COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 16, 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. 95-1686

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

DIANA R. VAN PELT,
DIRK S. VAN PELT
and AMERICAN MEDICAL SECURITY,

Plaintiffs-Respondents,

EMPLOYERS INSURANCE OF WAUSAU,
a mutual company,

Involuntary-Plaintiff-Respondent,

v.

EVER GREEN GROWERS, INC.,
RURAL MUTUAL INSURANCE CO.
and AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Defendants-Respondents,

JAMES E. ZIMMERMAN,

Defendant-Third Party
Plaintiff-Respondent,

v.

GENERAL CASUALTY COMPANY OF WISCONSIN,

Third Party Defendant-Appellant.

APPEAL from orders of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed and cause remanded*.

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

ANDERSON, P.J. General Casualty Company of Wisconsin (General Casualty) appeals from an order denying its summary judgment motion and from an order granting James E. Zimmerman's motion for declaratory judgment. General Casualty argues that it acted within its contractual rights by denying coverage to Zimmerman in accordance with the policy's "regular use" exclusion. We conclude that the General Casualty policy is a second policy agreeing to defend and indemnify Zimmerman against a loss from the operation of the accident vehicle, rendering the "regular use" exclusion invalid under § 631.43(1), STATS. Consequently, the General Casualty policy can be stacked on the Rural Mutual Insurance Co. (Rural Mutual) policy. We further conclude that General Casualty breached it duty to defend Zimmerman and is therefore liable for expenses incurred by Zimmerman in defending this suit. Accordingly, we affirm the trial court's orders.

The facts are undisputed. On October 21, 1992, Zimmerman was operating a pickup truck, in the course of his employment for Ever Green Growers, Inc. (Ever Green), when he collided with two vehicles and several

people were injured. At the time of the accident the pickup truck was insured under a policy issued to Ever Green by Rural Mutual. Zimmerman also owned a Ford Aerostar van that was insured under a personal automobile policy issued by General Casualty.

One of the injured parties commenced suit against Zimmerman, Ever Green and Rural Mutual. Because the demands of the complaint were in excess of the $250,000 limit of the Rural Mutual policy, Zimmerman retained his own counsel. Zimmerman tendered the defense of the action to General Casualty on April 14, 1994. On June 9, 1994, General Casualty declined to defend based upon a recorded statement Zimmerman gave that the truck was owned by Ever Green and was provided to him for business and personal use. General Casualty concluded that the "regular use" exclusion in its policy precluded coverage for the accident. Consequently, Zimmerman filed a third-party action against General Casualty alleging a breach of the contractual duty to defend. The circuit court heard competing motions; Zimmerman filed a motion for declaratory judgment on his third-party complaint and General Casualty asked for summary judgment on the question of the existence of insurance coverage.

The circuit court initially held that General Casualty waived the right to contest coverage because it had breached its duty to defend Zimmerman. After additional argument, the circuit court concluded that General Casualty had not waived its right to contest coverage. On the merits of the summary judgment motion, the court found that General Casualty had

established a prima facie case for summary judgment because Zimmerman's use of his employer's truck fell under the "regular use" exclusion in the General Casualty policy. However, the court concluded that the "regular use" exclusion violates § 631.43(1), STATS., and held that Zimmerman was entitled to coverage under the General Casualty policy.

The court also considered portions of Zimmerman's motion for declaratory judgment. First, the court, reaffirming its conclusion that General Casualty had breached its duty to defend Zimmerman, held that General Casualty would be liable for the expenses Zimmerman incurred in the defense of the action. In the alternative, the court found that General Casualty failed to timely comply with the requirements of ***Mowry v. Badger State Mut. Casualty Co.***, 129 Wis.2d 496, 385 N.W.2d 171 (1986), and whether or not it had breached the duty to defend, it would still be liable for the attorney's fees and expenses incurred by Zimmerman under the reasoning of ***Elliott v. Donahue***, 169 Wis.2d 310, 318, 485 N.W.2d 403, 405 (1992). General Casualty sought leave to appeal the circuit court's nonfinal order which this court granted on July 31, 1995.

