

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2855

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

CLARK WOLFF AND LINDA WOLFF,

PLAINTIFFS,

v.

GRANT COUNTY BOARD OF ADJUSTMENT, GRANT
COUNTY PLANNING AND ZONING COMMITTEE, AND
GRANT COUNTY,

DEFENDANTS-APPELLANTS,

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PENNSYLVANIA,

INTERVENOR-DEFENDANT-
RESPONDENT.

APPEAL from a judgment of the circuit court for Grant County:
MICHAEL KIRCHMAN, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

ROGGENSACK, J. Clark and Linda Wolff requested approval from the Grant County Planning and Zoning Committee for a Planned Residential Unit Development (PUD), which was denied unless they agreed to dedicate a Wisconsin public access road for the subdivision. Based on that denial, the Wolffs sued Grant County and its agents. Grant County tendered the defense to National Union Fire Insurance Company of Pittsburg, Pennsylvania under a public officials and employees liability policy. National Union asserted a coverage defense, with which the circuit court agreed. On review, we conclude that the Wolffs' complaint describes the Board's decision of establishing a condition for approval of the Wolffs' PUD and the injuries which are alleged to have resulted from that decision, as indirectly connected to property damage and to a regulatory taking. Because claims arising from property damage and takings are excluded from coverage, National Union has no duty to defend. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

The Wolffs own approximately 108 acres of property in the Town of Jamestown, Grant County, Wisconsin. When they purchased it, the only public access was through an adjacent lot located in Illinois. Because they wanted to subdivide 42.79 acres of their parcel to make a residential development, they filed an application for approval to establish a PUD, with the Grant County Zoning Administrator. Prior to the County's review of the Wolffs' request, the Town of Jamestown had reviewed it and recommended that approval not be given. When the County Planning and Zoning Committee met, it denied approval of the PUD, unless the Wolffs purchased and dedicated a public access road in Wisconsin. The Wolffs appealed to the Board of Adjustment. The Board was also concerned about the lack of Wisconsin public access into the proposed subdivision,

especially as the concern related to fire, safety and school busing. Therefore, it affirmed that condition as necessary for approval.

The Wolffs then filed a lawsuit against Grant County and other county agents, claiming relief under the following theories: (1) *certiorari* review of the condition imposed by the Board, (2) mandamus directing the County to grant approval of the PUD, (3) inverse condemnation, and (4) a violation of 42 U.S.C. § 1983. All of the claims for relief were based on the Board's decision to deny approval of the PUD unless the Wolffs built and dedicated a Wisconsin public access road for the proposed subdivision.

Grant County was insured by National Union under a public officials and employees liability policy. The indemnity provisions of the policy obligated National Union to: (1) pay all sums for which Grant County became legally obligated to pay as damages, (2) defend any claim¹ against Grant County alleging a wrongful act, even if groundless, and (3) pay the defense costs. However, the policy contained exclusionary provisions. Section III. specified that it did not apply to the following claims or damages. It stated:

III. Exclusions

This policy does not apply to any Damages or Claim: ...

B. seeking relief or redress in any form other than Damages, or attorney's fees, costs or expenses ... however, the Company shall defend such a Claim in

¹ A claim is defined as:

a judicial proceeding alleging a Wrongful Act that is filed against an Insured in a court of law or equity and which seeks Damages or other relief. Claim shall also mean an administrative proceeding alleging a Wrongful Act, provided an enforceable award of Damages can be made against an Insured at the administrative proceeding.

accordance with Insuring Agreement B, subject to a Policy Period aggregate limit of \$100,000. ...

- D. Arising Out Of ... (2) damage to or destruction of any property, including the loss of use thereof, (3) any allegation relating to the foregoing exclusions (d)(1) through (d)(2) ... including, without limitation, any allegation that the violation of a civil right caused or resulted from such Damages or Claim;
- E. Arising Out Of inverse condemnation, temporary or permanent taking, adverse possession or dedication by adverse use;

The policy defined “Damages” and “Arising Out Of” to mean:

- D. Damages means a monetary judgment or settlement agreed to with the consent of the Company. ...
- F. Arising Out Of means originating from, having its origin in, growing out of, flowing from, incident to or having connection with, whether directly or indirectly;

Grant County tendered the defense to National Union, who accepted it under a reservation of rights. National Union then intervened in the lawsuit between the Wolffs and Grant County and sought a declaration that exclusions III., D. and E. eliminated any need to defend or indemnify Grant County. The circuit court agreed, and granted summary judgment to National Union on its coverage defense. This appeal followed.

