COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2016

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. 2014AP2854 **Cir. Ct. No. 2012CV739**

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

JAMES KLATT AND CAROL KLATT,

PLAINTIFFS,

MEDICA HEALTH PLANS AND LUMBERMENS UNDERWRITING ALLIANCE,

INVOLUNTARY-PLAINTIFFS,

V.

PENSKE TRUCK LEASING COMPANY, LP,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

PENSKE TRUCK LEASING CORPORATION, ABC INS. CO., DEF INS. CO., GHI INS. CO. AND JKL INS. CO.,

DEFENDANTS,

V.

GREAT WEST CASUALTY COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Reversed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Penske Truck Leasing Company, LP, appeals a summary judgment holding that Great West Casualty Company had no duty to defend or indemnify Penske. Penske argues summary judgment was inappropriate because there was a disputed issue of material fact. We agree with Penske and reverse.

BACKGROUND

¶2 James Klatt was an employee of Modern Transport, Inc., which rented trucks from Penske. After Modern Transport's drivers completed their routes, they had to return the trucks to a Penske parking lot. By contract, Penske was included as an additional insured on Modern Transport's automobile insurance with Great West.

¶3 Klatt[1] sued Penske for unspecified personal injuries following an incident in the Penske lot in January 2012. Klatt's complaint alleged negligence, but it did not explain precisely how he was injured. Rather, it alleged only that Klatt was required to return his truck to a designated portion of Penske's lot and place paperwork regarding the truck in a designated drop box in the lot, and that his injuries resulted from "large accumulations of ice" in the lot. Penske filed a

[1] Klatt's spouse is also a plaintiff, bringing a derivative claim for loss of society and companionship.

third-party claim against Great West, seeking a defense and indemnity for Penske's potential liability to Klatt related to the truck.

¶4 Great West moved for summary judgment, seeking a declaration that "there is no coverage afforded under [its] policy issued to Modern Transport[] with respect to any defense obligations, indemnity obligations or obligations to pay any judgments against Penske in connection with [Klatt's] complaint." Great West's motion argued that "the coverage issue between Penske and Great West must be decided solely based upon a comparison of the allegations of the underlying injury complaint and the Great West Policy." The motion further contended that, while Penske had referenced extrinsic facts in an unrelated motion:

> under the "four corners" rule the only relevant consideration in determining coverage is whether the allegations of [Klatt's] complaint "potentially" come within the coverage under the policy. Thus extrinsic facts are not to be considered. Therefore, this Court need not look beyond the allegations of [Klatt's] Complaint and the Great West Policy to declare that Great West does not afford coverage to Penske in this instance.

¶5 In an oral ruling, the circuit court denied Great West's motion, applying the four-corners-of-the-complaint rule as Great West had requested. The court explained:

> I'm to construe allegations liberally, make reasonable inferences based upon the language of the Complaint, and not to use extrinsic evidence.
>
> Regarding the … first part of the motion[2] for summary judgment, it's my understanding that there was a direction to make [a] determination if it is possible that the injury related to the use of the truck. The court finds that a liberal

[2] Great West's summary judgment motion presented additional arguments not at issue in this appeal.

> reading would make it not impossible the injury could have occurred as Mr. Klatt climbed out of the truck onto an icy parking lot. Therefore, it's possible that the injury is related to the use of the truck and that portion of the motion for summary judgment is denied.

¶6 The court nonetheless held open the time for filing summary judgment motions, observing that the possibility of an injury relating to use of the truck was distinguishable from whether there was a genuine issue. It explained, "Therefore, although all motions for summary judgment thus far are denied, the court … would rehear similar arguments in the future as discovery occurs and maybe some of the facts come in more."

