COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1998

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. 97-0542

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

FOX CITY SCALE, INC., AND GARY BLASEWITZ,

PLAINTIFFS-CO-APPELLANTS,

MILWAUKEE MUTUAL INSURANCE COMPANY, AND GENERAL CASUALTY COMPANY OF WISCONSIN,

INTERVENING PLAINTIFFS-RESPONDENTS,

V.

BADGER SCALE, INC., AND GREGORY A. STRATZ,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM E. CRANE, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Fox City Scale, Inc. and Gary Blasewitz, and Badger Scale, Inc. and Gregory A. Stratz co-appeal from an order granting declaratory judgment in favor of their insurers, Milwaukee Mutual Insurance Company and General Casualty Company of Wisconsin, which determined that the insurers did not owe a duty to defend or indemnify the insureds. We affirm.

The following facts are undisputed. Blasewitz and Stratz were equal shareholders in Fox City Scale, Inc. (Old Fox City). Due to disagreements between them, Blasewitz and Stratz entered into a Corporate Separation Agreement (the Agreement) in September 1995 and divided Old Fox City's assets, liabilities and customers between them. Blasewitz retained the Fox City name (hereafter New Fox City) and Stratz opened Badger Scale. Both entities sold, installed, serviced and repaired commercial and industrial scale and weighing devices. The Agreement provided, inter alia, that each company would receive a list of customers from Old Fox City and that each company was prohibited for a one-year period from soliciting, directly or indirectly, any business from the other's protected customer list.

Commercial disputes arose between the new entities. In February 1996, Blasewitz/New Fox City sued Stratz/Badger, alleging eight claims for monetary and/or declaratory relief. The amended complaint alleges that at or about the time of the separation, Stratz took actions which violated the Agreement and harmed the business reputations of Blasewitz/New Fox City by making defamatory statements about Blasewitz, intimidating employees to prevent Blasewitz/New Fox City from retaining and hiring employees, suggesting criminal activity by Blasewitz and Old Fox City, and making allegations about the financial activities of Old Fox City which negatively affected the financial situation of New Fox City. New Fox City's legal theories for relief were tortious interference with

contractual relations and prospective contractual relations, deceptive and fraudulent representations under § 100.18, STATS., business defamation and disparagement, civil conspiracy, unfair trade practices, breach of the Agreement, and declaratory relief of the parties' rights under the Agreement. In its amended answer and counterclaim, Badger denied the material allegations of the amended complaint and pled counterclaims of tortious interference with contractual relations, deceptive and fraudulent representations under § 100.18, civil conspiracy, unfair trade practices, and breach of the Agreement.

The parties' insurers intervened in the action. Milwaukee Mutual insured Stratz/Badger and Old Fox City/Blasewitz. General Casualty insured New Fox City/Blasewitz and arguably owed coverage relating to Badger's counterclaims. The intervening insurers sought a declaratory judgment that they did not have a duty to defend or indemnify their insureds. The trial court agreed that their commercial general liability policies did not afford coverage to the insureds for the claims and counterclaims because this was "a battle between the two parties over the separation of the firms, not in the conducting of the business of either of them" as contemplated by the business owner's coverage each insured purchased. The insureds appeal.

The question of whether insurance coverage exists for the particular claims in a lawsuit is a question of law we review de novo. *See* ***Elliott v. Donahue***, 169 Wis.2d 310, 316, 485 N.W.2d 403, 405 (1992). "An insurer has a duty to defend its insured if the complaint alleges facts that, if proven, would give rise to liability under the policy." *See* ***Atlantic Mut. Ins. v. Badger Med. Supply,*** 191 Wis.2d 229, 236, 528 N.W.2d 486, 489 (Ct. App. 1995) (citations omitted).

The insureds claimed coverage under the advertising injury and personal injury sections of the policies. Both policies state that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages" because of personal injury or advertising injury to which the policy applies.

In a ruling from the bench, the trial court concluded that the dispute arose from the separation of the businesses, not from conduct of the respective new businesses vis-à-vis third parties. The insureds argue that their claims and counterclaims alleged facts which constitute covered injuries under the policies. We assume without deciding that the pleadings allege conduct within the business of each company and that the conduct falls within the policies' definitions of personal and advertising injury. However, close inspection of the genesis of this dispute reveals that the parties allege that the other failed to perform pursuant to the Agreement and that the disputes arose from the termination of Old Fox City and the separation into two new businesses. We conclude that the principle of fortuitousness applies and coverage is precluded for occurrences and claims in the aftermath of the separation.[1]

The principle of fortuitousness is described as follows:

> [I]nsurance covers fortuitous losses and [particular] losses are not fortuitous if the damage is intentionally caused by the insured. Even where the insurance policy contains no language expressly stating the principle of fortuitousness, courts read this principle into the insurance policy to further specific public policy objectives including (1) avoiding profit from wrongdoing; (2) deterring crime; (3) avoiding fraud against insurers; and (4) maintaining coverage of a scope consistent with the reasonable

[1] We are not required to address the appellate issues as set forth by the parties. *See* ***Haessly v. Germantown Mut. Ins. Co.,*** 213 Wis.2d 108, 116, 569 N.W.2d 804, 807 (Ct. App. 1997).

> expectations of the contracting parties on matters as to which no intention or expectation was expressed.

Haessly v. Germantown Mut. Ins. Co., 213 Wis.2d 108, 117, 569 N.W.2d 804, 808 (Ct. App. 1997) (quoted source omitted; emphasis omitted). "This principle is also supported in Wisconsin insurance law as the rule that an insurance policy should be construed as providing coverage 'as it is understood by a reasonable person in the position of the insured.'" ***Id.*** (quoted source omitted).

We conclude that the fourth public policy objective of the principle governs here. A reasonable insured would not expect that the insurers' commercial general liability policies would provide coverage for disputes with a former business associate arising out of the dissolution of a previous corporate entity. The claims and counterclaims asserted in this case involve conduct by former business partners and do not seek damages for conduct in the course of Badger's and New Fox City's businesses or in the advertising of their goods, services or products. Rather, the claims are fall-out from the dissolution of Old Fox City. The litigants want their insurers to fund their post-Old Fox City disputes. We conclude that the insurers did not agree to accept the risk that the new entities' conduct would be driven by their antagonism towards each other.[2]

This case is similar to ***Farr v. Farm Bureau,*** 61 F.3d 677 (8th Cir. 1995). In ***Farr***, two shareholder groups were battling over management of the company. Claims and counterclaims were filed. The minority shareholders sought coverage under the company's commercial general liability policies' personal injury and advertising injury provisions. *See* ***id.*** at 678-79. Applying Nebraska law, the court concluded that the policies were not intended to cover

[2] This is how we construe the trial court's ruling from the bench.

internal disputes among shareholders; they were intended to cover corporate liability to a third party. *See* ***id.*** at 682.

New Fox City/Blasewitz argues that the principle of fortuitousness is coextensive with the policies' enumerated exclusions and that if the insurers did not exclude the types of claims and counterclaims in this case, the insureds have coverage. We disagree. The principle of fortuitousness furthers public policy objectives, is implied in each insurance contract and cannot be negated by the manner in which the exclusions are drafted. *See* ***Haessly,*** 213 Wis.2d at 117, 569 N.W.2d at 808 .

By the Court.—Order affirmed.

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