COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1354 Cir. Ct. No. 2011CV11011

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

SHERRY L. WOOSYPITI, HAROLD WOOSYPITI AND THE MILWAUKEE COUNTY MEDICAL PLAN,

PLAINTIFFS,

V.

TRAVELERS INSURANCE COMPANY, A/K/A PHOENIX INSURANCE COMPANY AND UNITED HEALTHCARE INSURANCE COMPANY,

DEFENDANTS,

SOUTHPOINTE MEDICAL DEVELOPMENT, LLC,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

GENERAL CASUALTY COMPANY OF WISCONSIN,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 KESSLER, J. Travelers Insurance Company appeals a decision of the circuit court reconsidering a prior order and granting summary judgment dismissing Travelers' claim against General Casualty Company of Wisconsin. We affirm.

BACKGROUND

¶2 We draw most of our facts from the circuit court's written decision. Southpointe Medical Development, LLC (Southpointe) owns the commercial building space at 4448 West Loomis Road, Greenfield. Southpointe's primary insurer is Travelers Insurance Company (Travelers). Lakeshore Medical Clinic (Lakeshore) is a tenant in Southpointe's building described above. Lakeshore is insured by a Commercial General Liability policy purchased from General Casualty Insurance Company (General Casualty).

¶3 Pursuant to the lease agreement between Southpointe and Lakeshore, Lakeshore was required to procure liability insurance to protect Southpointe, as the landlord, under certain circumstances. As material here, the lease required Lakeshore to indemnify Southpointe for damages to a third-party resulting from Lakeshore's negligence. Lakeshore complied with this requirement by listing Southpointe as an "additional insured" under its policy with General Casualty. The General Casualty policy was in effect from December 15, 2009 to December 15, 2010.

¶4 On December 30, 2009, Sherry L. Woosypiti fell in the vestibule, a common area in Southpointe's building, and sustained injuries. Southpointe notified Travelers of Woosypiti's fall. Travelers conducted an investigation and determined that a Lakeshore client *may* have tracked snow into the vestibule, thus contributing to the fall. Travelers notified Lakeshore of its finding. Lakeshore, in turn, notified General Casualty. General Casualty advised Travelers that under the terms of the Lakeshore-Southpointe lease, Southpointe, not Lakeshore, was responsible for maintenance of the "common area" which included the vestibule. General Casualty conducted its own investigation and determined that Lakeshore did nothing that contributed to Woosypiti's fall. General Casualty notified Travelers of its finding.

¶5 On July 8, 2011, Woosypiti filed suit against Southpointe and Travelers alleging negligence. Five months later, on December 7, 2011, Travelers notified General Casualty of the lawsuit. Travelers, on behalf of Southpointe, demanded defense and indemnification. Woosypiti amended her complaint to include General Casualty as an additional defendant, but did not add Lakeshore. Woosypiti alleged General Casualty was liable based on the "additional insured" provisions of General Casualty's policy sold to Lakeshore.

¶6 Southpointe filed a motion to bifurcate and stay the proceedings pending determination of coverage. General Casualty responded with a motion for declaratory judgment arguing that under the facts and terms of its policy with Lakeshore, it had no duty to defend Southpointe. The circuit court, Judge Dominic Amato presiding, held a hearing to determine whether General Casualty had a duty to defend. Relying solely on the "additional insured" clause in the General Casualty policy, the circuit court found that both General Casualty and

Travelers had a shared responsibility to defend Southpointe. The "additional insured" clause provided:

> **SCHEDULE OF ADDITIONAL INSUREDS**
>
> ….
>
> The persons or organizations shown in the Schedule are included as insureds as provided by paragraph C.4. of WHO IS AN INSURED of the Commercial Marketplace Policy Liability Coverage Form. Coverage provided each such insured is only with respect to liability arising out of their interest as described below.
>
> ….
>
> | Name and Address of Additional Insured | Interest |
> | --- | --- |
> | South Pointe Medical Development
4448 W. Loomis | Lessor |
>
> ….
>
> **C. WHO IS AN INSURED**
>
> ….
>
> 4. Any person or organization for which you are required:
>
> By written contract; …
>
> To provide coverage of the type afforded by Business Liability Coverage for operations performed by you or on your behalf or for facilities you own, rent or control….

(Some formatting altered; some capitalization omitted.)

¶7 Ultimately, Travelers settled Woosypiti's claims. Although the parties dispute the reasons causing the unilateral settlement, it is not disputed that General Casualty did not contribute to Travelers' defense costs or to the settlement amount. Travelers pursued its claim against General Casualty alleging breach of the duty to defend and seeking reimbursement for its defense costs. General

Casualty then moved for reconsideration of the circuit court's earlier order that General Casualty had a duty under its policy with Lakeshore to defend Southpointe and for summary judgment on Travelers' indemnification claim.

¶8 The circuit court, now Judge Mary Kuhnmuench presiding,[1] reconsidered the prior order and reversed the previous ruling that General Casualty had a duty under its policy to defend Southpointe. The court concluded that by reading the "additional insured" clause "in isolation," rather than with the rest of the insurance contract, the court made an error of law. The court found that based on the language of its contract as a whole, General Casualty did not have a duty to defend Southpointe and granted General Casualty's motion for summary judgment dismissing Travelers' claim.

