COURT OF APPEALS
DECISION
DATED AND RELEASED

August 8, 1995

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3032

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

COL D'VAR GRAPHICS, INCORPORATED,
a Wisconsin corporation,

Plaintiff-Co-Appellant,

STATE FARM GENERAL INSURANCE CO.,
a foreign corporation,
GARY E. SKINNER, individually and
NIKI KARP, individually,

Plaintiffs,

v.

FORRESTER ENTERPRISES, INC.,
a Wisconsin corporation, d/b/a
ANCHOR MOVING SYSTEMS,

Defendant-Appellant,

THE HOME INSURANCE COMPANY,
a foreign corporation and
UNITED STATES FIDELITY AND
GUARANTY COMPANY (USF&G),
a foreign corporation,

Defendants-Respondents,

FIREMAN'S FUND INSURANCE COMPANY,
a foreign corporation,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Affirmed.*

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

WEDEMEYER, P.J. Forrester Enterprises, Inc., appeals from a judgment concluding that the coverage provided under its insurance policy issued by The Home Insurance Company, is limited to physical damage that occurred to Col D'Var Graphics, Inc.'s machinery and does not provide coverage for incidental or consequential damages.

Forrester claims that the trial court erred as a matter of law in concluding that Home's warehouseman's policy did not cover incidental and consequential damages resulting from the physical property damage. Forrester also claims that the trial court erred in determining the coverage question on a post-verdict motion. Because Home's warehouseman's policy clearly and unambiguously provides only for coverage for damage or loss of property, and because the trial court did not err in determining coverage after the rendering of the jury verdict, we affirm.

I. BACKGROUND

Col D'Var Graphics, hired Forrester (doing business as Anchor Moving Systems) to move some of its printing and typesetting equipment from one place of business to another. Some of the equipment was damaged during the move. Col D'Var sued Forrester claiming that Forrester was responsible for both the physical damage to the property and for damages due to business

interruption. Forrester notified its insurance carrier, Home. Home agreed to defend Forrester, but reserved the right to contest coverage.

On the day before trial, (three years after the initial occurrence of damages), Home attempted to raise, for the first time, the issue of coverage. At the pretrial conference which was not transcribed, the trial court denied Home's attempt to raise the coverage issue at trial. The jury awarded Col D'Var $96,000 as compensation for business interruption loss, $58,528 for "out-of-pocket losses," and $21,667.76 plus $55,935.64 for property damage.

Home filed a post-verdict motion for a declaratory judgment on insurance coverage. Home claimed the policy did not cover incidental and consequential damages flowing from the physical damage to the printing equipment. Forrester responded that Home's policy did provide coverage for all the damages awarded by the jury and that Home's motion was procedurally improper. Both parties agree that the language of the policy is clear and unambiguous. Nevertheless, they each reach diametrically opposed conclusions as to the effect of the language.

The trial court granted Home's motion, determining that Home and Forrester were jointly and severally liable for the property damages awarded by the jury, but that Forrester alone was responsible for the damages the jury awarded for out-of-pocket losses and business interruption losses. Forrester now appeals.

II. DISCUSSION

A. The Coverage Question.

Forrester first claims the trial court erred in granting Home's post-verdict motion because the policy provided coverage for *all* damages resulting from its liability to Col D'Var. Forrester's contention is based on three considerations: (1) public policy favors a finding of coverage; (2) the plain meaning of the policy in question provides coverage for the entire jury award;

and (3) in the alternative, if the terms of the policy are ambiguous, the policy must be construed against Home and in favor of coverage.

STANDARD OF REVIEW

Whether an insurance policy provides coverage is a question of law which we decide *de novo*. *See* ***Lechner v. Scharrer***, 145 Wis.2d 667, 672, 429 N.W.2d 491, 494 (Ct. App. 1988). When interpreting an insurance policy, this court must construe the policy as it is understood by a reasonable person in the position of the insured. ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 263, 371 N.W.2d 392, 394 (Ct. App. 1985). While we must construe exceptions that tend to limit liability strictly against the insurer, strict construction does not permit strained construction. ***Id.*** at 264, 371 N.W.2d at 394.

As with a contract, the objective in interpreting and construing an insurance policy is to ascertain the true intentions of the party. ***Home Mut. Ins. Co. v. Insurance Co. of North America***, 20 Wis.2d 48, 51, 121 N.W.2d 275, 277 (1963). The policy is to be considered as a whole in order to give each of its provisions the meaning intended by the parties. ***Laabs v. Chicago Title Ins. Co.***, 72 Wis.2d 503, 511, 241 N.W.2d 434, 438-39 (1976). This exercise may include placing the questionable language in the context of the policy, and examining the purpose and subject matter of the insurance. ***Swart v. Rural Mut. Ins. Co.***, 117 Wis.2d 478, 482, 344 N.W.2d 719, 720-21 (Ct. App. 1984). The language of a policy will be considered ambiguous only after all of the rules of construction are exhausted. ***Hemerley v. American Family Mut. Ins. Co.***, 127 Wis.2d 304, 309, 379 N.W.2d 860, 863 (Ct App. 1985). If the terms of a policy are not ambiguous, we shall simply apply those terms rather than engage in construction. ***Leverence v. United States Fidelity & Guar.***, 158 Wis.2d 64, 73, 462 N.W.2d 218, 222 (Ct. App. 1990).