DISCUSSION

Standard of Review.

The interpretation of an insurance policy is a question of law which we decide *de novo*. See *Filing v. Commercial Union Midwest Ins. Co.*, 217 Wis.2d 640, 644, 579 N.W.2d 65, 66 (Ct. App. 1998).

Insurance Contract.

Grant County contends that National Union is required to defend it in this lawsuit and to indemnify it if damages are awarded to the Wolffs. National Union contends that the exclusions, when read together with the definitional sections of the policy and the case law bearing thereon, require no defense and no indemnification.

When we interpret the words of an insurance contract, we operate under the principle that the policy must be read in the manner in which a reasonable insured would have understood the policy terms. *See id.* The test that we apply is an objective one. *See Bertler v. Employers Ins. of Wausau*, 86 Wis.2d 13, 17, 271 N.W.2d 603, 605 (1978). Therefore, whether an ambiguity exists in an exclusion from coverage under an insurance policy depends upon the meaning that the words used to describe the exclusion would have to a reasonable person of ordinary intelligence in the position of the insured. *See Kozak v. United States Fidelity & Guar. Co.*, 120 Wis.2d 462, 467, 355 N.W.2d 362, 364 (Ct. App. 1984). If an ambiguity exists in an insurance policy, we must construe the policy against the insurance company and in favor of the insured. *See Filing*, 217 Wis.2d at 645, 579 N.W.2d at 66 (citing *Stanhope v. Brown County*, 90 Wis.2d 823, 849, 280 N.W.2d 711, 722 (1979)). And finally, an insurance policy must be interpreted as a whole, in order to give reasonable meaning to all of its provisions. *See Berg v. Schultz*, 190 Wis.2d 170, 175, 526 N.W.2d 781, 783 (Ct. App. 1994).

An insurance company's duty to defend and indemnify is governed by the allegations set out in the complaint, which allegations, if proven, would permit recovery under the policy. *See School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis.2d 347, 364, 488 N.W.2d 82, 87 (1992). Therefore, we determine

whether a policy excludes coverage by focusing on the incident and the injury described in the complaint, not on the theories of liability presented. *See Berg*, 190 Wis.2d at 177, 526 N.W.2d at 783. Examining the incident is central to our analysis because the exclusions stated in an insurance policy often are driven by the incident which allegedly caused damage, rather than by the theory of liability set forth in a claim. *See id.* We focus on the injury because it, too, may be described as an exclusion and because an insurance carrier has no duty to defend, unless the relief prayed for is covered under the policy. *See City of Edgerton v. General Cas. Co.*, 184 Wis.2d 750, 765, 517 N.W.2d 463, 470 (1994). If multiple claims are contained in the complaint and only one is covered under the policy, the insurance company must still defend the lawsuit. *See Grube v. Daun*, 173 Wis.2d 30, 73, 496 N.W.2d 106, 122 (Ct. App. 1992).

We begin by examining the complaint² because it is within the four corners of that document that the incident and injury, for which Grant County requests coverage, has been described. The complaint contains four counts; each has a separately stated prayer for relief. The first count seeks *certiorari* review of the conditions required for approval of the Wolffs' PUD and requests the circuit court to vacate the decision of the Board, to enter a decision "required by law," or to remand to the Board for further proceedings. In support of *certiorari* review, the complaint states that the Board wrongfully refused to grant approval of the PUD without the Wolffs providing a Wisconsin public access road. It also asserts that the Wolffs could provide the necessary public access road only as follows:

² We note that this opinion expresses no opinion about the sufficiency of the pleadings or the merits of the listed claims. A duty to defend depends on the nature of the claims alleged, not on their merits. *See School Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis.2d 347, 364, 488 N.W.2d 82, 87 (1992).

by purchase of land from other private owners and construction of the road all at Plaintiffs' expense only to gift it to the public, all of which constitutes an unconstitutional taking of Plaintiffs' property without just compensation in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Sections 9 and 13, of the Wisconsin Constitution.