General Casualty contends on appeal that § 631.43(1), STATS., does not invalidate the applicability of the "regular use" exclusion in its policy with Zimmerman and that it "acted wholly within its contractual rights by denying coverage to Zimmerman" and complied with the requirements of ***Mowry*** and ***Elliott.***

"Regular Use" Exclusion

General Casualty first argues that the trial court erred by denying its motion for summary judgment. We review a motion for summary judgment using the same methodology as the trial court. ***M & I First Nat'l Bank v. Episcopal Homes***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***M & I First Nat'l Bank***, 195 Wis.2d at 496-97, 536 N.W.2d at 182. Summary judgment presents a question of law which we review de novo. ***Id.*** at 497, 536 N.W.2d at 182. As the material facts are not contested, only issues of law remain to be determined.

General Casualty contends that the "regular use" exclusion in Zimmerman's policy does not violate § 631.43(1), STATS. Instead, General Casualty maintains that ***Agnew v. American Family Mut. Ins. Co.***, 150 Wis.2d 341, 441 N.W.2d 222 (1989), demonstrates the inapplicability of § 631.43(1) to this case. While we agree that "regular use" exclusions do not necessarily violate § 631.43(1), we conclude that General Casualty's exclusion is invalid because there are two policies which provided coverage for the accident vehicle.

Section 631.43(1), STATS., known as the "stacking statute," provides:

> When 2 or more policies promise to indemnify an insured against the same loss, no 'other insurance' provisions of the policy may reduce the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no 'other

> insurance' provisions. The policies may by their terms define the extent to which each is primary and each excess, but if the policies contain inconsistent terms on that point, the insurers shall be jointly and severally liable to the insured on any coverage where the terms are inconsistent, each to the full amount of coverage it provided. Settlement among the insurers shall not alter any rights of the insured.

General Casualty's policy with Zimmerman has two relevant provisions. The Insuring Agreement, Part A—Liability Coverage provides, "We will pay damages for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." "Insured" is defined as "You or any 'family member' for the ownership, maintenance or use of any auto or 'trailer.'" However, the "regular use" exclusion states that General Casualty "do[es] not provide Liability Coverage for the ownership, maintenance or use of: … [a]ny vehicle, other than 'your covered auto,' which is owned by you; or furnished or available for your regular use."

The policy's insuring agreement provides coverage for *any vehicle* used by the insured, not just the vehicle described in the Declarations. The policy's "regular use" exclusion attempts to reduce this coverage to only the vehicle in the Declarations. The legislature has "indicated its intent to invalidate attempts by insurers to avoid their statutory obligations to compensate the insured up to the aggregated policy limits of the insured's coverage by enacting the stacking doctrine." ***Welch v. State Farm Mut. Auto. Ins. Co.***, 122 Wis.2d 172, 178, 361 N.W.2d 680, 683 (1985). We interpret General Casualty's "regular use" exclusion as an attempt to avoid the stacking doctrine's prohibition of

reducing clauses, and we therefore agree with the circuit court that the exclusion is invalid.

We also view ***Rodey v. Stoner***, 180 Wis.2d 309, 509 N.W.2d 316 (Ct. App. 1993), as directly on point.[1] In ***Rodey***, the insured had four policies covering vehicles that were not involved in the accident. ***Id.*** at 311, 509 N.W.2d at 317. The policies contained a definitional exclusion (uninsured motorist vehicle) and a coverage exclusion (drive-other-car exclusion)[2] which contained similar language and both precluded coverage. ***Id.*** at 313, 509 N.W.2d at 317-18. This court concluded that because there were two or more policies promising to indemnify Rodey against the same loss, the drive-other-car and the uninsured motorist provisions were invalid under § 631.43, STATS. ***Rodey***, 180 Wis.2d at 318, 509 N.W.2d at 320; *see also* ***Link v. General Casualty Co.***, 185 Wis.2d 394, 403, 518 N.W.2d 261, 264 (Ct. App. 1994), and ***Patraw v. American Family Mut. Ins. Co.***, 185 Wis.2d 757, 761, 519 N.W.2d 643, 644 (Ct. App. 1994).

