COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2011

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 Nos. 2010AP2495
2010AP2496

Cir. Ct. Nos. 2009CV3459
2010CV531

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

NO. 2010AP2495

ASHWAUBENON CREEK, LLC,

PLAINTIFF-APPELLANT,

INVESTORS COMMUNITY BANK,

PLAINTIFF,

UNITED STATES SMALL BUSINESS ASSOCIATION, C/O WISCONSIN BUSINESS DEVELOPMENT FINANCE CORPORATION,

INVOLUNTARY-PLAINTIFF,

V.

BAY BANK, LEONARD RUEL AND UNITED STATES OF AMERICA C/O DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE,

DEFENDANTS,

SPORTS CONVENTION, LLC,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

G-SKAAT, LLC, THE DE PERE GRAND, LLC, CHAD M. SCHAMPERS, CASEY L. LADOWSKI, FRANK R. HERMANS AND WILLIAM T. THAYSE,

THIRD-PARTY DEFENDANTS,

TRI VAN, LLC, SUSAN L. PFEIFFER, SCOTT R. VANDENHEUVEL, RICK J. VANDENHEUVEL AND TERRY J. GERBERS,

THIRD-PARTY DEFENDANTS-APPELLANTS,

ACUITY, A MUTUAL INSURANCE COMPANY AND WILSON MUTUAL INSURANCE COMPANY,

INTERVENORS-THIRD-PARTY DEFENDANTS-RESPONDENTS.

NO. 2010AP2496

SPORTS CREEK, LLC,
PLAINTIFF,

V.

G-SKAAT, LLC,

DEFENDANT,

ASHWAUBENON CREEK, LLC, TRI VAN, LLC, SUSAN L. PFEIFFER, SCOTT R. VANDENHEUVEL, RICK J. VANDENHEUVEL AND TERRY J. GERBERS,

DEFENDANTS-APPELLANTS,

WILSON MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

INVESTORS COMMUNITY BANK,

INTERVENOR-DEFENDANT,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENOR-DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Ashwaubenon Creek, LLC, Tri Van, LLC, Susan Pfeiffer, Terry Gerbers, Scott VanDenHeuvel and Rick VanDenHeuvel appeal a summary judgment dismissing Acuity, a Mutual Insurance Company, and Wilson Mutual Insurance Company. The circuit court concluded Acuity and Wilson Mutual had no duty to defend or indemnify in these consolidated cases. We affirm.

¶2 Ashwaubenon Creek rented a building to Sports Convention, LLC, which operated a banquet business. Ashwaubenon Creek sued Sports Convention, alleging it failed to make payments due under the lease and also seeking a declaration of the parties' rights regarding fixtures and improvements on the premises. Sports Convention filed a counterclaim and a fifty-four page third-party complaint against eleven individuals and businesses, including Tri Van, Gerbers, Pfeiffer, the VanDenHeuvels and others. The third-party complaint contained eighteen causes of action, and essentially alleged racketeering, conspiracy and

other activities calculated to raid Sports Convention of its assets, employees, inventory and customers, and fatally injure its business.

¶3 Sports Creek, LLC, a part owner of Ashwaubenon Creek, also sued Tri Van and G-Skaat, LLC and their members Pfeiffer, Gerbers and the VanDenHeuvels, alleging breach of Ashwaubenon Creek's operating agreement. Sports Creek requested judicial dissolution of Ashwaubenon Creek and damages for breach of fiduciary duty.

¶4 Acuity had issued "Bis-Pak" and commercial umbrella policies to Van Den Heuvel Electric, Inc. Tri Van was an additional insured.

¶5 Wilson Mutual had issued separate homeowner's policies to Pfeiffer and Gerbers. Pfeiffer is a member of Tri Van and Gerbers is a member of G-Skaat. The VanDenHeuvels are also members of Tri Van.

¶6 Acuity and Wilson Mutual intervened and sought to bifurcate and stay the proceedings. They also filed motions for declaratory and summary judgment on coverage. After a hearing, the circuit court granted summary judgment and dismissed Acuity and Wilson Mutual from the lawsuits, and directed counsel for Acuity to "prepare the necessary order granting that motion on the duty to defend." Following this ruling, the parties disputed whether the court's decision addressed the duty of indemnification. The court rejected Ashwaubenon Creek's argument that a judgment on the duty of indemnification was inappropriate before a jury reached any verdict or before facts were established, and signed Acuity's proposed order.

