COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

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.

NOTICE

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

No. 95-1334

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

Plaintiff-Respondent,

v.

THE GETZEN COMPANY,

Defendant-Appellant,

SENTRY INSURANCE, a mutual company,
NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY,
NORTHBROOK NATIONAL INSURANCE COMPANY,
THE AETNA CASUALTY & SURETY COMPANY,
and CINCINNATI INSURANCE COMPANY,

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Reversed and cause remanded*.

Before Wedemeyer, P.J., Fine, J, and Michael T. Sullivan, Reserve Judge.

PER CURIAM. The Getzen Company, a brass musical instrument manufacturer and repairer, appeals from a summary judgment granted in favor of General Casualty Company of Wisconsin, Getzen's general comprehensive liability insurer.[1] General Casualty commenced a declaratory judgment action requesting that the trial court find that General Casualty had no duty to indemnify Getzen as a result of the Wisconsin Department of Natural Resources's remediation orders in connection with alleged environmental contamination on Getzen's property. The trial court concluded as a matter of law that under the terms of the commercial umbrella liability policies at issue in this case, General Casualty had "no duty to defend the Getzen Company where an environmental clean-up was ordered by a governmental agency." We agree with Getzen's argument that the trial court erred in concluding that the umbrella policies precluded General Casualty's duty to indemnify Getzen. Accordingly, we reverse and remand the matter to the trial court for further proceedings consistent with this opinion.

[1] Several other insurance companies were joined as defendants, but each of these companies has settled with Getzen and, accordingly, are not parties to this appeal.

I. BACKGROUND.

Getzen allegedly discharged hazardous waste at its Walworth County facility from approximately 1959 through 1983. In February 1990, the Department of Natural Resources received an anonymous complaint concerning the alleged hazardous waste disposal practiced at the site. Over the next two years, the Department issued various notices to Getzen concerning Getzen's noncompliance with regulations at the site.[2] A March 1992 Department order required Getzen to close and remediate the site in accordance with Wisconsin hazardous waste management regulations. Finally, on August 14, 1992, the Department conditionally approved a closure plan for the Getzen site.

General Casualty issued various underlying general comprehensive liability insurance policies to Getzen between 1978 and 1984. General Casualty also issued to Getzen commercial umbrella liability policies that were in effect from 1980 to 1984. Getzen first notified General Casualty of the Department proceedings on February 13, 1992, when Getzen's insurance agent forwarded a Notice of Incompleteness dated October 29, 1991, from the Department to Getzen. The 1991 notice threatened further enforcement action if Getzen did not immediately submit a closure plan in accordance with the Department requirements. By letter dated March 17, 1992, General Casualty responded by saying that since no suit had been brought, General Casualty's duty to defend had not been triggered. It also advised Getzen that further investigation would be necessary to determine whether any of the insurance policies covered the costs of complying with the Department's orders. In a letter dated April 16, 1992, Getzen formally demanded that General Casualty provide a defense.

[2] In August 1990, the Department issued a notice to Getzen for noncompliance with hazardous waste management regulations. In approximately October 1990, the Department took samples of residue from the waste burn pile area at the site and, based on those results, issued a notice of violation requiring Getzen to stop burning in the burn pile area. In March 1991 the Department issued a notice of violation requiring Getzen to perform soil testing in the burn pile area and remediate existing contamination. In February 1992, the Department issued a notice of violation ordering Getzen to stop discharging sump water onto the ground.

On May 5, 1993, General Casualty filed a suit seeking a declaratory judgment that General Casualty had no duty to defend Getzen or cover Getzen's costs arising from compliance with the Department's orders. Getzen filed an answer and a counterclaim alleging that, based on the insurance policies, General Casualty had a duty to defend and indemnify Getzen; Getzen also alleged breach of contract and bad faith on the part of General Casualty. Based on our supreme court's recent decision in ***City of Edgerton v. General Casualty Co. of Wisconsin***, 184 Wis.2d 750, 517 N.W.2d 463 (1994), the trial court granted General Casualty's motion for summary judgment and ruled that General Casualty had no duty to defend or indemnify Getzen. The trial court also dismissed Getzen's counterclaim. Getzen appeals from the judgment incorporating the trial court's rulings on these issues.

II. ANALYSIS.

Getzen argues that the trial court erred in its application of the ***City of Edgerton*** decision to the umbrella liability policies in this case. Getzen further argues that the issue presented in this appeal is limited solely to the "scope of coverage," in other words, General Casualty's "duty to indemnify" Getzen, that is provided in the umbrella policies' coverage provisions and is broader than the policies' "duty to defend" provisions. Getzen contends that the trial court inappropriately focused on "both the defense and coverage aspects of the ***Edgerton*** decision in denying Getzen ... coverage under the Umbrella Policies," because the dispositive policy language at issue in the ***Edgerton*** decision "does not appear in the coverage provision of the Umbrella Policies issued to Getzen." We agree that umbrella policies coverage provisions are the appropriate focus of this appeal and further that under the specific coverage language of these policies ***City of Edgerton*** is not controlling. Accordingly, the trial court inappropriately granted summary judgment to General Casualty.