For the *certiorari* claim, we conclude that whether we focus on the incident or on the injury, the result is the same: namely, the claim is excluded under the policy. The incident alleged as a wrongful act in count one of the complaint is the Board's decision to refuse to grant approval to the Wolffs' PUD until it has a public access road in Wisconsin. The Wolffs allege this incident caused an injury of "an unconstitutional taking of Plaintiffs' property," because in order to satisfy the Board's condition for approval, the Wolffs would have to purchase additional property, build a road and dedicate it to the State of Wisconsin. That injury is bottomed on the Wolffs' desire to use their property in a particular fashion, which use is being denied because of the action of the Board. Therefore, according to the complaint, the incident at issue (the Board's decision) is indirectly connected to a loss of use of the Wolffs' property. The injury is specifically alleged to be a "taking" of property. Based on the allegations as set out in the complaint and the definition of "Arising Out Of" contained within the policy, we conclude that both the incident and its resulting injury are excluded from coverage under paragraphs III., D. and E. of the policy. Accordingly, National Union has no duty to defend Grant County against the first count.

Similarly, National Union has no duty to defend Grant County against the second count of the Wolffs' complaint. The second count, mandamus, incorporates the takings allegation from the first count, claiming indirectly a loss of use and a taking of the Wolffs' property. The relief prayed for is a "decision as required by law" or a remand for further proceedings. The incident and the injury

which give rise to this mandamus claim are the same as the *certiorari* claim. Accordingly, National Union has no duty to defend the second count.

The third count of the complaint, inverse condemnation, again incorporates the takings allegation from the *certiorari* claim and additionally alleges:

9. In order to obtain a public Wisconsin access road, Plaintiffs are expected to purchase private property, or an easement for road purposes over private property, at Plaintiffs' expense. Even if there is a price at which the private owners would sell, Plaintiffs would also be required to build a road thereon at their expense. Then, Plaintiffs would be required to gift such road to the public in order that the access be a public access.

10. Whether or not Plaintiffs were to perform such condition by making such substantial, exacted donation to the public, the imposition of said condition upon the use of Plaintiffs' property will nevertheless have unconstitutionally and substantially diminished the use and the value of Plaintiffs' property. ...

12. In the event that the Court vacates and removes said condition, as it should, so that the taking is not permanent, Plaintiffs will nevertheless have suffered a temporary taking of their property without just compensation in violation of Section 13, Article I, of the Wisconsin Constitution, for which Plaintiffs should be adequately compensated.

For this inverse condemnation claim, the Wolffs pray for "just compensation from Defendant for the property taken from them, in excess of the minimum jurisdictional amount." And finally, in count four, the Wolffs assert a violation of 42 U.S.C. § 1983, by incorporating the taking allegations of the *certiorari* and inverse condemnation claims. The Wolffs seek "actual damages" and "reasonable attorney fees" for this alleged civil rights violation. The incident is the same in counts three and four, as it was in counts one and two: the Board's conditioning approval of the Wolffs' PUD on providing a public access road in

Wisconsin. By so doing, the Wolffs allege a regulatory taking, which involves a type of property damage accomplished through the use of administrative procedures. See *Hoepker v. City of Madison Plan Comm'n*, 209 Wis.2d 633, 651, 563 N.W.2d 145, 152 (1997); see also *Eberle v. Dane County Bd. of Adjustment*, ___ Wis.2d ___, 595 N.W.2d 730 (1999). Although the injuries are more broadly stated and monetary compensation is requested, as well as other relief in these last two counts, the incidents and the injuries are nevertheless excluded from coverage because they are either indirectly connected with damage to or a loss of use of property or with an alleged taking, either temporary or permanent. Accordingly, National Union has no duty to defend counts three and four. Therefore, because we conclude there is no duty to defend any count set out in the complaint, we affirm the judgment of the circuit court.

CONCLUSION

We conclude that whether we focus upon the incident (the Board's decision of refusing to grant approval to the Wolffs' PUD until they have obtained public road access in Wisconsin) or the injuries which are alleged to have resulted from that decision, all four claims set out in the Wolffs' complaint are indirectly connected to property damage or to a regulatory taking. Therefore, the public officials and employees liability insurance policy excludes coverage for the Wolffs' lawsuit, and National Union has no duty to defend Grant County against it.³

³ Grant County also alleged that National Union was estopped from refusing to defend the County on theories of laches, waiver and estoppel. We conclude that this claim is without merit. National Union followed the procedures set out by the Supreme Court in *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis.2d 496, 521, 385 N.W.2d 171, 182-83 (1986), and therefore, we do not address this argument further.

By the Court.—Judgment affirmed.

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