COURT OF APPEALS
DECISION
DATED AND FILED

December 18, 2003

Cornelia G. Clark
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. 02-2994

Cir. Ct. No. 01-CV-854

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

DAIRY SOURCE, INC.,

PLAINTIFF,

V.

BIERY CHEESE CO., DENNIS H. BIERY AND JUDITH L. BIERY,

DEFENDANTS-APPELLANTS,

THREE CHEESE, LLC,

DEFENDANT,

AMERICAN EMPLOYERS' INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 VERGERONT, J. Biery Cheese Co., Dennis H. Biery, and Judith L. Biery[1] appeal the circuit court's order declaring that American Employers' Insurance Company did not have a duty to defend or to indemnify Biery Cheese in the suit filed against it by Dairy Source, Inc. We agree with the trial court that American Employers' does not have a duty to defend or to indemnify because of the exclusion for "personal and advertising injuries" that arise out of a breach of contract and the exclusion for those injuries that are caused with the knowledge of violating rights and inflicting injury. Accordingly, we affirm.

BACKGROUND

¶2 The relevant allegations in Dairy Source's complaint against Biery Cheese are the following. Dairy Source is a Wisconsin corporation engaged in the marketing and distribution of shelf-stable processed cheese products. Biery Cheese is an Ohio corporation engaged in the manufacture of fresh sliced cheese products. In 1999, Biery Cheese expressed interest in forming a partnership with Dairy Source to manufacture, market, and distribute Dairy Source products. The two companies executed a confidentiality and nondisclosure agreement in June 1999. Under the agreement, both companies agreed to keep strictly confidential and use only for the purposes of furthering their partnership such information as design and labeling techniques, distribution and customer lists, designs, drawings, formulas, and recipes. Dairy Source and Biery Cheese then formed a partnership whereby Biery Cheese would manufacture shelf-stable cheese products in glass jars, plastic containers, and aerosol cans for Dairy Source at cost; Dairy Source

[1] In this opinion, "Biery Cheese" refers to both the company and to Dennis and Judith Biery, the owners.

would market and resell those products; and Dairy Source and Biery Cheese would split profits from those sales. Prior to entering into the partnership with Dairy Source, Biery Cheese lacked the capacity and technology to manufacture shelf-stable processed cheese products. After executing the confidentiality agreement, Dairy Source provided Biery Cheese with the technology, formulas, recipes, brand and trade names, licensing rights, trade dress, packaging, and customer contacts necessary to manufacture Dairy Source products. The company began doing business under the partnership agreement in May 2000.

¶3 The complaint further alleged that beginning in December 2000, Dairy Source and Biery Cheese had repeated disputes over payments for products for which Dairy Source believed it had already paid. Biery Cheese repeatedly demanded the parties enter into a new "supply agreement" increasing payments by Dairy Source to Biery Cheese for the products it produced under the threat of production shutdown by Biery Cheese if its demands were not met. Biery Cheese also threatened to misappropriate and convert to its own use Dairy Source's products, customer lists, trademarks, labels, formulas, trade dress, and copyrights, all protected under the confidentiality agreement, unless Dairy Source sold its product line under conditions unacceptable to Dairy Source.

¶4 As a result of Biery Cheese's bad faith, the complaint alleges, Dairy Source was not able to reach a fair and reasonable supply agreement with Biery Cheese or a fair and reasonable agreement to sell its product line and book of business to Biery Cheese. Biery Cheese shut down production of Dairy Source products on August 31, 2001, and rejected purchase orders submitted by Dairy Source. Biery Cheese intentionally engaged in this conduct, knowing Dairy Source would be unable to retain another manufacturer, causing Dairy Source's customers to go directly to Biery Cheese. Biery Cheese then manufactured shelf-

stable cheese products using Dairy Source's protected formulas and techniques, packaged with Dairy Source's trademarked jar lids, copyrighted labels, trademark names, and protected label and lid artwork, and Biery Cheese sold these products directly to Dairy Source customers without the consent of Dairy Source and in violation of the confidentiality agreement. Biery Cheese contacted other Dairy Source customers, making harmful and untruthful statements. Biery Cheese also purchased, from Dairy Source suppliers, lid caps and canisters bearing Dairy Source trademarks and protected labels either to use in selling product or to hold to prevent Dairy Source from using them.

¶5 In its complaint, Dairy Source sought damages for breach of the confidentiality agreement, misappropriation of trade secrets in violation of WIS. STAT. § 134.90, and conversion.[2] For the breach of confidentiality agreement, Dairy Source alleged that Biery Cheese acknowledged in the agreement that unauthorized use of the confidential information would cause Dairy Source irreparable harm. For the trade secret claim, Dairy Source alleged Biery Cheese knowingly and intentionally took control of Dairy Source's confidential and proprietary information through improper means and without consent. For the conversion claim, Dairy Source alleged that Biery Cheese knowingly and intentionally took Dairy Source's proprietary, confidential, and trademarked information and property, including Dairy Source products, customer formulas, technology, and manufacturing methods, and did so willfully and maliciously,

[2] Dairy Source also sought injunctive relief, dissolution of its partnership with Biery Cheese, and an accounting and offset on returned product. Biery Cheese does not contend the insurance policy provides coverage for these causes of action, and we do not consider them on this appeal.

resulting in serious interference with the rights of Dairy Source to possess that information and property.

