Appeal No. 2009AP2868 **Cir. Ct. No. 2009CV231**

WISCONSIN COURT OF APPEALS
DISTRICT II

JEFFREY M. WILKINSON,

PLAINTIFF,

V.

JAMES R. ARBUCKLE,

DEFENDANT-APPELLANT,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Pursuant to WIS. STAT. RULE 809.61 (2007-08) this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does the four-corners rule govern an insurer's duty to defend when, in response to a lawsuit, an insured alleges that he acted in self-defense and the insured's policy expressly provides coverage for injuries sustained by acts of self-defense?

BACKGROUND

In 2007, this court issued ***Estate of Sustache v. American Family Mutual Insurance Co.***, 2007 WI App 144, ¶¶8-19, 303 Wis. 2d 714, 735 N.W.2d 186 (***Sustache I***)[1] with the proviso that in doing so the court was cognizant of: (1) two court of appeals decisions that conflict on the question of whether exceptions to the four-corners rule are recognized in Wisconsin;[2] (2) one supreme court case that implies exceptions do exist;[3] and (3) two supreme court cases that seem to be at odds with ***Grieb v. Citizens Casualty Co.***, 33 Wis. 2d 552, 148 N.W.2d 103 (1967), but do not overrule ***Grieb***.[4] This court found that the four-corners rule is the law in Wisconsin when measuring an insurer's duty to defend and that the rule knows no exception until the supreme court holds otherwise. ***Sustache I***, 303 Wis. 2d 714, ¶19.

The decision was appealed, and the supreme court in ***Estate of Sustache v. American Family Mutual Insurance Co.***, 2008 WI 87, ¶24, 311 Wis. 2d 548, 751 N.W.2d 845 (***Sustache II***), acknowledged that the issue was whether there are any

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[1] We will refer to this court's decision in ***Estate of Sustache v. American Family Mutual Insurance Co.***, 2007 WI App 144, 303 Wis. 2d 714, 735 N.W.2d 186, as ***Sustache I***, and the Wisconsin Supreme Court's decision in ***Estate of Sustache v. American Family Mutual Insurance Co.***, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845, as ***Sustache II***.

[2] *Compare* ***Prof'l Office Bldgs, Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 580-81, 427 N.W.2d 427 (Ct. App. 1988) ("the duty to defend is dependent solely on the allegations of the complaint"), *with* ***Berg v. Fall***, 138 Wis. 2d 115, 122, 405 N.W.2d 701 (Ct. App. 1987) (noting that an insurer's duty to defend is not limited by the allegations in the complaint).

[3] ***Grieb v. Citizens Cas. Co.***, 33 Wis. 2d 552, 558, 148 N.W.2d 103 (1967) ("There are at least four exceptions to the [four-corners] rule … and generally the insurer who declines to defend does so at his peril.").

[4] *See* ***Smith v. Katz***, 226 Wis. 2d 798, 815-16, 595 N.W.2d 345 (1999), and ***Doyle v. Engelke***, 219 Wis. 2d 277, 284 n.3, 580 N.W.2d 245 (1998).

exceptions to the four-corners rule. The court, however, decided the case on other grounds after finding that the four-corners rule was not applicable because the insurer provided a defense and submitted extrinsic evidence, and the circuit court held a hearing on whether the insured's policy provided coverage. ***Id.***, ¶¶28-29.

THE INSTANT CASE

Jeffrey M. Wilkinson filed a civil complaint against James R. Arbuckle alleging that on May 6, 2008, Wilkinson was injured when Arbuckle willfully and maliciously assaulted and battered him. Arbuckle answered by denying that he was the aggressor and alleging that he was protecting his father from an attack by Wilkinson. Arbuckle stated that he was only using "such force as was necessary to protect his father, restrain Wilkinson, and protect himself from Wilkinson." Arbuckle counterclaimed against Wilkinson for intentional battery.[5]

Arbuckle contends that his homeowner's policy with Acuity grants coverage when an insured causes bodily injury when acting in self-defense. The Acuity policy provides that if a claim is made or a suit is brought against Arbuckle for damages caused by an "occurrence," Acuity will provide a defense even if the suit is groundless, false, or fraudulent. "Occurrence" is defined as an "accident." The "exclusions" section of the policy states that while intentionally harmful acts committed by the insured are not covered, acts "committed to protect persons or

[5] This raises the interesting possibility that perhaps neither Wilkinson nor Arbuckle's insurers have a duty to defend under the four-corners rule.

