COURT OF APPEALS
DECISION
DATED AND RELEASED

October 31, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0839

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

CAPITOL INDEMNITY CORPORATION,

Plaintiff-Appellant,

v.

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Capitol Indemnity Corporation appeals from a trial court order granting summary judgment to Aetna Casualty and Surety Company, holding that Capitol is not entitled to contribution from Aetna because Aetna was an excess insurer according to the "other insurance" clauses of both policies and because Capitol's primary coverage limits had not been exhausted.

The facts of this case are undisputed. In December 1991, a fire destroyed the Wild Goose Inn Bar/Supper Club in Waupun, Wisconsin. Capitol insured the Inn as owner. Norwest held a mortgage on the Inn and is a loss payee under the Capitol policy. Norwest also had a property insurance policy from Aetna that covered all properties in which Norwest held a mortgage interest. After the fire, Capitol paid Norwest $347,646, representing Norwest's loss of its interest in the Inn.

Capitol subsequently brought a declaratory judgment action seeking contribution from Aetna. Capitol argued that the "other insurance" clauses from both policies were mutually repugnant "excess" clauses, requiring the loss to be prorated. Aetna argued that Capitol was not entitled to contribution because Aetna provided only excess coverage and Capitol's primary coverage limits had not been exhausted. Following cross-motions for summary judgment, the trial court rejected Capitol's argument that the total loss should be prorated, and granted judgment in favor of Aetna. Capitol appeals.

In reviewing summary judgments, we apply the methodology in § 802.08(2), STATS., in the same manner as the trial court. ***Williams v. State Farm Fire & Casualty Co.***, 180 Wis.2d 221, 226, 509 N.W.2d 294, 296 (Ct. App. 1993). Our review is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Further, interpretation of insurance policy provisions presents a question of law, which we also independently review. *See* ***Oelhafen v. Tower Ins. Co.***, 171 Wis.2d 532, 535, 492 N.W.2d 321, 322 (Ct. App. 1992). We only look to the plain meaning of the policy language, unless policy language is ambiguous. ***Schaefer v. General Casualty Co.***, 175 Wis.2d 80, 84, 498 N.W.2d 855, 856 (Ct. App. 1993). "In construing and interpreting an insurance policy, the policy is considered as a whole to give each of its provisions the meaning the parties intended." ***Id.***

Aetna's policy states that it insures, *inter alia*, "[r]eal and personal property on which direct insurance has lapsed or been cancelled, or inadequate insurance is maintained." Both policies also include "other insurance" clauses. Aetna's policy states:

> This policy shall not cover to the extent of any other insurance whether prior or subsequent hereto in date, and by

> whomsoever affected, directly or indirectly covering the same property and this company shall be liable for loss or damage only for the excess value beyond the amount due from such other insurance.

Capitol's "other insurance" clause states:

> 1.You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.
>
> 2.If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

The language of each policy is clear and unambiguous and, we conclude, the policies are not mutually repugnant. Because Capitol's insurance was direct, had not lapsed or been cancelled, and because its coverage limits had not been exhausted, under the terms of the Aetna policy, Aetna's excess policy never came into play. Only coverage under the Capitol policy applied. Therefore, Capitol is not entitled to contribution and summary judgment was properly granted to Aetna.[1]

[1] Because we conclude that the policy language is clear on its face, we need not address the parties' arguments about the trial court's consideration of ***Oelhafen v. Tower Ins. Co.***, 171 Wis.2d

By the Court. – Order affirmed.

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

(..continued)
532, 492 N.W.2d 321 (Ct. App. 1992), in which the court of appeals upheld an umbrella excess clause against three pro rata clauses based on policy language and premiums paid for coverage. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed). Similarly, we need not address Capitol's argument that the trial court erred by considering the affidavit of Aetna's senior account analyst in construing the policies, nor need we address Aetna's general/blanket/secondary versus specific/primary policy coverage argument. *See* ***Gross***, 227 Wis. at 300, 277 N.W. at 665.