COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-3050

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

SYBRON INTERNATIONAL CORPORATION, SYBRON TRANSITION CORP. AND KERR MANUFACTURING CORPORATION,

PLAINTIFFS-APPELLANTS,

V.

SECURITY INSURANCE COMPANY OF HARTFORD,

DEFENDANT-RESPONDENT,

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, ONE OF THE WAUSAU INSURANCE COMPANIES, GLOBE INDEMNITY COMPANY, ONE OF THE ROYAL INSURANCE COMPANIES, HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, MEDMARC, A/K/A HAMILTON RESOURCES CORPORATION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Reversed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Sybron International Corporation, Sybron Transition Corp., and Kerr Manufacturing Corporation (collectively, "Sybron"), appeal from the circuit court judgment following the order granting summary judgment to their insurer, Security Insurance Company of Hartford. Sybron argues that the circuit court erred in concluding that, under New York law, it failed to timely notify Security of a claim for which Sybron was seeking insurance coverage under its Security policies. Sybron contends that whether it had a reasonable basis for failing to timely notify Security is a material factual issue. Sybron is correct and, therefore, we reverse.

I. BACKGROUND

¶2 According to the summary judgment submissions, on March 30, 1989, Kerr Manufacturing Corporation, a subsidiary of Sybron International Corporation, and other parties, including the New York University Dental School, were served with a complaint filed in New Jersey by the estate of Dr. Joel Spector. The Spector suit alleged that, in 1988, Dr. Spector died from malignant mesothelioma.[1] The suit further alleged that Dr. Spector had been exposed to "asbestos-containing products and materials … designed, manufactured and distributed" by Kerr during his dental school years, 1955-1960, and during his subsequent dental career.

[1] Malignant mesothelioma is a form of cancer associated with exposure to asbestos.

¶3 Upon receiving the complaint in the New Jersey Spector suit, Stephen Tomassi, counsel for Sybron, in the words of his affidavit, "undertook an examination of available insurance coverage for [the] action" and found that "[f]rom 1996 [sic] to part of 1971," Security "issued primary policies to Sybron."[2] In April 1989, Tomassi, according to his affidavit, "contacted the attorney representing the Estate of Spector, [Ronald] Grayzel, and inquired when the exposure took place so that [he] could determine if there was potential insurance coverage for the lawsuit." According to Tomassi, Grayzel explained that "the only exposure he was aware of occurred during the time Dr. Spector was in dental school from 1955 to 1959." Tomassi then wrote Grayzel, stating:

> As I informed you in our phone conversation on April 25, 1989, Kerr is unable to identify the insurance carrier that provided coverage for it during the years 1955 to 1960, the years in which you believe Joel Spector was exposed to Kerr products. As a result, Kerr will be directing the defense of this lawsuit and retaining counsel in New Jersey to represent it.

¶4 As detailed in his affidavit, Tomassi determined that the Security policies provided no coverage for the Spector suit against Kerr. He made that determination based on several factors, including legal research and his experience

[2] Tomassi's affidavit contains a "summary of known primary coverages" from 1964 through 1988. According to the summary, Security insured Sybron, under various policy numbers, for policy years 1965-1971. According to Tomassi's November 4, 1992 letter to all identified insurers in the Spector suit, however, Security was the insurer for the policy period 1967-1971.

in lawsuits dealing with similar coverage issues.[3] Tomassi concluded that New York law requires "injury-in-fact" for the triggering of insurance coverage and,

[3] Sybron points out that Sybron and Security also were parties in a case involving the death of another dentist, Dr. Alan Press, allegedly as the result of exposure to asbestos-containing products manufactured by Kerr. In that case, Orion Group (Security's parent company, according to Tomassi's affidavit in the instant case) issued a letter to Tomassi on June 13, 1990, stating, "This is to advise you that, should plaintiff succeed in showing that exposure to asbestos caused the death of its decedent, your policy will only respond to such exposure as was proven to have occurred during the policies' effective dates." Further, in a "memorandum of law" filed in the Press case in 1993, Security cited three federal district court cases it characterized as "all holding that New York follows the injury in fact trigger theory with respect to claims for bodily injury" and "reject[ing] assertions that coverage may be triggered (1) by mere exposure to a harmful substance without actual injury during the policy period, or (2) by manifestation of symptoms of an injury which may have occurred earlier, or (3) under a continuous trigger theory."