¶6 Biery Cheese sought coverage for its potential liability under its American Employers' commercial general liability insurance policy. The relevant portions of the policy provide:

> COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies.
>
> …
>
> 2. Exclusions
>
> This insurance does not apply to:
>
> a. "Personal and advertising injury":
>
> (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";
>
> …
>
> (6) Arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement";
>
> …
>
> SECTION V – DEFINITIONS
>
> 1. "Advertisement means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.
>
> …

> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> …
>
> f. The use of another's advertising idea in your "advertisement"; or
>
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

¶7 American Employers' accepted Biery Cheese's tender of defense with a reservation of rights. It then intervened in this action and asserted a cross-claim against Biery Cheese, seeking a declaration that the policy did not provide coverage for Dairy Source's allegations. The trial court determined that Ohio law governed in analyzing the insurance policy. The court then concluded the policy did not provide coverage for the allegations in the complaint because of the exclusion in 2(a)(1), which we will refer to as the "knowing injury exclusion," and the exclusion in 2(a)(6) relating to breach of contract.

DISCUSSION

¶8 Biery Cheese contends the trial court erred because the breach of contract exclusion applies only to the claim for breach of the confidentiality agreement and there are other claims that arguably constitute a "personal and advertising injury." According to Biery Cheese, the knowing injury exclusion does not apply to these other claims.

¶9 Although the parties and the trial court do not refer to Biery Cheese's motion for a declaratory ruling as a motion for summary judgment, that is in effect what it was. We review summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Generally, summary judgment is proper

where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

¶10 Construction of insurance policy language presents a question of law, which we review de novo. ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). Whether an insurer has a duty to defend or indemnify when there are no facts in dispute also presents a question of law. ***Professional Office Buildings, Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 580, 427 N.W.2d 427 (Ct. App. 1988). Finally, the question of which state's law controls is also a question of law. ***American Family Mut. Ins. Co. v. Powell***, 169 Wis. 2d 605, 608, 486 N.W.2d 537 (Ct. App. 1992).

¶11 The parties debate whether Ohio or Wisconsin law applies in construing the insurance contract. The first step in a choice of law analysis is to determine whether the laws of the two states differ. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, 233 Wis. 2d 314, 327 n.2, 607 N.W.2d 276.

¶12 Under Wisconsin law, an insurer's duty to defend is determined by comparing the allegations in the complaint to the terms of the insurance policy. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. An insurer's duty to defend its insured in a suit by a third party exists when the allegations in the complaint, if proved, "would give rise to the possibility of recovery that falls under the terms and conditions of the insurance policy." ***Id.*** (citation omitted). The court is to consider only the allegations in the complaint, without resort to extrinsic evidence. ***Id.*** The duty to defend is broader than the duty to indemnify, because the duty to defend is triggered by arguable, as opposed to actual, coverage. ***Id.***, ¶20. We therefore liberally construe the

allegations in the complaint, assume all reasonable inferences in favor of the insured, and resolve any doubt about the duty to defend in favor of the insured. ***Id.*** In addition, although the complaint may contain some theories of liability not covered by the insurance policy, the insurer is obligated to defend the entire action if even one theory of liability appears to fall within the coverage of the policies. ***Id.***, ¶21.

¶13 The only difference the parties point to between Ohio and Wisconsin law in determining an insurer's duty to defend is that under Ohio law courts are to look beyond the complaint and examine extrinsic evidence in certain situations. As under Wisconsin law, the initial inquiry under Ohio law is whether the allegations state a claim that is arguably or potentially within the policy coverage. ***Cincinnati Ins. Co. v. Anders***, 789 N.E.2d 1094, 1097 (Ohio 2003); ***City of Willoughby Hills v. Cincinnati Ins. Co.***, 459 N.E.2d 555, 558 (Ohio 1984). If the court concludes the complaint does not contain arguably or potentially covered claims, the insurer does not have a duty to defend. ***Motorists Mut. Ins. Co. v. Nat'l Dairy Herd Improvement Ass'n, Inc.***, 750 N.E.2d 1169, 1176-77 (Ohio Ct. App. 2001). However, unlike Wisconsin law, under Ohio law there are situations where, even if the allegations of the complaint might arguably give rise to coverage, the court may look to extrinsic evidence to conclude there is no coverage and therefore no duty to defend. ***Anders***, 789 N.E.2d at 1097 (citing ***Preferred Risk Ins. Co. v. Gill***, 507 N.E.2d 1118, 1123-24 (Ohio 2002)).