LANGUAGE OF THE POLICY

We first examine the language of the policy which forms the basis of this dispute. The Home insurance contract entitled "Furniture Warehousemen's Policy" includes the following relevant language:

DESCRIPTION OF COVERAGE & INSURING CONDITIONS.

Subject to the terms of this policy, this Company agrees:

TO PAY ON BEHALF OF THE INSURED ALL SUMS WHICH THE INSURED SHALL BECOME LEGALLY OBLIGATED TO PAY BECAUSE OF LIABILITY, either imposed on or assumed by the Insured:

COVERAGE I

As a Warehouseman or Bailee for loss or destruction of or damage to personal property of others, including but not limited to Freighters, Forwarders, other Motor Carriers, Individual shippers and branches of the Federal or State Government, accepted for storage, packing, crating (or other preparation for shipment) or while being held as Storage-In-Transit for other Freight Forwarders and other Motor Carriers occurring at the locations listed in this policy.

COVERAGE 2

As a Carrier for physical loss or damage to Household Goods, General Merchandise and electronic or data processing equipment while in the custody or control of the Insured in the ordinary course of transit, including but not limited to packing, unpacking, moving hoisting or rigging, and skidding or palletising or while being held as Storage-In-Transit.

1. Public Policy.

Forrester first asserts that public policy favors and requires us to conclude that there is coverage for the jury's award of damages. We are not convinced.

As our supreme court has stated in ***Cieslewicz v. Mutual Service Casualty Insurance Co.***, 84 Wis.2d 91, 103, 267 N.W.2d 595, 601 (1978), "'[p]ublic policy' is no magic touchstone." More than one public policy exists. ***Id.*** Included in the menu of public policies is the policy to favor freedom of contract. ***Id.*** A species of this general policy is the right of an insurer to limit liability by the terms of its contract unless it is prohibited by statute, case law, or sound considerations of public policy. ***Resseguie v. American Mut. Liab. Ins. Co.***, 51 Wis.2d 92, 101, 186 N.W.2d 236, 241 (1971).

Forrester correctly asserts that "[p]ublic policy in Wisconsin favors finding coverage when the insurance policy terms permit it." ***Newhouse v. Laidig, Inc.***, 145 Wis.2d 236, 242, 426 N.W.2d 88, 91 (Ct. App. 1988). Nevertheless, Forrester has failed to adequately develop its public policy argument and this court is not obligated to entertain an underdeveloped argument which provides neither a factual context nor legal authority. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981). Thus, Forrester's public policy argument fails.

2. Plain Meaning.

Next, Forrester claims that the plain meaning of Home's policy language provides coverage for the entire jury award. Forrester argues that a reasonable insured would understand Home's policy to mean what it says, i.e., it would pay "all sums which the insured shall become legally obligated to pay because of liability." Amplifying, Forrester states, "it is reasonable to interpret Home's policy to cover consequential damages. Forrester is legally obligated to pay because of Forrester's liability resulting from physical damages" to the equipment of Col D'Var. Forrester further argues, "[t]he only condition precedent to Home's obligation to pay is that Forrester's liability must arise from the physical loss or damage to the property of others." Forrester's argument fails because it is based on a misreading of the Home policy.

The basis for Forrester's argument appears to be the introductory language to the contractual agreement to insure, i.e., "this company agrees: to pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of liability ...." Forrester equates this language to the

scope of coverage undertaken by Home. Relying solely on this language, Forrester argues that the only condition precedent to Home's obligation to pay is that Forrester's liability must arise from physical loss or damage to the property of others.

Forrester's argument is alluring, but illusionary, and suffers from the malady of oversimplification by ignoring the language following the introduction. By the plain terms of the policy language, Home agreed, "subject to the terms of this policy," to pay all sums for which it shall be legally liable. As relates to this case, two of the five categories of coverage appear to be germane: Coverage one which obliges Home to pay, on behalf of the insured, "as a warehouseman or bailee *for loss or destruction of or damages to personal property* of others;" or Coverage two which obligates Home to pay on behalf of its insured "as a carrier *for physical loss of damage to" personal property*. (Emphasis added).

Regardless of which category of coverage applies, the coverage is clearly "for" physical loss and destruction of property. In the Declaration pages of the policy, we note that "insurance is provided under this policy only for coverages ...." The language of the insuring agreement upon which Forrester bases its entire agreement is the promise of Home to pay, subject to the terms of this policy, for damages that are covered in the insurance section of the policy.

