COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1454 **Cir. Ct. No. 2010CV309**

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

ANDREW OEMIG AND GINA OEMIG,

PLAINTIFFS,

V.

TOWN OF LOWELL,

DEFENDANT-APPELLANT,

KOPPLIN & KINAS CO., INC., CINCINNATI INSURANCE COMPANY AND FOTH INFRASTRUCTURE AND ENVIRONMENT, LLC,

DEFENDANTS,

RURAL MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

Before Sherman, J., Blanchard, J. and Charles P. Dykman, Reserve Judge.

¶1 BLANCHARD, J. At issue in this case is whether the Town of Lowell has coverage under its "business owners" insurance policy with Rural Mutual Insurance Company for negligence and other claims arising out of a project to relocate the intersection of two roads. We conclude, as did the circuit court, that coverage for the negligence claim as alleged against the Town is barred by the "professional services" exclusion in the policy, because the claim alleges that the Town was negligent in approving the project design, but not in actual project construction. We further conclude that the Town has failed to adequately develop any separate argument as to why the exclusion should not also bar coverage for the other three claims at issue in this appeal, each of which appears to be based on the Town's alleged negligence. Accordingly, we affirm the circuit court's judgment.

BACKGROUND

¶2 The Town contracted with two private contractors, Kopplin & Kinas Co., Inc. ("K&K"), and Foth Infrastructure and Environment, LLC ("Foth I&E"), to design and construct a project to relocate an intersection of roads adjacent to property owned by Andrew and Gina Oemig. The Oemigs brought claims against the Town, its insurer Rural Mutual, K&K, Foth I&E, and K&K's insurer, alleging damages caused by the project. The claims against the Town at issue here are:

(1) negligence, (2) negligent private nuisance, (3) strict liability private nuisance, and (4) trespass.[1]

¶3 The Oemigs alleged, among other things, that the Town negligently approved the design of the project. The Oemigs further alleged that the Town's conduct caused damage to their property, including discharge of surface water across the property resulting in rocky and rutted terrain.

¶4 The Town holds a "business owners" insurance policy with Rural Mutual. The circuit court granted a Rural Mutual motion to bifurcate the proceedings. The court then granted Rural Mutual's motion for summary judgment on the coverage issue. The circuit court agreed with Rural Mutual that Rural Mutual had no duty to defend or indemnify the Town and entered a judgment dismissing Rural Mutual from the Oemigs' action. The Town appeals.

¶5 We reference additional facts as needed in our discussion below.

DISCUSSION

¶6 Although the coverage issue in this case was resolved on summary judgment, the only pertinent material before the circuit court was the Oemigs' complaint and a copy of the Town's insurance policy. Thus, both the court and the parties addressed the coverage issue by comparing the allegations in the complaint to the policy terms, without consideration of any additional evidence. Because there is no other evidence to consider, we do the same. *Cf.* ***Olson v.***

[1] The Oemigs also alleged four additional claims against the Town, but the Town now concedes that there is no coverage for those claims. We therefore do not address those claims, which are for (1) breach of contract, (2) breach of the duty of good faith, (3) intentional private nuisance, and (4) inverse condemnation.

Farrar, 2012 WI 3, ¶¶34-38, 338 Wis. 2d 215, 809 N.W.2d 1; ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶¶28-29, 311 Wis. 2d 548, 751 N.W.2d 845 (when the affidavits on a coverage issue include evidence in addition to the complaint and insurance policy, and the insurer has been providing a defense to the insured, the court may consider material extrinsic to the complaint and policy, thus departing from "four corners" rule).[2]

¶7 Whether an insurance policy provides coverage is a question of insurance contract interpretation subject to de novo review. ***1325 N. Van Buren, LLC v. T-3 Group, Ltd.***, 2006 WI 94, ¶23, 293 Wis. 2d 410, 716 N.W.2d 822. If an insurance policy provides coverage for even one claim in a lawsuit, then the insurer is obligated to defend the entire suit. ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶21, 261 Wis. 2d 4, 660 N.W.2d 666.

¶8 If we were applying the four-corners rule, the allegations of the complaint would be controlling, regardless of the actual merits of the allegations. ***Estate of Sustache***, 311 Wis. 2d 548, ¶20. In addition, we would construe the allegations liberally, draw reasonable inferences from those allegations, and resolve any doubts in favor of the insured. *See* ***Olson***, 338 Wis. 2d 215, ¶29 n.5. We will assume in the Town's favor, without deciding the issue, that we should apply these same standards when, as here, the coverage issue arises on summary

[2] "The four-corners rule is normally stated as a rule in which the insurer's duty to defend is determined 'without resort to extrinsic facts or evidence.'" ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶27, 311 Wis. 2d 548, 751 N.W.2d 845 (quoting ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666). Stated another way, "[w]hen 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.***

judgment but there is no evidence to consider in addition to the complaint and insurance policy.

