COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2014

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. 2013AP1320 **Cir. Ct. No. 2012CV2342**

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

PUMPKIN, INC., GLEN ROETHLE AND SUSAN JOY ROETHLE,

PLAINTIFFS,

UNITED HEALTHCARE OF WISCONSIN, INC.,

INVOLUNTARY-PLAINTIFF,

V.

BASIL E. RYAN, JR., D/B/A RYAN MANAGEMENT, INC., BASIL E. RYAN, JR., INDIVIDUALLY, BASIL E. RYAN, III AND BLAKE RYAN,

DEFENDANTS-APPELLANTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Basil E. Ryan, Jr., d/b/a Ryan Management Inc., Basil E. Ryan, Jr., individually, Basil E. Ryan, III, and Blake Ryan (collectively, the Ryans) appeal a declaratory and summary judgment in favor of American Family Mutual Insurance Company. The circuit court concluded that American Family had no duty to defend the Ryans against claims alleged in a civil complaint filed by Pumpkin, Inc., Glen Roethle, and Susan Joy Roethle.[1] We affirm.

BACKGROUND

¶2 According to the complaint, Pumpkin, Inc. is a corporation in the business of providing crane equipment and crane operators to third parties, Roethle is an employee of Pumpkin, Inc., and Susan Joy Roethle is his wife. The complaint further alleges that Pumpkin, Inc. contracted to provide Ryan, Jr. with equipment and personnel during the period from November 2010 through December 2011. Pumpkin, Inc. and the Roethles state six causes of action against the Ryans arising during the contract term: (1) breach of contract; (2) conversion; (3) theft; (4) battery; (5) conspiracy to cause injury; and (6) malicious and outrageous conduct warranting punitive damages. The Ryans filed an answer denying the allegations, asserting self-defense in regard to the battery, and stating counterclaims.

[1] In the remainder of this opinion, we refer to Glen Roethle by his surname and we refer to Susan Joy Roethle by her full name.

¶3 During the time period described in the complaint, American Family insured the Ryans under a continuous series of farm/ranch insurance policies. Upon receiving the complaint in this case, American Family assumed defense of the Ryans and assigned outside counsel for them. American Family then successfully moved to intervene in the action, to bifurcate the proceedings, and to stay litigation of the Ryans' liability until the circuit court determined coverage issues.

¶4 After the parties conducted discovery, American Family moved for summary and declaratory judgment. As relevant here, American Family argued that it had no duty to defend the Ryans because the governing insurance policies do not provide coverage for the intentional acts alleged by Pumpkin, Inc. and the Roethles. The circuit court agreed with American Family. Accordingly, the circuit court granted American Family summary and declaratory judgment, and the Ryans appeal.

DISCUSSION

¶5 Summary judgment is appropriate only when no genuine dispute exists as to any material fact, and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[2] Whether the circuit court properly granted summary judgment is a question of law that we consider independently of the circuit court's determination. *See* ***Brown Cnty. v. OHIC Ins. Co.***, 2007 WI App 46, ¶9, 300 Wis. 2d 547, 730 N.W.2d 446.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶6 The decision to grant or deny a declaratory judgment rests in the circuit court's discretion. ***Olson v. Farrar***, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1. When the circuit court's exercise of discretion turns on a question of law, however, we review the legal question *de novo*. ***Id.*** The circuit court's decision to grant declaratory judgment here turned on the interpretation of an insurance policy, which presents a question of law. *See* ***id.*** We therefore review the grant of declaratory judgment *de novo*. *See* ***id.***

¶7 The Ryans assert that American Family has a duty to defend them against the six causes of action alleged by Pumpkin, Inc. and the Roethles. "[A]n insurer must defend all suits where there would be coverage if the allegations were proven, even if the allegations are 'utterly specious.'" ***Id.***, ¶29 (citation omitted). Moreover, "[i]f an insurance policy covers one claim, the insurer must provide a defense for the entire action." ***State v. GE-Milwaukee, LLC***, 2012 WI App 5, ¶6, 338 Wis. 2d 349, 808 N.W.2d 734. On appeal, the Ryans rely on a theory that American Family must defend them because the insurance policies at issue provide coverage for the battery claim.

¶8 "An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy." ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. The nature of the claim is controlling. *See* ***id.***

¶9 The relevant contractual terms are not in dispute. American Family agreed to provide coverage for an "occurrence," defined in the policies as an "accident." Further, no dispute exists that the policies exclude coverage "for damages due to bodily injury or property damages expected or intended from the stand-point of the insured." As to the nature of the battery claim, the complaint

alleges that Roethle was at the Ryan property for business purposes on June 1, 2011, when Ryan, Jr. "intentionally engaged in battery upon [] Roethle, with intent to cause bodily harm to him."