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[1] General Casualty attempts to distinguish ***Rodey v. Stoner***, 180 Wis.2d 309, 509 N.W.2d 316 (Ct. App. 1993). General Casualty maintains that ***Rodey*** and its progeny deal strictly with uninsured and underinsured motorists and do not apply in a liability context. The applicability of § 631.43(1), STATS., does not turn on the applicability between liability and indemnity insurance contracts. ***Agnew v. American Family Mut. Ins. Co.,*** 150 Wis.2d 341, 348, 441 N.W.2d 222, 226 (1989). "Rather, an analysis must be made on a case-by-case basis as to whether the particular liability policy at issue promises to indemnify the insured against the same loss as the other insurance policies involved." ***Id***. at 348-49, 441 N.W.2d at 226 (quoted source omitted).

[2] General Casualty refers to this provision as a "regular use" exclusion. Despite the different labels attached by insurers, the definition of "drive-other-car" exclusions are virtually identical and produce the same result as the "regular use" exclusion. Thus, we will treat them in a like manner.

Similarly, Zimmerman was covered by two policies promising to indemnify him against the same loss—an accident while he used Ever Green's truck.[3] Accordingly, General Casualty's "regular use" exclusion is invalid under § 631.43, STATS. This is true, irrespective of the fact that the policies are provided by two separate insurance companies. *See* ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 167-68, 361 N.W.2d 673, 678 (1985).

Similar to the circuit court, we view ***Agnew*** as distinguishable. In ***Agnew***, the driver was the son of the named insured and policy owner who had three American Family automobile insurance policies in full force and effect. Each policy covered a separate motor vehicle he owned. ***Agnew***, 150 Wis.2d at 343, 441 N.W.2d at 223. The question was whether American Family had to pay the limits of the policies insuring the two vehicles not involved in the accident. All three policies contained a "drive-other-car" exclusion that American Family claimed prohibited stacking of the three policies.[4]

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[3] Rural Mutual provided automobile liability insurance covering the 1989 Ford truck and has agreed to indemnify Ever Green, or its employees, from any and all damages resulting from the accident which is the subject of this litigation.

[4] The "drive-other-car" provision read as follows:

This coverage does not apply to:

> Bodily injury or property damage arising out of the use of any vehicle, other than your insured car, which is owned by or furnished or available for regular use by you or any resident of your household. [Footnote omitted.]

Agnew, 150 Wis.2d at 344-45, 441 N.W.2d at 224. Again we note the different labels used by the insurers. However, the ***Agnew*** provision is virtually identical to the clause at issue in this case, and the different labels do not change our analysis.

> In ***Agnew*** the supreme court decided that
>
> [e]ach American Family policy insures against liability arising from the operation of the vehicle specified in the policy owned by the policyholder. Thus under this part of each policy in this case only the policy covering the [accident vehicle] covered liability incurred by reason of operation of the [accident vehicle].
>
> In addition, each American Family policy insures against the liability the policyholder and a relative residing in his or her household incur by reason of the operation of a vehicle not named in the policy as long as, inter alia, the vehicle involved in the accident is not also owned by the policyholder or a relative residing in his or her household.

Id. at 349-50, 441 N.W.2d at 226. Because the policyholder owned all three vehicles, the supreme court concluded that only one policy promised to indemnify the insured against the loss incurred and § 631.43(1), STATS., was inapplicable. ***Agnew***, 150 Wis.2d at 351, 441 N.W.2d at 227.

In contrast, Zimmerman was covered under *two policies*: the Rural Mutual policy which specifically covered the accident vehicle and General Casualty's policy which promised to provide coverage for any vehicle used by the insured. When two or more policies provide coverage for the same loss, then no other provisions of the policies may reduce the protection of the insured. Accordingly, we conclude that the stacking statute, § 631.43(1), STATS., invalidates General Casualty's "regular use" exclusion.[5]

[5] We also note that Ever Green owned the accident vehicle, not Zimmerman. So the purpose of "drive-other-car" (or "regular use") exclusions—to prevent a policyholder from insuring all the cars in one household by taking out just one policy and paying only

Duty to Defend

General Casualty further contends that it is "impossible to reconcile the trial court's declaratory judgment order," declaring it breached its duty to defend, with ***Mowry*** and ***Elliott***. According to General Casualty, the tenet of these two cases is that an insurer does not breach its duty to defend by denying coverage where the issue of coverage is fairly debatable. General Casualty's arguments are based upon a faulty view of the duty to defend cases.