¶9 We conclude for the reasons explained below that the Town has no coverage under its Rural Mutual policy for the Oemigs' claims.

¶10 The Town's business owners policy includes occurrence-based "comprehensive business liability" coverage for "property damage." An "occurrence" is defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶11 The parties dispute whether there is an initial grant of coverage under this definition of occurrence, and whether, if there was an occurrence, various exclusions apply to remove coverage for each of the four claims. Assuming, without deciding, that there was an occurrence and an initial grant of coverage, we nonetheless conclude, as explained further below, that, based on the professional services exclusion, the Town has no coverage under its Rural Mutual policy for the Oemigs' four claims.

¶12 Before proceeding further, we pause to note that some of the Town's arguments appear to assume, without explanation, that the Town may have coverage under its policy with Rural Mutual for the acts of the private contractor defendants. To clarify, while in the main the Town argues that coverage exists for acts of the Town, and not acts of the contractors, at points in its briefing the Town appears to suggest that coverage is premised on acts of its "agents," the contractors. The extent to which this assumption might or might not be correct under any policy term or terms, as properly construed under the law, is far from apparent. We note, without purporting to draw any conclusions in this context, that the policy provides coverage for sums that an "insured" becomes obligated to

pay, and defines insureds to include the Town's "executive officers," "employees," and "volunteer workers," without apparent reference to agents more generally. In any case, lacking any focused briefing from the Town on this topic, we decline to rely on the Town's apparent assumption about acts of the contractors to reverse any aspect of the circuit court's decision regarding insurance coverage for the Town, and we do not further address the Town's arguments apparently premised on the assumption.[3]

¶13 In the following sections, we address each of the four claims in light of the professional services exclusion. In doing so, we conclude that the exclusion applies to the negligence claim as alleged against the Town, and that the Town has failed to adequately develop any separate argument on appeal why the exclusion should not also bar coverage for the other three claims, given that each appears to be based on the Town's alleged negligence.

1. Negligence

¶14 Rather than begin our analysis by describing the allegations supporting the Oemigs' negligence claim, we begin with the exclusion language because, as we explain further below, the parties disagree not on the scope or meaning of the exclusion but only regarding how to interpret the Oemigs' allegations. Once the exclusion is understood, a close review of the allegations resolves the disagreement between the parties on appeal.

[3] As far as the record discloses, the Oemigs' claims against K&K, Foth I&E, and K&K's insurer remain pending.

¶15 The professional services exclusion provides, in pertinent part, as follows:

> This insurance does not apply to:
>
> …. "property damage" … caused by the rendering or failure to render any professional service. This includes but is not limited to:
>
> ….
>
> (2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;
>
> (3) Supervisory, inspection or engineering services ….

¶16 Exclusions are strictly construed against the insurer, and any ambiguity in an exclusion must be resolved in favor of the insured. *See, e.g.*, ***Varda v. Acuity***, 2005 WI App 167, ¶9, 284 Wis. 2d 552, 702 N.W.2d 65. Professional services exclusions in insurance policies, at least traditionally, have been associated with "services involving specialized knowledge, labor or skill which is predominantly mental or intellectual rather than physical or manual." *See* ***Leverence v. United States Fid. & Guar.***, 158 Wis. 2d 64, 82, 462 N.W.2d 218 (Ct. App. 1990) (citation omitted), *overruled in part on other grounds by* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶77, 274 Wis. 2d 220, 682 N.W.2d 405; *but see* ***Eddy v. B.S.T.V., Inc.***, 2005 WI App 78, ¶10, 280 Wis. 2d 508, 696 N.W.2d 265 (characterizing traditional view of professional services exclusion as a "somewhat elitist view of labor-classification" and rejecting that view).