¶7 Great West subsequently filed a renewed motion for summary judgment. It argued that, while the duty to defend is "[g]enerally" determined by a comparison of the policy to the complaint's allegations, the court purportedly held in ***Schinner v. Gundrum***, 2013 WI 71, 349 Wis. 2d 529, 833 N.W.2d 685, that "'additional evidence' (beyond that stated [in] the Complaint) may be considered where the additional evidence does not 'undermine or change the thrust of the allegations in the Complaint,' but rather assists in making the evidence clear." Thus, Great West asserted, additional evidence could be considered "in determining the duty to defend Penske."

¶8 Great West's renewed motion then relayed Klatt's deposition testimony, as follows.[3] Klatt pulled into the Penske lot at 1:30 a.m. and the lot was covered with packed snow and had not been sanded or salted. He parked his truck between two other tractor-trailers and then exited his tractor and walked

[3] Klatt's deposition testimony was attached to Great West's renewed motion as an exhibit.

around it to conduct a safety inspection. He returned to the cab and completed his safety inspection report. Klatt climbed down again and started walking to put his paperwork in the mailbox. When asked what happened then, he responded, "I got out of the truck and started walking. My feet went out from under me, and I went backwards. And this foot, here, caught." He further explained that the area where his foot caught was covered with packed snow.

¶9 Additionally, Klatt was asked about an Eau Claire Hospital urgent care report that stated Klatt "said he was on the job driving his truck and when he got on the truck he rolled his ankle." Klatt testified, "I don't remember calling—saying that." When asked if there was any reason the medical staff would have written this, he stated "no."

¶10 Klatt was similarly questioned about a Mayo Clinic Health System orthopedics report, which stated "he was on the job driving his truck. [W]hen he got on the truck, he rolled his ankle." Klatt testified that "what the doctor wrote is wrong," and that he "possibly" told the doctor that he "rolled his ankle when [he] got off the truck."

¶11 Finally, Great West's motion relayed Klatt's interrogatory response, where he stated:

> As I was walking down the side of my trailer to get to the drop box, I began to slip on glare ice. Penske had not salted or sanded that parking area. My left foot got caught on a chunk of ice, but my right foot kept going, and I fell backwards.

Although its argument had focused on the duty to defend, Great West again concluded its motion by seeking a declaration that its policy provided "no

coverage … with respect to any defense obligations, indemnity obligations or obligations to pay any judgments ….”

¶12 The circuit court granted Great West’s renewed motion for summary judgment. At the outset of its oral ruling, the court expressed some confusion, observing:

> What I’m deducing from having read this and reviewed summary judgment is that this is an art form rather than a science. … And it depends on how strictly you want to follow … a four-corners rule, only looking at the documents, only looking at the … insurance policy. But summary judgment certainly has been used to allow facts, especially [u]ndisputed facts, to be weighed in and to ultimately … sort of say as a matter of law there’s no way they can win here.
>
> And, you know, I’ll be the first to admit I’m inexperienced in this and when I’m supposed to be looking at the four corners or when I … can take a look at some facts. I mean, isn’t it overall we have a motion for summary judgment[?]
>
> ….
>
> And I’m not sure if it’s just about the coverage or if it’s summary judgment in general. But it’s clear to me the record is now supplemented.

¶13 The court then discussed Klatt’s deposition testimony and held:

> [A]s a matter of law with I’m going to say undisputed facts, because even if they are disputed, I don’t think a reasonable jury can get through that deposition and find that the injury was related to use of the truck. So I’m going to make that finding. No properly instructed, reasonable jury could find based on the fact[s] as put forth in the Klatt deposition that the injury was related to use of the truck.
>
> … So for that reason, … summary judgment should be granted to [Great West].

Penske subsequently argued the court should restrict itself to the four corners of the complaint, but if it was going to consider Klatt's deposition, it had also inadequately considered the medical reports.