¶9 Travelers appeals both the circuit court's decision to reconsider and the construction of General Casualty's contract with Lakeshore. Travelers argues that based on the language of the insurance contract with Lakeshore, General Casualty breached its duty to defend Southpointe, thus the circuit court erroneously granted General Casualty's motion for reconsideration.

DISCUSSION

Standard of Review.

¶10 We review a grant of summary judgment independently, using the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate

[1] After Judge Amato retired, Judge Kuhnmuench succeeded his calendar.

where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).[2]

¶11 "The interpretation of an insurance policy and the existence of coverage under the policy are questions of law which we decide *de novo*." *See* ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, ¶7, 234 Wis. 2d 374, 610 N.W.2d 501. As our supreme court explained in ***American Family Mutual Insurance Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65, appellate courts follow a three-step process when interpreting insurance contracts:

> First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage. If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there. If the claim triggers the initial grant of coverage in the insuring agreement, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain. We analyze each exclusion separately; the inapplicability of one exclusion will not reinstate coverage where another exclusion has precluded it. Exclusions sometimes have exceptions; if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies.

(Citations omitted.)

¶12 To determine whether there was a duty to defend, we compare the allegations in the complaint to the relevant portions of the insurance policy. *See* ***Liebovich v. Minnesota Ins. Co.***, 2008 WI 75, ¶16, 310 Wis. 2d 751, 751 N.W.2d

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

764; ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶7, 280 Wis. 2d 624, 695 N.W.2d 883. The insurer has a duty to defend whenever the allegations in the complaint, if proven, create a possibility of recovery that falls under the terms and conditions of the insurance policy. ***Liebovich***, 310 Wis. 2d 751, ¶16. If we find a duty to defend based on the complaint alleging facts which make coverage fairly debatable, we then analyze the policy to determine whether there are policy exclusions which exclude coverage altogether, or exclude only the duty to defend in certain circumstances. *See* ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 43-44, 577 N.W.2d 366 (Ct. App. 1998). Policy exclusions are narrowly construed against the insurer with any ambiguity resolved in favor of the insured. ***Id.***

¶13 "To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. We review a circuit court's grant of a motion for reconsideration under the erroneous exercise of discretion standard of review. *See* ***id.***, ¶6. A manifest error of law is "the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" ***Id***., ¶44 (citation omitted). An appellate court reviews "the [circuit] court's factual findings regarding what occurred under the clearly erroneous standard but will independently consider whether those facts fulfill the legal standard." ***Id.***, ¶3.

The Duty to Defend.

¶14 Lakeshore, as a tenant, was required by its lease with Southpointe to provide certain insurance for the benefit of Southpointe. Lakeshore did that

through the General Casualty policy which, as we have seen, identifies Southpointe an "additional insured." An "additional insured" is described in the policy as: "Any person or organization for which you are required … [b]y written contract … [t]o provide coverage of the type afforded by Business Liability Coverage for operations performed by you or on your behalf or for facilities you own, rent or control." The additional insured endorsement states: "[c]overage provided each such insured is only with respect to liability arising out of their interests as described below" where Southpointe is described as the lessor of the property insured, and specifically included as an insured. The policy language, in the context of the requirement of the lease and specific identification of Southpointe as an additional insured, provides at least a fairly debatable initial grant of coverage to Southpointe.

¶15 Thus we consider whether one or more exclusions in the policy preclude coverage under the facts here. General Casualty argues that under the facts here, its policy acted as an excess carrier to Southpointe based on the "other insurance" clause in the General Casualty policy. Consequently, because Travelers has never demonstrated that it exhausted its policy limits, General Casualty never had a duty to defend.

¶16 The General Casualty policy provided:

> H. OTHER INSURANCE
>
> 1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not….
>
> ….
>
> 3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or

> "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so.

¶17 We have previously interpreted "other insurance" clauses, such as the General Casualty clause, to mean that the parties intended for the policy provider to act as the excess carrier where there is other insurance applicable to the same claim. *See* ***Riccobono***, 234 Wis. 2d 374, ¶13. Here, Woosypiti alleged claims of negligence against Southpointe. Southpointe's primary insurer was Travelers. Applied to this case, General Casualty's policy creates a duty to defend Southpointe against Woosypiti's claims only if Travelers refused to do so. Travelers did not refuse to defend Southpointe. In addition, the other insurance clause expressly covers *only* a loss that is in excess of what is covered by the primary carrier. Travelers has not alleged that the settlement with Woosypiti exceeded its policy limits. Accordingly, under the facts of this case, we agree with the circuit court that the General Casualty policy expressly excluded any duty to defend Southpointe against Woosypiti's claims.

The Motion for Reconsideration.

¶18 Travelers argues that the circuit court erroneously granted General Casualty's motion for reconsideration because General Casualty did not present either new evidence or evidence of a manifest error of law.