¶17 Here, the Town does not argue that the issue is one of strict versus broad construction, nor does the Town argue that the professional services exclusion is ambiguous. Similarly, as indicated above, the parties' disagreement regarding the applicability of the exclusion to the Oemigs' negligence claim

focuses not on the scope or meaning of the exclusion but on the proper interpretation of the Oemigs' allegations. More specifically, the parties appear to agree that the exclusion applies if the Town's alleged role in the project was limited to negligent project design or approval of design, but that the exclusion does not apply if the Town's alleged role includes negligence in the actual construction of the project. The parties disagree, however, on whether the Oemigs alleged that the Town negligently constructed the project, as opposed to only alleging that the Town was negligent in approving designs for the project or in some other aspect of design.

¶18 The circuit court concluded, as Rural Mutual argues, that the Oemigs' negligence claim did not allege that the Town negligently constructed the project. We agree with the circuit court and Rural Mutual.

¶19 In arguing to the contrary, the Town relies on only one paragraph in the Oemigs' complaint. That paragraph refers to both the Town and its private contractors, and states as follows:

> 60. The failure of the Town, Foth I&E and K&K to exercise ordinary care in the design *and performance of the construction Project* … has proximately caused the plaintiffs to suffer damages ….

(Emphasis added.)

¶20 Standing alone, paragraph 60 of the complaint might seem to support the Town's argument that the Oemigs alleged that the Town negligently constructed the project. However, when we read paragraph 60 in the context of the other allegations supporting the Oemigs' negligence claim, even construing the allegations liberally and assuming all inferences in favor of the Town, it becomes clear that the Oemigs' negligence claim does not allege that the Town negligently

constructed the project. The most pertinent allegations are as follows, culminating in paragraph 60 as quoted above:

> **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**
>
> 7. … [T]he Town of Lowell entered into contracts with Kopplin & Kines, Co., Inc. (K&K) and with Foth Infrastructure and Environment, L.L.C. (Foth I&E) for the design, relocation, and reconstruction of the intersection … (the "Project").
>
> ….
>
> 9. The Town of Lowell and Foth I&E agreed that Foth I&E would represent the Town of Lowell and operate as the Town's agent throughout the Project.
>
> 10. Foth I&E designed the Project.
>
> 11. The Town *approved the design*, including the layout and grade of the reconstructed portions of [one of the roads], the relocated intersection of [the roads], the location, elevation and grade of the overburden and the plans for storm water management and erosion control.
>
> 12. Foth I&E agreed to obtain all necessary permits ….
>
> ….
>
> 17. K&K agreed to confine its work operation within the right-of-way and easements secured by the Town of Lowell.
>
> 18. K&K agreed to obtain approval … for any work required beyond the right-of-way and easements ….
>
> 19. K&K agreed to obtain all necessary permits ….
>
> 20. K&K agreed to dispose of all surplus material excavated ….
>
> 21. During the Project, K&K used the area within the legal description specified in the temporary Easement to store surplus excavation material instead of hauling the material away.

> 22. K&K pushed surplus excavation material far beyond the geographical limits ….
>
> ….
>
> **FOURTH CLAIM: NEGLIGENCE AGAINST THE TOWN OF LOWELL, FOTH I&E AND K&K**
>
> ….
>
> 51. The Town and Foth I&E *designed and/or approved the design* for construction without adequate safe outlets ….
>
> ….
>
> 53. *K&K constructed the Project*, including location, placement, grading and seeding of the surplus excavation material on the plaintiffs' property and on the adjacent property owned by the Town. *K&K failed to construct the project in accordance with acceptable construction practices and procedures.*
>
> ….
>
> 56. As a result of the faulty and defective design and/or construction of the Project, surface water … is now collected and discharged across the plaintiffs' property.
>
> 57. The surface water run-off has caused wash-out and erosion and turned large sections of plaintiffs' lawn in to rocky and rutted terrain.
>
> ….
>
> 60. The failure of the Town, Foth I&E and K&K to exercise ordinary care in the design and performance of the construction Project … has proximately caused the plaintiffs to suffer damages ….

(Emphasis added.)

¶21 It is clear from a review of the above allegations in context that paragraph 60, the only allegation on which the Town relies, is a summary and synthesis of the preceding allegations, none of which alleges that the Town negligently constructed the project, but which allege instead that K&K

constructed the project. Indeed, none of the preceding allegations can be reasonably construed to imply that the Town played any role in the project's actual construction. Rather, the complaint alleges that the Town approved the design of the project, which "K&K constructed," and that "K&K failed to construct the Project in accordance with acceptable construction practices and procedures."

¶22 We therefore conclude that the Oemigs' negligence claim, even when liberally construed and resolving any doubt in favor of the Town, does not allege that the Town negligently constructed the project. Accordingly, the professional services exclusion applies to the Oemigs' negligence claim.

