COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2639-FT

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

VALET ONE SYSTEMS, INC. AND HAMPTON SUDS LAUNDROMAT, INC.,

PLAINTIFFS-APPELLANTS,

V.

SENTRY INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Valet One Systems, Inc., and Hampton Suds Laundromat, Inc., (the insureds) appeal from a circuit court order dismissing their action for a declaratory judgment against Sentry Insurance, A Mutual Company,

(Sentry), regarding insurance policy coverage. Because we conclude that the policy issued by Sentry to the insureds covered certain losses incurred by them on June 21, 1997, we reverse the circuit court's order. We conclude further that the circuit court properly ruled that Sentry's failure to pay the insureds' claim did not violate § 628.46, STATS., and that the insureds are not entitled to attorney's fees under § 806.04, STATS. Accordingly, we affirm the circuit court's judgment in part, reverse in part and remand the case for the entry of a judgment conforming to this opinion.[1]

BACKGROUND

The insureds separately operated a dry-cleaning establishment and a laundromat on the ground floor of the same building, but shared a common basement. The basement was utilized by both insureds to store equipment used in their respective businesses.

To protect against losses due to damage to their equipment or the premises, the insureds purchased an insurance policy from Sentry. The policy, entitled "Businessowner's Special Property Coverage Form," excluded coverage for water damage:

> B. EXCLUSIONS
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> ....

[1] This is an expedited appeal under RULE 809.17, STATS.

> g. WATER
>
> (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
>
> (2) Mudslide or mudflow;
>
> (3) Water that backs up or overflows from a sewer, drain or sump; or
>
> (4) Water under the ground surface pressing on, or flowing or seeping through:
>
> (a) Foundations, walls, floors or paved surfaces;
>
> (b) Basements, whether paved or not; or
>
> (c) Doors, windows or other openings.
>
> But if Water, as described in B.1.g.(1) through (4), results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

Because the policy did not provide coverage for loss due to damages caused by sewer backup, the insureds purchased an "Additional Coverages" endorsement to the main policy. The endorsement provided coverage for sewer backup damage:

> B. COVERED CAUSES OF LOSS
>
> The following are added to Covered Causes of Loss:
>
> ....
>
> 2. Water
>
> We will pay for direct loss, and resulting collapse caused by:
>
> a. Flood, surface water, waves, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not. But we only cover these causes of loss if the covered property is located in Flood Zone B, C, or X as defined by the National Flood Insurance Program; ...
>
> b. Mudslide or mudflow;
>
> c. Water that backs up or overflows from a sewer, drain or sump; or

> d. Water under the ground surface pressing on, or flowing or seeping through:
>
> (1) Foundations, walls, floors or paved surfaces;
>
> (2) Basements, whether paved or not; or
>
> (3) Doors, windows or other openings.
>
> We will not pay for loss by the causes described in paragraph a. if covered property is not located in Flood Zone B, C, or X....
>
> Exclusion B.1.g. in the Coverage Form does not apply to loss covered by these provisions.

On June 21, 1997, the insureds suffered damages caused both by flooding and sewer backup in their shared basement. The water rose to approximately eight feet, significantly damaging equipment stored in the basement. Shortly after the incident, the insureds notified Sentry of the damage and hired a public adjusting company to assess the amount of the loss.

Sentry denied the insureds' claim, explaining that the loss appeared to be primarily by flood and surface water, and the property was not located in a designated flood plain. The insureds sought a declaration from the circuit court to settle three disputes: (1) whether the losses incurred by the insureds on June 21, 1997, were covered under policies issued by Sentry to them; (2) whether Sentry's failure to pay their claim violated § 628.46, STATS.; and (3) whether the insureds were entitled to reasonable attorney's fees and costs associated with proving coverage under the policy pursuant to § 806.04, STATS. Sentry moved for summary judgment. The trial court concluded that Sentry's policy did not cover the damages resulting from the flood on June 21, 1997, and granted Sentry summary judgment. This appeal followed.

INSURANCE COVERAGE

This appeal involves the interpretation of an insurance policy and, therefore, presents a question of law for which we accord no deference to the conclusions of the trial court. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990). The trial court decided the issue on a motion for summary judgment. Summary judgment should be granted when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Section 802.08(2), STATS. The methodology for summary judgment was comprehensively set forth by the supreme court in ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987), and we follow that methodology here.