Security responds by pointing to earlier correspondence in the Press case (an August 23, 1989 letter from Orion Group to Tomassi) which warned Sybron that "[b]ecause of the uncertainty in the law, it is our suggestion that you put each carrier on notice, from the first exposure right on through the manifestation of asbestosis." Security also argues that Sybron's reliance on documents from the Press case is "misleading," particularly given that the documents were generated subsequent to the complaint in the instant case.

Security's response, while well-reasoned in some respects, is problematic in others. After all, Security seeks to rely on correspondence (albeit earlier correspondence) from the Press case while faulting Sybron for doing so. And Security maintains that the *duration* of Sybron's failure to provide notice of the Spector suit goes to establish, in part, the *unreasonableness* of Tomassi's decision. If that is so, then correspondence in the Press case between Sybron and Security, subsequent to the complaint in the Spector suit, could be important as long as it was generated during the time between the filing of the Spector suit and Sybron's notice of the suit to Security.

No doubt, the timing, circumstances, and correspondence in the Press case will assist a jury in evaluating what, as we will explain, remains the genuine issue of material fact: whether Tomassi's delay in providing Security notice of the Spector suit was reasonable.

Additionally, Security also argues that we should affirm the summary judgment based on the doctrine of issue preclusion because the federal courts in the Press case concluded that Sybron's failure to provide notice of the Press suit for twenty-two months, to a different insurer, was unreasonable. *See* ***Sybron Transition Corp. v. Sec. Ins. Co. of Hartford***, 107 F.3d 1250, 1257 (7th Cir. 1997). We disagree.

(continued)

therefore, that the Security policies covering Kerr subsequent to Dr. Spector's dental school years could not provide coverage for Dr. Spector's disease and death because New York law "rejects a continuous trigger of policies from first exposure through manifestation regardless of when actual injury occurs." Accordingly,

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Issue preclusion requires, among other things, that the dispositive issues of the two cases be essentially the same. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). "Whether issue preclusion should bar litigation in a particular situation is a decision that must be made on considerations of fundamental fairness." ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 304, 592 N.W.2d 5 (Ct. App. 1998), *review denied sub nom.* ***Precision Erecting v. AFW Foundry***, 225 Wis. 2d 489, 594 N.W.2d 383 (1999). Factors courts may consider when deciding whether to invoke issue preclusion include the following:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Crozier, 173 Wis. 2d at 688-89.

Sybron contends that here, unlike the situation in the Press case, "there was no claim of exposure to asbestos from the Kerr product during the insurance years." Thus, Sybron asserts:

> The issue here is entirely different. This is <u>not</u> a case where the insured, knowing of the lawsuit, and that the claim involved injury covered under the terms of the policy, failed to give notice; rather, from what was apparent to Sybron in 1989 to 1992, there was no coverage.

Sybron is incorrect. Paragraphs 3-6 of the first count of the New Jersey Spector complaint alleged that Dr. Spector was exposed to asbestos-containing materials "designed, manufactured and distributed" by Kerr and other, unidentified, parties during his years of employment as a dentist, as well as during the years in which he "trained for his profession."

Thus, although Sybron ultimately may argue that Tomassi reasonably relied on information obtained from Grayzel in concluding that "there was no claim of exposure to asbestos from the Kerr product during the insurance years," Security may counter that the complaint did indeed make such a claim.

believing the estate was alleging that Dr. Spector had been exposed to asbestos from a Kerr product only prior to the years in which Kerr was insured by Security, Tomassi did not notify Security of the Spector suit.

¶5 In March 1990, Sybron was served with a complaint filed in New York by Dr. Spector's estate. The allegations contained in the complaint were similar to those contained in the complaint that had been filed in New Jersey the previous year. According to Security's brief to this court, shortly after the New York suit was filed, the New Jersey suit was discontinued.

¶6 On November 4, 1992, however, despite the fact that no additional facts regarding Dr. Spector's exposure had been discovered or alleged, Tomassi gave Security notice of the Spector suit.[4] By letter dated December 14, 1992,

[4] Tomassi's November 4, 1992 letter was addressed to a representative of Connecticut Specialty Insurance Group (which includes Security Insurance Company of Hartford), as well as to representatives of other insurers. The poorly-drafted letter informed the insurers of the existence of the Spector case for which "[t]he summons and complaint were served on Kerr on *March 30, 1989*," thus indicating the *New Jersey* case. (Emphasis added.) It stated that Joel Spector *contracted* mesothelioma on November 22, 1988; both the New Jersey and New York complaints, however, alleged that he *died* on that date. The letter went on to say that "[t]he defense of this case is hereby tendered to each of your companies," and it named the *New Jersey* law firm that was representing Kerr in the case.