¶19 A manifest error is "the type of error which tends to immediately reveal itself as such to reasonable legal minds." ***Schinner v. Schinner***, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988). The circuit court's initial decision was based on an isolated part of the insurance policy, rather than on the policy as a whole. Our supreme court requires a sequential analysis of the insurance contract as a whole. *See* ***American Family***, 268 Wis. 2d 16, ¶24. Initially, the circuit court

judge ignored that analytical requirement and relied on only an isolated portion of the insurance contract. That was a manifest error of law immediately apparent to reasonable legal minds. The successor circuit court, Judge Kuhnmuench, recognized the error, applied the proper analysis to the insurance contract, and properly granted the motion for reconsideration.

¶20 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶21 BRENNAN, J. (*dissenting*). I disagree with the Majority's interpretations of the "Other Insurance" provisions in these two policies and the Majority's reliance on ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, 234 Wis. 2d 374, 610 N.W.2d 501. The insurance policy provisions in this case are significantly different from those in ***Riccobono***, and are plainly in conflict with each other and therefore cancel each other out. *See* ***Schoenecker v. Haines***, 88 Wis. 2d 665, 672, 277 N.W.2d 782 (1979).

¶22 Because I conclude that the "Other Insurance" excess provisions conflict with each other and therefore cannot be given effect, both policies "arguably provide" primary coverage for the claims against Southpointe, and consequently both insurers had a duty to defend. *See* ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666 (An insurer has a duty to defend when there is a "'possibility'" of recovery or, stated a different way, when the complaint states a claim that is *arguably covered* under the policy.) (citation omitted). Therefore, I would reverse and remand General Casualty's dismissal on the duty to defend issue.

¶23 A comparison of the policy language shows the direct conflict in the "Other Insurance" provisions and the misapplication of ***Riccobono*** here.

¶24 First, the General Casualty policy clearly provides coverage. It specifically names Southpointe as an additional insured. Additionally, it describes "Insured" as "[a]ny person or organization for which you [Lakeshore] are required: … By written contract … [t]o provide coverage of the type afforded by Business Liability Coverage for operations performed by you or on your behalf or for facilities you own, rent or control." There is no dispute that the written lease

required Lakeshore to provide third-party liability coverage to Southpointe. Thus, Southpointe falls within the definition of "Insured," as well. But even if it did not, Southpointe is clearly an additional insured under the General Casualty policy because it is expressly named as such. Second, after providing coverage to Southpointe, as noted, the General Casualty policy attempts to make itself excess to any other insurance with the language in its "Other Insurance" provision, stating:

> **H. OTHER INSURANCE**
>
> **1.** If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not.

¶25 Next, we look at the Travelers' language. The Travelers' policy language plainly indicates it provides primary coverage, but then it too attempts to make itself excess when there is any other primary liability coverage for the liability claims in the complaint, stating:

> **a. Primary Insurance**
>
> This insurance is primary except when **b**. below applies. …
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> ….
>
> **(2)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

¶26 Thus, it is clear that the plain language of both policies' "Other Insurance" provisions are in direct conflict with each other because both provide

primary coverage, but then both state they will only provide excess coverage if there is any other primary coverage.

¶27 The Majority concludes the two policies here are not in conflict and are identical to those in ***Riccobono***. I disagree.

¶28 In ***Riccobono***, we construed "Other Insurance" provisions of two commercial general liability policies and concluded that Capitol Indemnity Corporation, who insured the Riccobonos' restaurant, was intended to be the primary insurer for the restaurant's landlord, Seven Star, Inc. ***Id.***, 234 Wis. 2d 374, ¶¶7-13. We deemed Society Insurance, another liability insurer for Seven Star, the excess insurer.[1] ***Id.***, ¶12. We reached that conclusion by analyzing the policy language and determining that the "Other Insurance" clauses were not in direct conflict. *See* ***id.***, ¶11.

¶29 But the language of Capitol's policy was significantly different from the Travelers' policy here. Capitol's policy stated it was primary, but then provided for only a few limited instances in which it would be excess—none of which were applicable in that case. ***Id.***, ¶13 ("Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for 'your work'"). In contrast, here, the Travelers' policy expressly states that it is primary except where there is "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." This precisely describes General Casualty's coverage. There is no dispute here that the General Casualty policy

[1] There were other procedural differences between ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, 234 Wis. 2d 374, 610 N.W.2d 501 and the case at hand, not pertinent to this dissent. For example, the Riccobonos sued Seven Star for breach of lease and intentional interference with contract. It was not a third-party negligence claim like the case here.

provided coverage to Southpointe as an additional insured. So, unlike the policies in ***Riccobono***, Travelers' "Other Insurance" provision directly conflicted with General Casualty's policy.

¶30 Our Wisconsin caselaw is clear: where there is a direct conflict in policy provisions and two policies cannot both be given effect, their conflicting claims cancel each other out. When two policies conflict or are repugnant to each other, neither will be given effect. ***Schoenecker***, 88 Wis. 2d at 672. Here, each policy claims it is excess, so they cancel out each other's attempt at exclusion.

¶31 As a result, I respectfully dissent from the Majority.