The central purpose of insurance policy interpretation is to ascertain the parties' intention as revealed by contract language. *See* ***Shorewood School Dist. v. Wausau Ins. Co.***, 170 Wis.2d 347, 367, 488 N.W.2d 82, 88 (1992). Policy language is given its common and ordinary meaning from the point of view of "what a reasonable person in the position of the insured would have understood the words to mean." ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis.2d 722, 735, 351 N.W.2d 156, 163 (1984). Accordingly, "ambiguity in policy language exists when the policy is reasonably susceptible to more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured." ***Sprangers v. Greatway Ins. Co.***, 175 Wis.2d 60, 67, 498 N.W.2d 858, 862 (Ct. App. 1993), *aff'd*, 182 Wis.2d 521, 514 N.W.2d 1 (1994). "A genuine ambiguity arises when the phrasing of a policy is so confusing that the average policyholder cannot make out the boundaries of the coverage." ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 264, 371 N.W.2d 392, 394 (Ct. App. 1985). Any "[a]mbiguities in coverage are to be construed in favor of

coverage, while exclusions are narrowly construed against the insurer." ***Smith***, 155 Wis.2d at 811, 456 N.W.2d at 598.

It was undisputed that the insureds' businesses were located in Flood Zone AE. The endorsement clearly stated that coverage for loss caused by flood or water was limited to property located in Flood Zone B, C, or X only. Under the policy's language, therefore, it is clear that flooding and surface water infiltration were not covered under the endorsement to the policy because the insureds' businesses were not located within the requisite flood plain. However, it was also undisputed that the insureds' losses were caused in part by sewer backup, a risk expressly covered in the endorsement. Because the record established that the basement damages were caused both by flooding outside the designated flood zone, a non-covered risk, and sewer backup, a covered risk, the coverage issue presented by this appeal is whether the main policy's concurrent cause exclusion, appearing at paragraph B.1., precluded coverage for the insureds' losses.

Sentry argues in its respondent's brief that the endorsement deleted only the main policy's exclusion of coverage for damage caused by water as set forth in B.1.g. and not the introductory concurrent cause exclusion set forth in paragraph B.1.:

> The Additional Coverages form unquestionably deletes paragraph B.1.g, which concerns the water exclusion, but not the introductory anti-concurrent causation paragraph of paragraph B.1. This is explained by underlying reason for the Additional Coverages form. The Additional Coverages form adds water as a limited coverage and specifically deletes B.1.g. to avoid contradictions between the Additional Coverages and the Special Property Coverage form. If the Additional Coverages form were intended to omit the anti-concurrent causation language, it would have excluded "paragraph B.1." It unambiguously did not do so.

We conclude that Sentry's interpretation is the narrowest one that can be read from the endorsement. If adopted and taken to its logical extension, however, Sentry's position would mean that most of the risks identified in the endorsement, like sewer backups, mud slides or drain backups, would only be covered if they occurred in the designated flood zones.

We conclude that the endorsement's "B.1.g." phrase can be read in a more expansive but still reasonable fashion to mean that the concurrent cause exclusion is removed, but only for the risks related to water identified in "g." This interpretation would retain the integrity of the concurrent cause exclusion for those risks identified as "a," "b," "c," and so forth, in the main policy. At the same time, removing the concurrent cause exclusion would grant coverage for risks like sewer backup that occur outside the designated flood zones.

We conclude that the phrase "B.1.g." in the endorsement is vague to the extent that it failed to accurately and completely indicate the boundaries of the coverage intended to be extended by the insurer to a policyholder. Accordingly, we conclude that the policy's language raises a genuine ambiguity in coverage. *See* ***Bulen***, 125 Wis.2d at 264, 371 N.W.2d at 394. Because an ambiguity in coverage is to be construed in favor of coverage and exclusions are to be narrowly construed against the insurer, we hold that the endorsement and main policy grant coverage for the losses claimed in this case. *See* ***Smith***, 155 Wis.2d at 811, 456 N.W.2d at 598.

STATUTORY COSTS

Section 628.46(1), STATS., states that "[u]nless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss."

The statutory language relevant to this controversy is clear and unambiguous. *See, e.g.,* ***Kania v. Airborne Freight Corp.,*** 99 Wis.2d 746, 758-59, 300 N.W.2d 63, 68 (1981) (application of a statute to a particular set of facts raises a question of law). The statute predicates an insurer's liability on the claimant's timely submission of proof of the amount of loss allegedly sustained. The record is undisputed that the insureds did not submit such proof. Accordingly, Sentry is not liable under § 628.46, STATS.

ATTORNEY FEES

Section 806.04(8), STATS.,[2] a subsection of the Uniform Declaratory Judgments Act, permits the recovery of attorney fees when recovery is proper under principles of equity. Such recovery of attorney fees can include those fees incurred by the insured in successfully establishing coverage under an insurance policy. *See* ***Elliott v. Donahue***, 169 Wis.2d 310, 314, 485 N.W.2d 403, 404

[2] Section 806.04(8), STATS., states:

> SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(1992). However, when coverage issues present a "fairly debatable issue" under the policy, the recovery of attorney fees may not be warranted. *See* ***id.*** at 324-25, 485 N.W.2d at 409. Because we conclude that the coverage issue presented by this appeal is fairly debatable, we hold that the trial court did not err in denying the insureds' request for attorney fees under § 806.04(8).

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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