COURT OF APPEALS
DECISION
DATED AND RELEASED

December 23, 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. 95-3154

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

R.A. Zehetner & Associates, Inc., d/b/a Bell Ambulance, a Wisconsin Corporation,

Plaintiff-Respondent,

v.

St. Paul Fire and Casualty Insurance Company, a Wisconsin Corporation,

Defendant-Appellant,

The Laub Group, Inc., a Wisconsin Corporation,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Affirmed*.

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

PER CURIAM. St. Paul Fire and Casualty Insurance Company appeals from a trial court judgment declaring that St. Paul breached its duty to defend its insured, R.A. Zehetner & Associates, Inc. d/b/a Bell Ambulance. Because it was "fairly debatable" whether, in light of the facts alleged in the complaint, coverage existed despite an employer's liability exclusion, we affirm.

This case arises out of a federal-court action against Bell Ambulance filed by Christine Stefanski, a Bell employee, which alleged, among other things, sexual harassment. Bell tendered the defense to its insurer, St. Paul, which denied coverage and refused to defend. Bell then filed this state-court declaratory judgment action, seeking to require St. Paul to defend and indemnify Bell against all losses or expenses incurred as a result of Stefanski's federal-court action. Bell subsequently settled the federal-court suit, and this state-court action continued.

The Stefanski complaint alleged that on December 30, 1992, Bell employee Joseph A. Wehner, along with the president of Bell and other Bell employees, left the Bell premises to "visit one or more restaurants and/or taverns" where they consumed alcoholic beverages. They returned several hours later. The complaint alleged that "Wehner has subsequently claimed that he was so impaired as a result of his consumption of alcohol ... that he cannot accurately recall his actions on the Bell Ambulance premises following his return ...." The complaint alleged that Wehner: touched and attempted to staple Ms. Stefanski's breasts, made a variety of sexual remarks to her, discharged a fire extinguisher soaking Ms. Stefanski below her waist, demanded sexual favors from her, and sexually assaulted another Bell employee.

The St. Paul CGL policy provides that St. Paul has the duty to defend any claim or suit alleging a covered "bodily injury" or "personal injury." The trial court[1] concluded that the complaint alleged no "personal injury," but that it did allege "bodily injury" that was not excluded by the policy's employer's liability exclusion.

[1] Reserve Judge Willis J. Zick made the oral rulings regarding summary judgment. Judge John E. McCormick signed the final order dated March 30, 1995.

St. Paul argues that it owed Bell no duty of defense based on the policy's employer's liability exclusion, which in part stated:

> We won't cover bodily injury to any employee arising out of and in the course of his or her employment.

St. Paul concedes that Stefanski suffered "bodily injury" but argues that the injury "ar[ose] out of and in the course of" Stefanski's employment and, therefore, was excluded from coverage under the policy.

When reviewing a trial court's decision whether to grant summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the trial court. *See* ***Transportation Ins. Co. v. Hunzinger Constru. Co.***, 179 Wis.2d 281, 289, 507 N.W.2d 136, 139 (Ct. App. 1993). Summary judgment methodology has been recited in many cases, *see* ***Hunzinger***, 179 Wis.2d at 289-292, 507 N.W.2d at 139-140, and need not be repeated here. Our review is *de novo*. ***Id.*** at 289, 507 N.W.2d at 139.

Whether an insurer has a duty to defend presents a question of law that this court independently reviews. ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 231, 522 N.W.2d 261, 266 (Ct. App. 1994). The duty to defend is broader than the separate duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage. ***Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.***, 176 Wis.2d 824, 834-835, 501 N.W.2d 1, 5 (1993). "Although an insurance company that 'declines to defend does so at [its] peril,' it is not liable to its insured unless there is, in fact, coverage under the policy or coverage is determined to be 'fairly debatable.'" ***Production Stamping Corp. v. Maryland Casualty Co.***, 199 Wis.2d 322, 326-327, 544 N.W.2d 584, 586 (Ct. App. 1996); *see also* ***Hamlin Inc. v. Hartford Accident & Indemn. Co.***, 86 F.3d 93, 96 (7th Cir. 1996) (The duty-to-defend test in Wisconsin is "whether the complaint arguably asserts a form of liability covered by the policy.") (Posner, J.).

In determining whether an insurer has a duty to defend, the allegations within the four corners of the complaint must be compared with the terms of the insurance policy. ***Newhouse***, 176 Wis.2d at 835, 501 N.W.2d at 5; ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis.2d 347, 364-365, 488

N.W.2d 82, 87-88 (1992). Further, policy exclusions are to be narrowly construed against the insurer and any ambiguity regarding coverage is resolved in favor of the insured. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 811, 456 N.W.2d 597, 598 (1990).

Seeking to apply the employer's liability exclusion, St. Paul argues that "all the injuries claimed in the Stefanski complaint plainly arose out of and in the course of Stefanski's employment with Bell." St. Paul points to the fact that the complaint alleges that the offensive conduct occurred at the work place while Stefanski was employed by Bell, and that it adversely affected the conditions of her subsequent employment at Bell. St. Paul cites ***Garriguenc v. Love***, 67 Wis.2d 130, 137, 226 N.W.2d 414, 418 (1975), which Bell concedes governs here, in support of its argument that only "some causal connection" is required in order for an act "to arise out" employment.[2]

We agree that the Stefanski complaint alleged bodily injury "arising out of ... her employment." The exclusion in this policy, however, encompasses bodily injury "arising out of *and in the course of* ... her employment." (Emphasis added.) The Stefanski complaint does not clarify whether she suffered bodily injury "in the course of ... her employment." It does not allege that Stefanski was on-duty or was on the premises for some

---

[2] In ***Garriguenc***, a spectator at a demolition derby brought suit against the track lessor, lessees, and their insurers for personal injuries sustained when a car left the track and struck the plaintiff, who had been watching from an infield enclosure. The insurer for the track lessor sought to apply a policy exclusion that excluded coverage for "bodily injury ... *arising out of* ... [a]utomobile or motorcycle racing or stunting." ***Id.*** at 132-133, 226 N.W.2d at 416 (emphasis added). The Wisconsin Supreme Court rejected the plaintiff's argument that the exclusion was not meant to apply to such indirect conduct as viewing a sporting event, and stated:

> The words "arising out of" in liability insurance policies are very broad, general and comprehensive; and are ordinarily understood to mean originating from, growing out of, or flowing from. All that is necessary is some causal relationship between the injury and the event not covered. That relationship exists in this case.

Id. at 137, 226 N.W.2d at 418; *see also* ***Bartel***, 127 Wis.2d 310, 379 N.W.2d 864 (attaching trailer to van owned by a "road band" by insured who was manager and member of the band satisfied "arising out of" standard for "business pursuits" exclusion of insured's homeowner's liability policy).

employment-connected purpose at the time she was assaulted. Thus, strictly construing the exclusion, we conclude that coverage for Ms. Stefanski's bodily injury is "fairly debatable" under the specific facts alleged in her complaint. Accordingly, St. Paul had a duty to defend. *See* ***United States Fire Ins. Co. v. Good Humor Corp.***, 173 Wis.2d 804, 818-819, 496 N.W.2d 730, 734 (Ct. App. 1993).[3]

By the Court. – Judgment affirmed.

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

[3] Because we conclude that St. Paul breached its duty to defend for "bodily injury" prior to obtaining a coverage determination with regard to the employer's liability exclusion, we need not address the parties' arguments regarding coverage for "personal injury." *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).