According to his affidavit, Tomassi gave Security notice of the Spector suit because of developments in the Press case. Tomassi explained:

> I gave notice of the *Spector* case on November 4, 1992 after Hartford [Accident & Indemnity Company], in the *Press* litigation, stated for the first time to me that it would claim late notice in the Press coverage dispute because I had provided notice only to Security initially since I had chosen Security to defend that action. At that point, even though in *Spector* there was no proof of exposure, or any allegation of exposure, beyond 1960, I made the decision to place all carriers on notice in any case regardless of the allegations of exposure or injury rather than face the risk of claims of late notice by any insurer. I therefore noticed not only Security but the other carriers as well in the Spector matter.

(Record reference omitted.)

Security expressed its understanding that Kerr/Sybron was seeking coverage regarding the *New York* case; Security denied coverage, asserting that Tomassi's notice was too late, coming "at least two and one-half years after [Sybron's] receipt of the underlying complaint."

¶7 Security invoked two provisions of all its policies covering Sybron during the times relevant to the case. In pertinent part, the provisions addressing an "Insured's Duties in the Event of Occurrence, Claim or Suit" state:

> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable….
>
> (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

(Emphases omitted.)

¶8 The Spector suit continued for several years without Security's participation, finally settling in 1995. Subsequently, Sybron filed the action underlying this appeal, seeking a declaration of Security's coverage for the Spector suit. Granting summary judgment, the circuit court concluded that there was "a reasonable possibility" that the Security policies provided coverage and, therefore, Sybron's good faith belief to the contrary was not a valid basis for the delay in providing notice. Sybron maintains, however, that whether its determination that the Security policies provided no coverage was reasonable was a material factual issue for trial. Sybron is correct.

II. DISCUSSION

¶9 As this court has explained:

> "Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and 'to avoid trials where there is nothing to try.'" While we apply the same methodology as the trial court when reviewing summary judgment, we owe no deference to the conclusion of the trial court. We first examine the pleadings to determine whether they state a claim for relief. If the pleadings state a claim and the responsive pleadings join the issue, we then must examine the evidentiary record to analyze whether a genuine issue of material fact exists or whether either party is entitled to a judgment as a matter of law.

Kotecki & Radtke, S.C. v. Johnson, 192 Wis. 2d 429, 436-37, 531 N.W.2d 606 (Ct. App. 1995) (citations omitted).

¶10 The parties agree that, in this case, New York law governs the evaluation of whether a material factual issue precluded summary judgment. They also agree that, under New York law, notice to an insurer must be given within a reasonable time under the circumstances. *See* ***Jenkins v. Burgos***, 472 N.Y.S.2d 373, 375 (App. Div. 1984) (Insurance polices requiring that notice be "immediate" or "as soon as practicable" are interpreted "to require that notice be given within a reasonable time under the circumstances.").

¶11 "Where an excuse or explanation is offered for delay in furnishing notice, the reasonableness of the delay and the sufficiency of the excuse are matters to be determined at trial." ***Hartford Accident & Indem. Co. v. CNA Ins. Cos.***, 472 N.Y.S.2d 342, 345 (App. Div. 1984). A jury's determination of whether a delay in providing notice was reasonable derives from "the facts and circumstances of the case at hand" and is "heavily dependent upon the factual

context" of the case. ***Mighty Midgets, Inc. v. Centennial Ins. Co.***, 389 N.E.2d 1080, 1083-84 (N.Y. 1979).

¶12 Circumstances affecting the reasonableness of a delay in providing notice may include the insured's good faith belief that the insurance policy provides no coverage. *See* ***Clute v. Harder Silo Co.***, 345 N.Y.S.2d 251, 253 (App. Div. 1973). Indeed, "where an insured has a reasonable belief, formed after an adequate investigation, that no claim arising out of the occurrence could fall within the coverage period of a particular insurer, a jury could find that the insured's late notice to that insurer was justifiable and excusable." ***Avondale Indus., Inc. v. Travelers Indem. Co.***, 774 F. Supp. 1416, 1431 (S.D.N.Y. 1991).

¶13 Thus, the reasonableness of the timing of an insured's notice to an insurer must be determined according to whether the facts and circumstances "'known to the insured at that time would have suggested to a reasonable person'" that the policy provided coverage. *See* ***Ogden Corp. v. Travelers Indem. Co.***, 924 F.2d 39, 43 (2d Cir. 1991) (quoted source omitted) ("The test for determining whether notice of occurrence must be given to a particular insurer 'is whether the circumstances known to the insured at that time would have suggested to a reasonable person the possibility of a claim [against that insurer].'"). In this case, therefore, a jury would need to consider whether Tomassi reasonably decided not to notify Security of the Spector suit until November 1992 based on his determination that the Security policies provided no coverage.