¶7 Ashwaubenon Creek posits two issues on appeal: (1) whether the circuit court erred in granting summary judgment declaring no duty of

indemnification existed when the insurers failed to supply any evidentiary facts supporting their motions; and (2) whether the insurers had a duty to defend because each supplied personal injury coverage for many of the intentional torts alleged in the complaints.

¶8 At the outset we note that for the first time on appeal, counsel for Ashwaubenon represents Tri Van, Pfeiffer, Gerbers, Scott VanDenHeuvel and Rick VanDenHeuvel "for the limited purpose of handling the appeal of this matter on issues of insurance coverage."[1] However, Tri Van, Gerbers, Pfeiffer and the VanDenHeuvels filed no briefs or affidavits in the circuit court in opposition to Acuity's and Wilson Mutual's motions for summary judgment and therefore forfeited any argument on appeal.[2] *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶9 Similarly, at the summary judgment hearing, Ashwaubenon Creek made no argument regarding the issue of whether the insurers had a duty to defend based on each supplying personal injury coverage for many of the intentional torts

[1] A notice of retainer was filed the same day as the notice of appeal.

[2] At the hearing on the summary judgment motion, the parties recognized that Acuity and Wilson Mutual had retained attorneys to defend the merits for the insureds, so those attorneys could not address coverage issues. Because Ashwaubenon Creek had potential responsibility by statute and under the LLC's operating agreement, counsel for Ashwaubenon Creek indicated at the hearing that "I … will probably take a position on coverage if those two gentlemen are unable to."

alleged in the complaints, and it will not be heard to argue that issue now.[3] Ashwaubenon Creek objected at the hearing to granting any declaration or summary judgment on the issue of indemnity because "there's [sic] no affidavits on the merits." Ashwaubenon Creek argued that neither Acuity nor Wilson Mutual had submitted affidavits containing facts concerning the underlying suits, relying instead upon the allegations of the pleadings and the language of the insurance policies.

¶10 Ashwaubenon Creek does not dispute that the duty to defend is governed solely by the allegations of the complaint and the language of the insurance policy. *See* ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. Moreover, it is the *nature* of the claim alleged against the insured which is controlling even though the suit may be groundless, false or fraudulent. ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845.

[3] Ashwaubenon Creek contends on appeal that no procedural basis existed to grant the summary judgment motions. It notes that the circuit court indicated in a letter dated July 26, 2010, that it intended only to hear the motion to bifurcate and stay proceedings at the August 11 hearing. However, the court's letter was sent after the scheduling order's deadline for briefs in opposition to summary judgment. Although the court at the outset of the hearing again indicated its belief that only bifurcation and stay would be heard, counsel for Acuity and Wilson Mutual stated that summary judgment motions were also pending. Counsel also noted that the motions had been pending for more than thirty days without a response. There were no objections to considering the motions for summary judgment and no requests were made for additional time to file briefs in opposition. Indeed, the court discussed the summary judgment issues with the parties and asked Ashwaubenon Creek whether there is "anything more that you need to file?" Counsel for Ashwaubenon Creek stated, "I don't think so, unless I need to take some discovery to develop additional facts to establish what the plaintiff is truly asserting." However, the parties had ample opportunity for discovery prior to the summary judgment hearing. We are not persuaded the court was procedurally limited in its ruling.

¶11 Nevertheless, Ashwaubenon Creek insists that "no Wisconsin case holds that an insurer's contractual obligation of indemnification should be adjudged based solely upon unsworn allegations in a complaint." It is mistaken.

¶12 In ***Employers Mutual Casualty Co. v. Horace Mann Insurance Co.***, 2005 WI App 237, ¶¶12-13, 287 Wis. 2d 418, 707 N.W.2d 280, this court held that Horace Mann did not have a duty to defend Bailey and then stated:

> Similarly, Horace Mann did not have a duty to indemnify Bailey, or to pay the settlement costs in the two lawsuits. Although the duty to defend and the duty to indemnify are distinct, coverage is the necessary precondition for both. *See* ***Smith v. Katz***, 226 Wis. 2d 798, 806-07, 595 N.W.2d 345 (1999). The duty to indemnify ultimately requires a finding of actual coverage, and that point is not reached unless we at least find arguable coverage. ***Id.*** Because we conclude that Bailey's activities were not arguably covered by Horace Mann's policy, Horace Mann did not have a duty to indemnify.

¶13 Ashwaubenon Creek also attempts to read too much into our decision in ***Olson v. Farrar***, 2010 WI App 165, ¶¶10-11, 330 Wis. 2d 611, 794 N.W.2d 245. According to Ashwaubenon Creek, ***Olson*** stands for the proposition that "courts determining the duty of indemnification *must* look beyond the allegations of the complaint and, in fact, may not consider them." We are not persuaded.

