanson's claims.

By the Court.—Order affirmed.

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

³ This fact distinguishes this case from *Leverence v. United States Fidelity & Guaranty*, 158 Wis. 2d 64, 462 N.W.2d 218 (Ct. App. 1990). In holding that an insurer had a duty to defend its client against negligence claims based on defects in prefabricated homes manufactured by the client, the court relied on the fact that the client had manufactured, as well as designed, the houses. Because the negligence claims primarily related to defects in the manufactured homes, rather than negligence in designing the homes, the court held that a professional services exclusion in the insurance policy did not preclude coverage. *Id.* at 82-85. Unlike the situation in *Leverence*, the negligence claims against Ruckert relate to its performance of engineering services, not performance of the actual construction project.