"The methodology for reviewing summary judgment motions has been recited many times and need not be repeated here." ***Spic & Span, Inc. v. Continental Casualty Co.,*** Nos. 95-1572 & 95-1917, slip op. at 5 (Wis. Ct. App. June 25, 1996). We do note that our review of the trial court's summary judgment ruling is *de novo*. ***Bay View Packing Co. v. Taff,*** 198 Wis.2d 654, 673, 543 N.W.2d 522, 528 (Ct. App. 1995). Further, "[t]he interpretation of an

insurance policy presents a question of law that we review independently of the trial court." ***Spic & Span, Inc.,*** slip op. at 5.

The relevant coverage language in the umbrella policies provides:

> **I. Coverage**: The company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability
>
> (a) imposed upon the Insured by law, or
>
> ...
>
> for ultimate net loss on account of:
>
> ...
>
> (b) property damage
>
> ...
>
> caused by or arising out of each occurrence happening anywhere in the world, during the policy period.[3]

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[3] The defense provision of the umbrella policy provides, in relevant part:

> **II.Defense, Settlement and Supplementary Payments:**
>
> When Underlying Insurance Does Not Apply to an Occurrence:
>
> With respect to any occurrence not covered by the underlying insurance listed in Item 3 of the Declarations, or any other underlying insurance applicable to the insured, but covered by this policy except for the amount specified in Item 4 of the Declarations, the company will, in addition to the amount of the ultimate net loss payable:

Getzen essentially argues that irrespective of the policies' duty to defend provisions, General Casualty still has an obligation to indemnify Getzen under the language of the above coverage provision. We agree.

The "duty to defend" provision provides that General Casualty will "defend any suit against the Insured seeking damages on account of ... property damage ... even if any of the allegations of the suit are groundless, false or fraudulent." Under this language, General Casualty's "duty to defend" is not triggered because, under ***City of Edgerton***, the Department's environmental remediation order does not constitute a "suit ... seeking damages." *See* ***City of Edgerton,*** 184 Wis.2d at 758, 517 N.W.2d at 468.

The coverage provisions of the policy, however, are much broader than the "duty to defend" provisions. The language provides that General Casualty "agrees ... to indemnify [Getzen] for all sums which [Getzen] shall be obligated to pay by reason of the liability ... imposed upon [Getzen] by law." Hence, the plain language of the umbrella policies provide for indemnification beyond that triggered by "suits ... seeking damages." Further, the Department's environmental remediation orders are clearly a "liability ... imposed upon ... by law," and thus fall within the coverage of the policies. ***Weyerhaeuser Co. v. Aetna Casualty & Sur. Co***., 874 P.2d 142 (Wash. 1994), which also involved an insurance claim for environmental contamination remediation, is persuasive on this point. The policy at issue provided indemnification to the assured "for all sums which the Assured shall be obligated to pay by reason of the liability, (a)

(..continued)

> (a) defend any suit against the Insured seeking damages on account of personal injury, property damage or advertising liability, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient;
>
> (b) pay all expenses incurred by the company, all costs taxed against the insured in any suit defended by the company and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon; ....

imposed upon the Assured by law." ***Id***. at 145-46. In a well-reasoned opinion, the Washington Supreme Court determined that the provisions of the policy covered property damage where the insured and the environmental agency cooperated in a pollution cleanup effort. ***Id***. at 149-50.

General Casualty contends that the limited "duty to defend" provisions abort the broader duty to indemnify provisions, because there can be no duty to indemnify in a drop-down situation like this—absent a concomitant duty to defend. We disagree.

General Casualty argues that the coverage and defense provisions must be read together as a unit. With this we agree, but we reject General Casualty's overall analysis because a plain reading of both provisions makes it evident that nothing in the duty to defend clause restricts the scope of coverage clause. In reaching this conclusion, we employ the maxim that the policy should be considered as a whole, with effect given to all of its provisions. ***Grotelueschen v. American Fam. Mut. Ins. Co***., 171 Wis.2d 437, 451, 492 N.W.2d 131, 136 (1992) (coverage will be found if the policy terms provide).

Finally, General Casualty argues that it may not be held to indemnify against an uncontemplated risk. The unambiguous terms of the umbrella policies implicate one of two situations: (1) when the underlying policy applies to an occurrence but the damages exceed the limits of the policy; and (2) when the underlying policy does *not* apply to the occurrence and the terms of the insuring agreement have been met. General Casualty argues that here the underlying insurance does not apply to the occurrence because, under ***City of Edgerton***, no coverage is afforded as a matter of law; that is, no lawsuit was commenced. Logically, General Casualty continues, one must look to the duty to defend provision to determine whether the umbrella policies apply.

We disagree because the duty to defend provision is entirely unrelated to General Casualty's duty of coverage or indemnification. General Casualty, however, has a right to participate in a defense because it has a duty to indemnify Getzen, although it may have no duty to defend Getzen. *See, e.g.*, ***Glatz v. General Accident, Fire & Life Assurance Corp.***, 175 Wis. 42, 47-48, 183 N.W. 683, 685 (1921).

Accordingly, because General Casualty has a duty to indemnify under the policy, summary judgment should not have been granted. We reverse and remand the matter to the trial court for further proceedings consistent with this opinion.[4]

By the Court.—Judgment reversed and cause remanded.

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

[4] Getzen also seeks an award for attorney fees based on equitable principles. Because we reverse and remand for further proceedings, any discussion of attorney fees is premature.