¶10 Because the duty to defend is triggered by the allegations in the complaint, the duty is initially assessed pursuant to the "four corners" rule. ***Id.***, ¶27. The rule provides: "'when a complaint alleges facts that, if proven, would constitute a covered claim, the insurer must appoint defense counsel for its insured without looking beyond the complaint's four corners.'" ***Id.*** (citation and brackets omitted). In this case, of course, American Family did appoint counsel and provide a defense for the Ryans, and the materials for and against summary and declaratory judgment include not only the complaint and the insurance policies but also affidavits and deposition testimony. Under these circumstances, the purpose of the four corners rule is served and the rule is not further implicated. *See* ***Olson***, 338 Wis. 2d 215, ¶70. Accordingly, extrinsic evidence may be considered when determining whether American Family would provide coverage if Pumpkin, Inc. and the Roethles prove the battery claim. *See* ***id.***, ¶39.

¶11 The extrinsic evidence presented by the parties includes the deposition testimony offered by Roethle and Ryan, Jr. in regard to their June 1, 2011 encounter. Roethle testified that Ryan, Jr. "pound[ed Roethle] in the side of the head." Roethle added that he was "n[o]t claiming any of this was accidental." Ryan, Jr. testified that he had "a struggle" with Roethle when Roethle arrived at the Ryan property. As summarized in the Ryans' appellate brief, Ryan, Jr. said that he "tried to keep Mr. Roethle from exiting his vehicle.... As Mr. Roethle continued to try to exit the vehicle, Mr. Ryan[, Jr.] continued to push him back in." The Ryans characterize Roethle as "an uninvited trespasser" and the encounter between Roethle and Ryan, Jr. as "a shoving match."

¶12 The Ryans contend that the differing descriptions of the June 1, 2011 incident render summary and declaratory judgment inappropriate and require a trial on the coverage issue. They insist that if they are afforded such a trial, the fact-finder might believe Ryan, Jr. and conclude that the June 1, 2011 incident was a covered occurrence because his actions were privileged as self-defense or as a reasonable effort to "remove an uninvited trespasser from his property." We reject this approach. The law is clear that "[t]he insurer's duty to continue to defend is contingent upon the court's determination that the insured has coverage *if the plaintiff proves his case*." *See* ***Sustache***, 311 Wis. 2d 548, ¶29 (emphasis added). The materials submitted here reflect that the Ryans do not have coverage if Pumpkin, Inc. and the Roethles prove the intentional battery that they have alleged. We therefore conclude that American Family has no further obligation to defend the Ryans.

¶13 Our conclusion is dictated by ***Sustache***. There, the supreme court considered an insurance company's duty to defend a suit in which the insured was accused of committing an intentional battery causing death, and the insured answered that he acted in self-defense. ***Id.***, ¶¶6-7. In ***Sustache***, as here, the policy provided coverage for "an occurrence," defined as "an accident," and the policy, as here, excluded coverage for intentional bodily injury. *See* ***id.***, ¶¶9-10. The insurer in ***Sustache***, again as here, provided an initial defense and engaged in discovery under a reservation of rights, then moved for summary judgment declaring that the insurer had no duty to defend because the policy excluded coverage. *See* ***id.***, ¶¶7,12.

¶14 The supreme court in ***Sustache*** compared the coverage provided under the policy to the allegations in the complaint, supplemented by affidavits and deposition testimony. *See* ***id.***, ¶¶30, 51. The court determined that the policy

term "accident" referred to "an unintended and unforeseen injurious occurrence." *See* ***id.***, ¶¶32, 54. The court further determined that the plaintiff in ***Sustache*** did not allege injury from an "accident" when claiming damages that flowed from the insured's "volitional assault that was intended, anticipated, and expected." *See* ***id.***, ¶53. Because "the plaintiffs' suit was not brought ... for damages caused by an occurrence to which the policy applies, [the insurer] ha[d] no duty to continue to defend." ***Id.***, ¶60 (quotation marks and one set of brackets omitted).

¶15 In the instant case, Pumpkin, Inc. and the Roethles allege that Ryan, Jr. intentionally assaulted Roethle. The allegation is inconsistent with the term "accident." *See* ***id.***, ¶54. ***Sustache*** teaches that American Family therefore has no duty to continue to defend.