¶14 Security argues:

> A reasonable man faced with an actual suit seeking damages for a person's contracting of a cancer, a commonly known progressive disease, would have certainly recognized that the injured person ***might*** have suffered, or ***might*** assert that he had suffered, at least some injury during some, or all, of the periods between his

> exposure to the carcinogen (here asbestos) and the date of his death.

However, while that *may* be so, Sybron correctly argues that whether that *is* so remains an issue for trial. And in this case, Sybron's summary judgment submissions arguably established several factual and legal bases for Tomassi's beliefs that New York law subscribed to the "injury-in-fact" principle, and that because the triggering occurrence was Dr. Spector's dental school exposure to the Kerr product, not the subsequent progression of the cancer, the Security policies provided no coverage.[5]

¶15 This is not a case where an insured failed to investigate whether a policy provided coverage. And this is not a case where the attorney's determination of potential coverage was based on his personal or peculiar

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[5] Relying on the principle that an insured's obligation to provide notice arises when circumstances known to the insured would suggest, to a reasonable person, the possibility of a claim, Security responds that Sybron "simply cannot meet its burden of proof in this regard." Security also argues that "while the courts do allow some latitude in the case of a mistake as to non-liability, a mistake as to non-coverage is hardly ever excused." Keeping in mind, however, that this appeal presents a review of summary judgment, we would note that Security's arguments, to at least a limited extent, actually undermine its position. After all, *whether* Sybron can meet its burden of proof, and *whether* this case presents one of those rare instances where a mistake as to non-coverage would be excused, are apparent jury issues.

Additionally, however, Security asserts that "New York recognizes **no** 'excuses' whatsoever with respect to an insured's breach of the 'notice of claim or suit' provision" and, "[a]ccordingly, pursuant to unambiguous New York law, no claimed 'excuse' offered by Sybron, *irrespective of its purported reasonableness*, is sufficient to justify Sybron's untimely notice." (Emphasis added.) But Security bases this assertion on ***New York v. Blank***, 27 F.3d 783 (2d Cir. 1994), and its statement that "a good faith belief by an *insured* that it was not covered under the policy would not excuse unreasonable delay in failing to notify its *insurer* of a *claim*." ***Id.*** at 796. Security contends that ***Blank*** thus overruled the standard articulated in ***Avondale Industries, Inc. v. Travelers Indemnity Co.***, 774 F. Supp. 1416, 1431 (S.D.N.Y. 1991). *See* ¶12, above.

We are not persuaded. We read nothing in ***Blank*** to overrule ***Avondale***. And the passage from ***Blank*** on which Security relies does little more than beg the question in the instant case: while "a good faith belief by [Tomassi] that [Kerr] was not covered under the [Security] polic[ies] would not excuse *unreasonable* delay in failing to notify [Security] of [the Spector] claim," was Tomassi's delay *reasonable*? *See* ***Blank***, 27 F.3d at 796 (emphasis added).

allegiance to a *disputed* legal principle. According to the submissions, Tomassi promptly investigated the potential for coverage and, based not only on undisputed facts but also on what he perceived to be *Security's apparent agreement regarding the controlling legal principle*, he concluded that the Security policies provided no coverage for the Spector suit. *See* ***Mighty Midgets***, 389 N.E.2d at 1084 ("[C]onduct and representations of [the insurer] may be considered in determining whether notice has been unduly delayed.").

¶16 The summary judgment submissions suggest that both Sybron and Security ultimately may have compelling arguments in support of their respective positions on the reasonableness of Tomassi's decision. While Security may contend that Tomassi, to stay on the safe side, should have provided prompt notice of the Spector suit, Sybron may maintain that Tomassi's failure to do so was reasonable.[6] Only after considering all the facts and circumstances can a jury determine whether Tomassi reasonably postponed providing notice to Security. Accordingly, we conclude that the circuit court erred in granting summary judgment.

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[6] Even if a jury were to find that Sybron's delay in providing notice of the Spector suit was not reasonable, it would also have to consider whether Security suffered prejudice as a result of the delay. *See* ***N.Y. Mut. Underwriters v. Kaufman***, 685 N.Y.S.2d 312, 313 (App. Div. 1999) (holding that insured's failure to timely notify insurer of suit "will be excused where no prejudice has inured to the insurer").

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).