Whether an insurer has a duty to defend is a question of law which we review de novo, and we make that determination on the basis of the allegations contained in the complaint. ***Grube v. Daun***, 173 Wis.2d 30, 72, 496 N.W.2d 106, 122 (Ct. App. 1992). In Wisconsin, an insurer's duty to defend is predicated on the allegations in the complaint and may not be based on "extrinsic evidence." ***Id.*** The duty of defense depends on the nature of the claim, not the merits, and any doubts must be resolved in favor of the insured. ***Elliott,*** 169 Wis.2d at 321, 485 N.W.2d at 407. If the insurance company refuses to defend, it does so at its own peril. ***Id.***

Once the insurer has notice of the claim and does not obtain a clear and express waiver of its duty to defend, the insurer remains obligated to defend the insured for those claims that fall within the terms of the policy.

(..continued)
one premium—is not frustrated by our determination. *See* ***Agnew***, 150 Wis.2d at 350, 441 N.W.2d at 226.

Towne Realty, Inc. v. Zurich Ins. Co., 193 Wis.2d 544, 558-59, 534 N.W.2d 886, 892 (Ct. App. 1995), *aff'd*, 201 Wis.2d 260, 548 N.W.2d 64 (1996). When an insurer, who has a duty to defend, claims that the terms of the policy deny coverage for the incident forming the basis of the suit, the insurer must take steps to seek and obtain a bifurcated trial—litigating coverage first and obtaining a stay of all proceedings in the liability and damage aspects of the case until coverage, or lack of coverage, is determined. ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 232-33, 522 N.W.2d 261, 266-67 (Ct. App. 1994) (citing ***Elliott***, 169 Wis.2d at 318, 485 N.W.2d at 406).[6] If the insurer follows this procedure, then it does not run the risk of breaching its duty to defend. ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis.2d 824, 836, 501 N.W.2d 1, 6 (1993).

General Casualty, however, did not follow the proper procedure. Instead, it denied Zimmerman's tender of defense on June 9, 1994. Consequently, Zimmerman was required to file a third-party action against General Casualty, which was filed on January 5, 1995. Only then, on January

[6] This duty is well established in Wisconsin and has been reiterated in numerous cases. *See* ***Grieb v. Citizens Casualty Co.***, 33 Wis.2d 552, 558, 148 N.W.2d 103, 106 (1967); ***Professional Office Bldgs. v. Royal Indem. Co.***, 145 Wis.2d 573, 585, 427 N.W.2d 427, 431 (Ct. App. 1988); ***Elliott v. Donahue***, 169 Wis.2d 310, 320-21, 485 N.W.2d 403, 407 (1992); ***Grube v. Daun***, 173 Wis.2d 30, 72-76, 496 N.W.2d 106, 122-24 (Ct. App. 1992); and ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis.2d 824, 836, 501 N.W.2d 1, 6 (1993).

24, 1995, did General Casualty file its motion for a stay of the proceedings and bifurcation of the insurance coverage and liability issues along with its responsive pleadings. By acting in reverse order, General Casualty breached its duty to defend Zimmerman.

Nevertheless, General Casualty relies on the fairly debatable language in both ***Mowry*** and ***Elliott*** in support of its denial of coverage and dismisses recent cases as imposing "draconian penalties in situations where the facts demonstrate there is no coverage or where an insurer has had a very legitimate question about coverage."[7] General Casualty maintains that its "regular use" exclusion, coupled with a recorded telephonic interview between General Casualty and Zimmerman, support its refusal to defend Zimmerman in the Van Pelts' lawsuit.