¶14 In ***Olson***, we stated:

> Recent decisions have made clear, however, that when an insurer has not refused to provide a defense prior to a determination of coverage and the question before the court is not whether the insurer has an initial duty to defend its insured but rather whether coverage is provided under the policy in question, the court's review is not limited by the four-corners rule.

Id., ¶10.

¶15 Significantly, ***Olson*** relied upon ***Sustache***. *See* ***Olson***, 330 Wis. 2d 611, ¶11. In ***Sustache***, the insurer moved for summary judgment on coverage and presented the court with affidavits. These affidavits included more evidence than the insurance policies and the complaint; they included transcripts of depositions. ***Sustache***, 311 Wis. 2d 548, ¶28. The insureds contended that their case required the court to evaluate whether "Wisconsin recognizes exceptions to the four-corners rule." ***Id.***, ¶24. Specifically, they sought an exception to the four-corners rule where self-defense is claimed. ***Id.*** The court stated:

> Where the insurer has provided a defense to its insured, a party has provided extrinsic evidence to the court, and the court has focused in a coverage hearing on whether the insured's policy provides coverage for the plaintiff's claim, it cannot be said that the proceedings are governed by the four-corners rule.

Id., ¶29 (emphasis omitted).

¶16 Contrary to Ashwaubenon Creek's perception, there is a distinction between stating that a court may not be constrained by the four-corners rule in certain circumstances and proclaiming that it *must* look beyond the allegations of the complaint, whether or not there is arguable coverage. Here, Acuity's and Wilson Mutual's motions asserting a lack of arguable coverage were supported by the insurance policies and the allegations of the complaints. No affidavits or other evidence were submitted in opposition.[4] The circuit court was not required to look further.

[4] We also reject Ashwaubenon Creek's reliance upon ***Acuity v. Bagadia***, 2008 WI 62, ¶52, 310 Wis. 2d 197, 750 N.W.2d 817. ***Bagadia*** does not support the conclusion that the duty to indemnify *requires* a court to look beyond the allegations of the complaint regardless of arguable coverage. *See* ***id.***

¶17 Ashwaubenon Creek also argues that the insurers stipulated on the record that their motions addressed only the duty of defense, but then "reneged on their stipulation" by submitting "a broad ranging order nullifying the duties of defense and indemnification forever." Ashwaubenon Creek claims the circuit court "signed it immediately," despite counsel's objection.

¶18 The record does not support Ashwaubenon Creek's representation that Acuity or Wilson Mutual stipulated to limiting the judgment to the duty of defense. Furthermore, in correspondence accompanying the proposed order, counsel for Acuity advised the court that it had circulated the proposed order to all counsel, and that Ashwaubenon Creek had objected because the order did not limit the court's decision to the duty to defend. The correspondence noted that Acuity's and Wilson Mutual's summary judgment motions "concern both the duty to defend and the duty to indemnify." The correspondence further indicated that "if the court would like further clarification on this issue, I would ask that the court please set the matter for another motion hearing." Ashwaubenon Creek subsequently hand-delivered correspondence to the court, expounding on its objection that the proposed order was not faithful to the court's oral ruling, and enclosing an alternative order.[5] In any event, the court was adequately apprised in the matter, signed the proposed order submitted by Acuity, and properly exercised its discretion in doing so.

¶19 Ashwaubenon Creek also argues that Acuity breached its duty to defend Pfeiffer and Gerbers based on Acuity's withdrawal of merits counsel after

[5] The first page of Ashwaubenon Creek's correspondence is dated August 27, 2010. However, the remaining pages are dated August 26. The order signed by the court indicates that it was filed August 27, 2010.

the summary judgment decision.[6] We disagree. The circuit court entered a stay of the underlying litigation while the cases proceeded on appeal, and there is accordingly no need for Acuity to defend while this appeal is proceeding. This is not a case where Acuity stopped defending and the underlying matter proceeded to trial with damages being assessed against the insured. It is also not dispositive that several motions were pending that were not subject to the stay. It is undisputed that two of those motions were fully briefed. The remaining motion dealt with the dissolution of Ashwaubenon Creek and whether a receiver should be appointed to run its daily affairs. Ashwaubenon Creek argues that this motion "greatly affected" Acuity's insureds, but its argument in this regard is underdeveloped, insufficiently supported by citation to the record on appeal, and will not be further considered. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[6] This contention does not apply to Wilson Mutual, as it is still defending under a reservation of rights.