¶14 The court responded that Klatt had clearly disavowed the statements attributed to him in the medical reports. It indicated, "So I'll make that as a finding of undisputed fact." The court then acknowledged it was going beyond the four corners of the complaint but expressed its belief it was permitted to do so under the summary judgment procedure. The court continued, "And, again, I will find that no properly instructed, reasonable jury could find, based upon Mr. Klatt's testimony at the deposition, that there's no way that they could go with what he either might have told the doctor or what the doctor or the—whoever transcribed that misunderstood …." The court concluded, "For that reason, summary judgment is granted."[4] Penske now appeals.

DISCUSSION

¶15 Penske argues the circuit court erroneously granted Great West's summary judgment motion because the four-corners rule applies to duty-to-defend inquiries and there was possible coverage under that rule, and because there were disputed issues of material fact precluding resolution of the indemnity issue. We agree in both respects.

¶16 Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter

[4] The circuit court issued a written order, but it merely stated the court was granting the motion based on the parties' submissions and arguments and for the reasons set forth on the record.

of law." WIS. STAT. § 802.08(2) (2013-14). When determining whether there are genuine factual issues, the facts must be viewed in the light most favorable to the nonmoving party. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). We review grants of summary judgment de novo. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997).

¶17 The imprecise content of Great West's summary judgment motions renders the basis of the circuit court's ruling on the revised motion unclear. In both motions, Great West asserted there was no "coverage" and identified three obligations as falling under that umbrella: to defend, to indemnify, and to pay any judgments on Penske's behalf. The duty to defend is not the same as "coverage," and the duty to defend is determined in a different manner than the duty to indemnify. On the other hand, the term coverage is typically used interchangeably with the duty to indemnify. Great West's motions grossly conflated the issues of indemnity coverage and the duty to defend. No wonder the circuit court expressed confusion.

¶18 Despite Great West's conflation of the issues in the circuit court, the issues presented in this appeal are straightforward. One must simply understand that the duty to defend and the duty to indemnify are distinct issues that must therefore be distinctly analyzed. Indeed, Great West does not now dispute that the

duty to defend is subject to the four-corners rule.[5] Nor could Great West reasonably dispute this well-established rule. Our supreme court has explained:

> To understand the role of the four-corners rule, it is essential to distinguish between the insurer's duty to indemnify and its duty to defend. Contracts for insurance typically impose two main duties: the duty to indemnify the insured against damages or losses, and the duty to defend against claims for damages.
>
> The duty to indemnify is fairly straightforward. An insurer must indemnify an insured against losses that are covered under the terms of the policy.
>
> The insurer's duty to defend is more complicated because it is broader than its duty to indemnify. "The duty of defense depends on the nature of the claim and has nothing to do with the merits of the claim." "The insurer is under an obligation to defend only if it could be held bound to indemnify the insured, assuming that the injured person proved the allegations of the complaint, regardless of the actual outcome of the case." Accordingly, an insurer must defend all suits where there would be coverage if the allegations were proven, even if the allegations are "utterly specious." "If there is any doubt about the duty to defend, it must be resolved in favor of the insured."
>
> Wisconsin policy is clear. If the allegations in the complaint, construed liberally, appear to give rise to coverage, insurers are required to provide a defense until the final resolution of the coverage question by a court.

Olson v. Farrar, 2012 WI 3, ¶¶27-30, 338 Wis. 2d 215, 809 N.W.2d 1 (citations omitted).

[5] Great West's brief does include the following argument heading: "The Circuit Court Properly Considered Extrinsic Evidence On The Issue Of Great West's Duty To Defend Penske." However, Great West merely argues it was proper to consider extrinsic evidence "by virtue of Penske's own prior conduct and statements." Ultimately, we need not reach that argument, as we reverse because there is a disputed issue of material fact, which precludes summary judgment on the issue of coverage. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶19 As noted above, the basis of the circuit court's decision on Great West's renewed motion for summary judgment is unclear due to Great West's conflation of issues. We therefore merely observe that, with respect to the duty to defend, the circuit court limited itself to the four corners of the complaint in rendering its decision on Great West's first motion, and neither party disputes that the court's four-corners analysis came to the correct conclusion. However, to the extent the court's subsequent decision determined the four-corners rule was somehow inapplicable to the duty-to-defend analysis in summary judgment proceedings, that holding was an erroneous application of the law.