However, this ignores the basic premise in ***Elliott*** that an insurance carrier's duty to defend is broader than its duty of indemnification and "is predicated on *allegations in a complaint*." ***Elliott***, 169 Wis.2d at 320, 485 N.W.2d at 407 (emphasis added). In this case, the Van Pelts made the following allegations regarding General Casualty's insured:

> 3. … [T]he defendant, James E. Zimmerman, … is employed by the defendant, Ever Green Growers, Inc.

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[7] General Casualty argues that ***Professional Office Bldgs.***, ***Grube*** and ***Kenefick***, *supra* note 6, violate the "clear holdings of ***Mowry*** and ***Elliott***" with their "draconian penalties." For this reason we certified this case to the Wisconsin Supreme Court. The certification, however, was denied. Thus, we are required to follow the direction set forth in the case law, even though General Casualty contests it.

> 6. … [T]he defendant, Rural Mutual Ins. Co., had in full force and effect a policy of automobile liability insurance covering the 1989 Ford truck, owned by the defendant, Ever Green Growers, Inc. and operated by the defendant, James E. Zimmerman, on October 21, 1992 at approximately 4:59 p.m., which vehicle was involved in an accident which is the subject of this litigation ….
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> 7. … [T]he defendant, James E. Zimmerman, was operating the 1989 Ford truck involved in the subject accident with the permission of and within the scope of the authority transmitted by the defendant, Ever Green Growers, Inc.

Thus, General Casualty's duty to defend is based on these allegations alone.

Under Zimmerman's personal automobile policy, General Casualty agreed to pay for damages "for 'bodily injury' or 'property damage' for which any 'insured' becomes legally responsible because of an auto accident." The allegations in the complaint fall under General Casualty's policy coverage. General Casualty acknowledged as much in its brief to the trial court when it noted that "[b]y these allegations, [it] could ascertain [that] … [t]he 1989 Ford truck *may have been* furnished or available to Zimmerman for his regular use." (Emphasis added.) Any doubts about the duty to defend must be resolved in favor of the insured. *See* ***Elliott***, 169 Wis.2d at 321, 485 N.W.2d at 407. Instead, General Casualty also looked to the recorded statement from Zimmerman and then determined that its "regular use" exclusion was applicable and denied coverage on this basis. In denying coverage, General

Casualty went beyond the allegations within the complaint and thereby breached its duty to defend.[8]

As a consequence of breaching its duty to defend, General Casualty is liable for Zimmerman's attorney's fees and expenses. Our supreme court has held that

> [t]he insurer that denies coverage and forces the insured to retain counsel and expend additional money to establish coverage for a claim that falls within the ambit of the insurance policy deprives the insured the benefit that was bargained for and paid for with the periodic premium payments. Therefore, the principles of equity call for the insurer to be liable to the insured for expenses, including reasonable attorney fees, incurred by the insured in successfully establishing coverage.

Elliott, 169 Wis.2d at 322, 485 N.W.2d at 408. General Casualty therefore is liable for any expenses incurred by Zimmerman in defending against the Van Pelt suit from the date General Casualty had notice of the claim, April 14, 1994, until May 3, 1995, the date General Casualty began representing Zimmerman under a reservation of rights. *See* ***Towne Realty***, 201 Wis.2d at 270, 548 N.W.2d at 68.

Because the case was decided by orders for declaratory judgment and summary judgment, Zimmerman did not have the opportunity to prove

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[8] Because we conclud that General Casualty breached its duty to defend Zimmerman, we need not address the circuit court's alternative holding regarding costs. ***City of Waukesha v. Town Bd. of The Town of Waukesha***, 198 Wis.2d 592, 601, 543 N.W.2d 515, 518 (Ct. App. 1995) (If a decision on one point disposes of an appeal, this court need not decide other issues raised).

the expenses incurred. We thus remand the case on this limited ground to the circuit court to entertain Zimmerman's claim for attorney's fees and expenses incurred in successfully establishing coverage. In all other respects, we affirm the circuit court's orders.

By the Court. – Orders affirmed and cause remanded.

Not recommended for publication in the official reports.