property" are covered.[6]

Acuity filed a motion for summary and/or declaratory judgment arguing that because Wilkinson's complaint alleged that Arbuckle "willfully and maliciously" attacked him, Arbuckle's conduct was not an occurrence and therefore not an accident. Thus, Acuity argued that it had no duty to defend or indemnify Arbuckle. The circuit court concurred in a detailed and thorough decision. The court concluded that ***Sustache I*** stands for the proposition that there are no exceptions to the four-corners rule in Wisconsin. The court applied the four-corners rule and concluded that because Wilkinson's complaint alleged intentional actions on the part of Arbuckle, there was no "occurrence" (i.e., no accident), and hence no coverage. The court noted that it may only look to the exclusions section of an insurance policy after determining that coverage exists. The circuit court commented on the problem with the four-corners rule in self-

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[6] The clause provides:

> **EXCLUSIONS—SECTION II**
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> **1.** This insurance does not apply, under Parts D, E, F and G to:
>
> . . . .
>
> d. **Bodily injury** or **property damage** arising out of an intentionally harmful act or omission committed by, or at the direction of, the **insured**. This exclusion applies if the injury or damage is substantially certain to follow from the intentionally harmful act or omission even if the actual injury or damage is different from that which was expected or intended.
>
> *This exclusion does not apply to* ***bodily injury*** *or* ***property damage*** *resulting from an act committed to protect persons or property.* [Emphasis added.]

defense situations—the facts as alleged by the *plaintiff* do not trigger the coverage that the policy was intended to provide for the *defendant*.

DISCUSSION

Black-letter law provides that an insurance policy is to be construed so as to give effect to parties' intentions. ***Plastics Eng'g Co. v. Liberty Mut. Ins. Co.***, 2009 WI 13, ¶27, 315 Wis. 2d 556, 759 N.W.2d 613. When a case presents a question of insurance interpretation, the policy must be read as a whole. *See* ***Liebovich v. Minnesota Ins. Co.***, 2008 WI 75, ¶27, 310 Wis. 2d 751, 751 N.W.2d 764. Litigants should not be able to resort to rules of construction for the purpose of modifying contracts, and courts need not resort to either rules of construction or case law to bolster their recognition of the plain meaning of a contract. ***Garriguenc v. Love***, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975). Exclusions are narrowly or strictly construed against the insurer, and any ambiguities in the policy are resolved in favor of coverage. ***Varda v. Acuity***, 2005 WI App 167, ¶9, 284 Wis. 2d 552, 702 N.W.2d 65. An insurance policy is not interpreted in a vacuum or based on hypotheticals, but is tested against the factual allegations at issue. ***Sustache II***, 311 Wis. 2d 548, ¶19.

In determining whether there is a duty to defend, the court first considers whether the insuring agreement makes an initial grant of coverage. ***Id.***, ¶22. If the court determines that the policy was not intended to cover the claims asserted, the inquiry ends. ***Id.*** When a court determines that the policy does not provide coverage based on the allegations found in the complaint, it is not necessary to interpret the policy's exclusions. ***Id.***, ¶23.

Here, the Acuity policy clearly and unambiguously provides coverage for self-defense. However, the coverage for self-defense is listed as an exception to

the agreement's general policy of excluding coverage for injuries stemming from intentional acts committed by the insured. Under the four-corners analysis, a complaint alleging battery will not trigger a defense under the policy's self-defense coverage because battery allegations preclude the initial grant of coverage under the policy's definition of an "occurrence" as an "accident." Therefore, Acuity's obligation to defend under the self-defense clause will rarely, if ever, be triggered given that self-defense is an affirmative defense.

In sum, although Arbuckle claims that the alleged injury was caused when he was acting in self-defense, the four-corners rule serves to deny him the defense that he and Acuity agreed upon. In this limited circumstance, the four-corners rule—a rule of construction developed by the courts to give effect to the parties' contractual intentions—is in direct conflict with the clear and unambiguous language of the policy and the parties' intentions.

CONCLUSION

The supreme court is the primary law-making court of this state and is the only court with authority to overrule, modify, or withdraw language from a prior appellate case. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). This case offers the supreme court the opportunity to address the application of the four-corners rule as it relates to an insurance policy that expressly provides coverage for self-defense, albeit in the exclusions section of the policy. We therefore respectfully submit that the supreme court address the conflict between the application of clear insurance policy language and the four-corners rule.