2. Negligent Private Nuisance

¶23 We turn next to the Oemigs' negligent private nuisance claim. Liability for a negligent nuisance depends on the existence of underlying negligent conduct: "A nuisance is nothing more than a particular type of harm suffered; liability depends upon the existence of underlying tortious acts that cause the harm." ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶25, 277 Wis. 2d 635, 691 N.W.2d 658.

¶24 Relying on ***Milwaukee Metropolitan Sewerage District***, the circuit court concluded that the Oemigs' negligent private nuisance claim was contingent on the Oemigs' underlying negligence claim, and that coverage for the negligent private nuisance claim should therefore be barred by the professional services exclusion. The Town's reasons for disagreeing with this ruling are unclear. The Town appears to rely primarily on an argument that we have now rejected: that the complaint alleges the Town negligently constructed the project. If the Town means to make some other argument regarding additional allegations in the Oemigs' complaint, that argument is undeveloped and we consider it no further.

See ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider insufficiently developed arguments).

3. Strict Liability Private Nuisance

¶25 Turning to the Oemigs' strict liability private nuisance claim, the Town argues that "[t]he analysis of this Claim is similar to" the analysis for the negligent private nuisance claim, and develops no separate argument for why there should be coverage for the strict liability private nuisance claim if there is no coverage for the negligent private nuisance claim. We therefore conclude that the professional services exclusion applies to the strict liability private nuisance claim for the same reasons we conclude that the exclusion applies to the negligent private nuisance claim. Again, the Town does not develop any clear argument as to what alleged Town conduct both falls outside the exclusion and forms a basis for the alleged nuisance.

4. Trespass

¶26 We turn finally to the Oemigs' trespass claim. The circuit court concluded that the trespass claim was based on alleged intentional acts by the Town and was therefore excluded by a different exclusion, the "expected or intended injury" exclusion.[4]

¶27 The Town argues that the circuit court erred because the Oemigs' trespass claim is based, at least in part, on alleged negligent conduct instead of

[4] The "expected or intended" injury exclusion applies to harm "expected or intended from the standpoint of the insured." Based on its conclusion that the trespass claim was based on alleged intentional acts, the court also concluded that the trespass claim failed to allege an accidental "occurrence."

intentional conduct. The Town points out that a trespass claim can be based on negligence and need not be based on intentional or even reckless conduct. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 677, 476 N.W.2d 593 (Ct. App. 1991) ("Trespass may be either an intentional intrusion or an unintentional intrusion resulting from reckless or negligent conduct ….").

¶28 Assuming, without deciding, that the circuit court should not have applied the expected or intended injury exclusion, we nonetheless decline to reverse the circuit court, because we again fail to see, based on any developed argument by the Town, why the professional services exclusion should not apply. The Town again appears to base its argument on its belief that the Oemigs alleged negligent construction by the Town. More specifically, the Town asserts that the trespass claim is based on the "Town's faulty construction" and the Town's "[placement of] surplus excavation." However, when we examine the allegations that the Town relies on for this assertion, what we find is the allegations refer to K&K, not the Town, as the defendant that engaged in faulty construction and placement of surplus excavation.[5] Accordingly, we see nothing in the Town's

[5] The allegations specific to the Oemigs' trespass claim that the Town cites are as follows:

> 62. K&K constructed the Project including locating, grading and seeding the overburden left on the plaintiffs' property and on the adjacent property ….
>
> 63. The Town and Foth I&E oversaw and approved the work performed by K&K and failed to require K&K to dispose of the surplus excavation material elsewhere.
>
> 64. The faulty design and/or construction of Wick Road and the surrounding areas collects and discharges surface water directly onto the plaintiffs' property which resulted in wash-out and erosion which has damaged the plaintiffs' property ….

(continued)

arguments to persuade us that the professional services exclusion should not apply to the Oemigs' trespass claim against the Town.

CONCLUSION

¶29 For all of the reasons stated, we conclude that the Town has no coverage for the Oemigs' claims against it and therefore affirm the circuit court's judgment dismissing Rural Mutual from the Oemigs' action.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

We note that these allegations state that the Town's role in the project included oversight and approval of K&K's work, but the Town does not develop an argument that its alleged oversight and approval role would constitute something other than "[s]upervisory … services" falling under the professional services exclusion. Rather, as we have indicated, the Town repeatedly focuses on its assertion that the Oemigs alleged that the Town negligently constructed the project.