¶20 It is clear, however, that the circuit court's decision on Great West's renewed motion considered extrinsic evidence and resolved the indemnity issue. As the court explained in ***Olson***:

> "Both the insurer and the insured have the right to have the court resolve the issue of coverage separate from any trial on liability." At a coverage trial, extrinsic evidence may be introduced "where appropriate to the resolution of the coverage question."
>
> Sometimes, the question of coverage is purely a matter of insurance policy interpretation, and it can be decided by a court as a matter of law in accordance with the well-established rules for interpreting insurance policies. However, at other times, the facts bearing on coverage are disputed, and coverage cannot be determined until these factual disputes are resolved in the circuit court.

Id., ¶¶35-36 (citations omitted).[6]

[6] While the duties to defend and to indemnify are distinct issues determined in different manners, a determination on indemnity may resolve the duty to defend:

(continued)

¶21 Penske acknowledges it was appropriate to consider extrinsic evidence with respect to indmenity. Nonetheless, Penske argues the court erred because Klatt had provided three different versions of events, two of which implicated coverage based on use of the truck. Specifically, Penske asserts the medical reports indicating Klatt injured himself while entering the truck, and Klatt's deposition testimony that he may have told the doctor he injured himself exiting the truck, are versions of the facts that would give rise to a duty to indemnify.

¶22 Great West agrees its policy provides coverage to Penske if Klatt's injuries resulted from his use of the truck. Further, it does not dispute that injuries caused by Klatt losing his footing while embarking or disembarking the truck would give rise to coverage. Rather, Great West argues that the two alternative versions of the facts that would require coverage are irrelevant because Klatt disavowed those versions of the facts. Great West asserts Penske "completely disregards later deposition testimony wherein he expressly disclaimed those purported statements." That assertion is untrue.

¶23 Contrary to Great West's assertion, Penske argues the circuit court was prohibited from resolving the disputed issue of fact on summary judgment.

> "Where the insurer has provided a defense to its insured, a party has provided extrinsic evidence to the court [that is relevant to the question of coverage], and the court has focused in a coverage hearing on whether the insured's policy provides coverage for the plaintiff's claim, ... [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."

Olson v. Farrar, 2012 WI 3, ¶38, 338 Wis. 2d 215, 809 N.W.2d 1 (quoting ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶29, 311 Wis. 2d 548, 751 N.W.2d 845).

Great West never directly responds to this argument. Instead, citing no authority, Great West recounts Klatt's deposition testimony and interrogatory response; observes the circuit court was "swayed by" this testimony; and asserts that, due to Klatt's disavowance of the prior versions of events, the facts were "clear and undisputed." That is not how summary judgment works.

¶24 When determining whether there are genuine factual issues, the facts must be viewed in the light most favorable to the nonmoving party. ***Kraemer Bros.***, 89 Wis. 2d at 567. A jury could reasonably conclude Klatt's statements to different medical personnel on separate occasions were more accurate than his subsequent contradictory statements made in the course of a civil lawsuit.[7] Further, Great West offered no testimony from the medical personnel who prepared the reports. The contents of those documents must therefore be accepted at face value on summary judgment. *See* ***id.*** Moreover, Great West fails to acknowledge or explain Klatt's deposition testimony that he "possibly" told the doctor that he "rolled his ankle when [he] got off the truck."

¶25 The question of Klatt's location at the time he was injured was central to the coverage dispute. For the above reasons, the circuit court erroneously resolved a disputed issue of material fact on summary judgment.

By the Court.—Order reversed.

[7] Although not asserted, based on the nearly identical language used, we recognize the possibility that the second medical report simply contained information obtained from the first report. However, that would be an improper inference to draw on summary judgment and, regardless, would not resolve the underlying dispute.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2103-14).