¶16 The Ryans respond by pointing to language in another case, ***Olson***. There, the supreme court observed: "[s]ometimes ... the facts bearing on coverage are disputed, and coverage cannot be determined until these factual disputes are resolved in the circuit court." ***Id.***, 338 Wis. 2d 215, ¶36. The Ryans believe that this statement supports their view that, because they dispute the accuracy of the battery allegation, they are entitled to a continuing defense from American Family and a coverage trial to resolve the dispute. The Ryans misconstrue ***Olson***. While that case acknowledges the unremarkable reality that circuit courts must sometimes resolve factual disputes relevant to coverage, ***Olson*** expressly confirms the long-standing Wisconsin rule that "'[t]he duty of defense depends on the nature of the claim and has nothing to do with the merits of the claim.'" ***Id.***, ¶29 (citing ***Elliott v. Donahue***, 169 Wis. 2d 310, 321, 485 N.W.2d 403 (1992)). Thus, under ***Olson***, the Ryans' contention that a factual dispute exists about the merits of the battery claim neither demonstrates a duty by the insurer to defend nor requires a trial to resolve coverage. *See* ***id.***

¶17 The Ryans nonetheless insist that "[a]s in ***Olson***, this case should be remanded for a coverage trial." Their position is perplexing given the supreme court's resolution of the issues in ***Olson*** and the marked dissimilarity between that case and this one. In ***Olson***, which involved a property damage dispute, the supreme court examined a circuit court's decision to relieve an insurer of the duty to defend and determined that the circuit court had based its decision on ambiguous language in the applicable insurance policy. *See* ***id.***, ¶¶20, 71. Because well-settled rules of insurance policy interpretation require construing ambiguous policy language in favor of an insured seeking coverage, the ***Olson*** court rejected the circuit court's analysis and construed two ambiguous policy exclusions in favor of coverage. *See* ***id.***, ¶¶42, 71. This aspect of ***Olson*** offers neither support for the Ryans nor guidance for this court because the parties here do not contend that any material provisions of the governing policies are ambiguous.

¶18 The ***Olson*** court next considered a third policy exclusion and observed that "there may be genuine issues of material fact" as to that exclusion, but, as ***Olson*** explains, the circuit court failed to address this exclusion during the summary judgment proceedings. *See* ***id.***, ¶69. The supreme court therefore remanded the matter, not for a coverage trial as the Ryans claim, but for further proceedings to address the exclusion that the circuit court had previously disregarded. ***Id.***, ¶¶69, 72. This final aspect of ***Olson*** offers no assistance in resolving issues in the instant case because the parties do not contend that the circuit court overlooked an applicable policy provision.

¶19 In short, ***Olson*** involved an ambiguous insurance policy and an incomplete circuit court review, conditions that are not present here. Accordingly, nothing in ***Olson*** suggests that further factual exposition is required to determine

whether American Family has a continuing duty to defend the Ryans. The undisputed material facts—including the terms of the policies, the allegations in the pleadings, and the testimony submitted to the circuit court—demonstrate that, as a matter of law, the Ryans do not have coverage if Pumpkin, Inc. and the Roethles prove their claim that Ryan, Jr. intentionally battered Roethle. *See* ***Sustache***, 311 Wis. 2d 548, ¶22. "Where it is clear that the policy was not intended to cover the claims asserted, the inquiry ends."[3] ***Id.***, ¶57.

¶20 Before we close, we acknowledge that the Ryans' appellate brief includes an additional contention. Specifically, the Ryans assert that American Family must continue to defend them because, they say, at a trial to resolve their liability, the circuit court might decide to include negligence questions on the verdict. *See* WIS. STAT. § 802.09(2) (providing that issues not raised in the pleadings but tried by the parties shall be treated as if raised in the pleadings). To preserve a claim for appellate review, however, a litigant must first present the claim to the circuit court and must do so in a way that ensures the circuit court understands it is asked to make a ruling. *See* ***Ladwig v. Ladwig***, 2010 WI App 78, ¶28 n.14, 325 Wis. 2d 497, 785 N.W.2d 664. The Ryans fail to show that they

[3] Although it is not necessary for resolution of this appeal, we add that the American Family insurance policies here would not provide coverage for damages resulting from the altercation on June 1, 2011, even if Pumpkin, Inc. and the Roethles adopted Ryan, Jr.'s description of the incident as a "shoving match" between a trespasser and a property owner. "'[A] result, though unexpected, is not an accident; the means or cause must be accidental.'" ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶53, 311 Wis. 2d 548, 751 N.W.2d 845 (citations omitted). The testimony that Ryan, Jr. offered in his deposition reflects intentional acts, not "'an event or condition occurring by chance or arising from unknown or remote causes.'" *See* ***id.***, ¶53 (citations omitted). Thus, his testimony does not describe an accident and fails to suggest that the June 1, 2011 incident gave rise to a covered claim, notwithstanding his contention that his actions were privileged because he acted either in self-defense or to repel a trespasser. As the ***Sustache*** court notes, "even if privileged, 'an injury deliberately caused by an act of self-defense is still not an injury that was caused by an accident.'" ***Id.***, ¶53 n.13 (citation omitted).

cited WIS. STAT. § 802.09(2) in circuit court, much less that they presented the statute as a basis to deny American Family's motion for summary and declaratory judgment. Accordingly, we decline to address the issue. *See* ***Ladwig***, 325 Wis. 2d 497, ¶28 n.14.

By the Court.—Judgment affirmed.

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