When the language of the policy is viewed in the context of its insured's interest and its purpose, the scope of coverage is made manifest. Forrester was in the business of moving and storage. The policy is designed to provide protection for warehousemen and carriers such as Forrester for the loss, damage or destruction of property over which it assumes care and custody. Here Home's policy sets forth a description of the type of goods that are insured, deductions from property loss and the method of property evaluation should coverage be activated. Coverage is limited. There is no language evincing an intent to cover economic, consequential or other non-physical damage.[1] The language does not extend coverage to any and all damages

[1] *See* ***Gonzalez v. City of Franklin***, 137 Wis.2d 109, 122, 403 N.W.2d 747, 752 (1987) (the terms of an unambiguous insurance policy should not be rewritten by construction to bind an insurer to a risk it never contemplated).

resulting from the damages to or loss of property. Rather, it provides coverage only *for* damage to the property.

We conclude that the language of the policy is clear and unambiguous; that Home agreed to pay all damages that Forrester is "legally obligated to pay for the coverage as described," and that the applicable coverages described are only "for" physical damage to certain property. We further conclude that in the context of the purpose of the policy and the nature of its constituent elements, no reasonable insured would expect coverage of all damages resulting from any property damage.

3. Ambiguous Language Construed Against Home.

Because we have concluded that the language is unambiguous, it is not necessary for us to address Forrester's alternative argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

B. Procedural Issue.

Forrester also claims that the trial court erred in ruling on the coverage issue by post-verdict motion. Forrester, citing ***Allstate Insurance Co. v. Charneski***, 16 Wis.2d 325, 331, 114 N.W.2d 489, 492 (1962), argues that proper procedure demands that a trial on coverage occur. We disagree.

Although Wisconsin case law provides an insurer with an option to litigate the coverage issue before the underlying claim, this procedure arises primarily in the context of whether an insurer has a duty to defend. *See* ***Elliott v. Donahue***, 169 Wis.2d 310, 318, 485 N.W.2d 403, 406 (1992). The duty to defend was not at issue in the instant case. Home acknowledged its duty to defend from the very beginning of this lawsuit. Home challenges only whether its duty to indemnify extends to consequential damages. Hence, the case law that Forrester relies on is inapposite.

Our statutes provide guidance for the situation presented in the instant case—that is, when an insurer has an obligation to defend, even though the case may involve damages that are not covered by the policy. Section 803.04(2)(b), STATS., provides:

> If an insurer is made a party defendant pursuant to this section and it appears at any time before or during the trial that there is or may be a cross issue between the insurer and the insured or any issue between any other person and the insurer involving the question of the insurer's liability if judgment should be rendered against the insured, the court may, upon motion of any defendant in the action, cause the person who may be liable upon such cross issue to be made a party defendant to the action and all the issues involved in the controversy determined in the trial of the action.... Nothing herein contained shall be construed as prohibiting the trial court from directing and conducting separate trials on the issue of liability to the plaintiff or other party seeking affirmative relief and on the issue of whether the insurance policy in question affords coverage. Any party may move for such separate trials and if the court orders separate trials it shall specify in its order the sequence in which such trials shall be conducted.

Accordingly, whether the cross issue of coverage should be decided within the context of the liability trial or in a separate trial is left to the discretion of the trial court. Section 803.04(2)(b), STATS. Section 803.04(2)(b) clearly provides the trial court with the authority to decide the coverage question within the context of the liability trial. Our review of this issue, therefore, is limited to whether the trial court erroneously exercised its discretion. ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993).

We conclude that the trial court did not erroneously exercise its discretion in deciding the coverage issue by post-verdict motion because: (1) interpreting the policy to reach a coverage determination is a question of law,

see ***Just v. Land Reclamation, Ltd.***, 155 Wis.2d 737, 744, 456 N.W.2d 570, 572, *modified,* 157 Wis.2d 507, 456 N.W.2d 570 (1990); and (2) there were no unresolved factual issues pertinent to the coverage determination. Therefore, a separate trial on the coverage question would have been a waste of time. The only factual issues had already been resolved in the liability trial: (1) the jury decided that Forrester's conduct resulted in property damage and in consequential damages; and (2) the jury decided the amounts of these damages. Thus, the only unresolved issue was whether the policy provides coverage for property damage alone or for both property damage and consequential damages. This issue is a question of law that does not require a trial to resolve. Given these circumstances, it was appropriate for the trial court to decide the coverage question by post-verdict motion. Based on the foregoing, the trial court did not erroneously exercise its discretion in deciding the coverage issue within the context of the liability trial.[2]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[2] Moreover, Forrester's request that this case be remanded for further discovery is without merit. Because we have concluded that the language of the policy is clear and unambiguous, there are no factual disputes that require additional discovery.

We also reject Forrester's contention that Home waived its right to contest coverage. The earliest pleadings filed by Home affirmatively alleged that "said policy of insurance is subject to all of its terms, conditions, provisions and limitations contained therein." In addition, it is undisputed that Home defended the underlying claim pursuant to a reservation of rights. Further, prior to trial, Home again raised the coverage issue with respect to certain types of damages.