¶14 We can see no genuine difference between a court's obligation under Wisconsin law to liberally construe the allegations in the complaint and impose a duty to defend if any claims are arguably covered by the terms of the policy and the court's obligation under Ohio law to make an initial inquiry as to whether the complaint contains potentially or arguably covered claims. The difference that

Biery Cheese highlights—that the court under Ohio law may consider extrinsic evidence in certain situations—appears to apply only to narrow the duty to defend, not to broaden it, and therefore does not appear to benefit Biery Cheese. In any event, that difference does not affect the initial analysis of the complaint, on which there is no genuine difference. We therefore apply Wisconsin law in determining whether American Employers' has a duty to defend Biery Cheese based on the allegations of the complaint. *See* ***Wisconsin Label Corp.***, 233 Wis. 2d at 327 n.2 (applying Wisconsin law because there was no genuine difference in the laws of the two states).

¶15 We will assume for purposes of this decision that the breach of contract exclusion applies only to the claim for breach of the confidentiality agreement. We therefore turn to Biery Cheese's position that there are other arguably covered claims. Biery Cheese argues that the allegations in the complaint arguably show personal and advertising injuries under both subsections (14)(f) and (g). Under subsection (f), Biery Cheese relies on allegations describing the confidential and proprietary information it allegedly misappropriated and contends that customer information, marketing aids, and point of sale material arguably constitute "advertising ideas." Under subsection (g), Biery Cheese contends that the allegations that it manufactured and sold shelf-stable cheese products bearing Dairy Source's protected labels and trademarked jar lids arguably state a claim for trademark or trade dress infringement. According to Biery Cheese, both the use of advertising ideas and the trademark or trade dress infringement arguably occurred "in [its] advertisement" as required by both subsections. This is so, according to Biery Cheese, because of the allegations that it used Dairy Source's lids, packaging, and labels, which are advertisements in Biery Cheese's view, and because of the allegations that Biery Cheese contacted

Dairy Source's customers to gain their business, which in Biery Cheese's view is a form of advertising its products. We do not decide whether any of these allegations constitute a "personal and advertising injury" under the policy, because, even if we assume they do, we conclude the knowing injury exclusion applies to them.

¶16 This knowing injury exclusion states that no coverage exists for a personal and advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" The complaint clearly alleges that the materials and information that, in Biery Cheese's analysis, arguably constitute either advertising ideas, trademarks, or trade dress were used by Biery Cheese knowing that they were protected by the confidentiality agreement, knowing that Biery Cheese was using them in violation of that agreement, and knowing that they were Dairy Source's proprietary information and materials, all without Dairy Source's consent. Resolving all doubts in Biery Cheese's favor, there is simply no way to read these allegations other than as allegations that Biery Cheese did these things knowing they would violate the contractual and proprietary rights of Dairy Source, and knowing that they were using Dairy Source's advertising ideas and infringing on Dairy Source's copyright, trademark, and trade dress.

¶17 Biery Cheese argues that the knowing injury exclusion nonetheless does not preclude coverage because the claims of conversion, misappropriation of trade secrets, and trademark/trade dress infringement do not require that the defendant intended to violate the rights of the plaintiff or to injure the plaintiff. Therefore, according to Biery Cheese, "the possibility of liability exists under the Complaint even with no intentional act, [and] the allegations of the Complaint arguably bring the case within the Policy coverage." Biery Cheese relies, without

explanation, on Ohio cases for the elements of these claims, apparently assuming that, because in its view Ohio law governs construction of the insurance contract between American Employers' and Biery Cheese, Ohio law also governs the claims alleged against Biery Cheese. We will assume without deciding that an intent to violate the rights of the plaintiff or to injure the plaintiff is not a necessary element of the claims Biery Cheese contends constitute advertising injuries. Even if we do so, we are not persuaded by Biery Cheese's argument that the elements of the claims control rather than the specific conduct alleged in the complaint. Biery Cheese does not develop this argument beyond a bare assertion and does not provide authority for it. The fact that liability for the claims asserted in this complaint might be established without proving conduct that would come within the knowing injury exclusion does not alter the fact that the conduct establishing liability alleged *in this complaint* indisputably comes within the exclusion. We can see that if this complaint could arguably be read to suggest that Biery Cheese did not do the acts alleged with knowledge that they would violate Dairy's Source's rights and inflict a personal and advertising injury, then Biery Cheese might have liability for conduct that would not come within the exclusion. But we conclude this complaint cannot be read in that manner, even when read most favorably to Biery Cheese. Based on the allegations in this complaint, there is not a possibility of liability for conduct that does not come within the exclusion.

¶18 We conclude the complaint does not allege facts that, if proved true, would result in coverage under the insurance policy. Accordingly, we affirm the order of the trial court declaring that American Employers' has neither a duty to defend nor a duty to indemnify Biery Cheese.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.