COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2538

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

WAUWATOSA SCHOOL DISTRICT AND
UNITED STATES FIRE INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

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

PER CURIAM. Wauwatosa School District and United States Fire Insurance Company appeal from the trial court's grant of summary judgment dismissing their cause of action against National Union Fire Insurance Company

of Pittsburgh, Pennsylvania.[1] The school district argues that National Union breached its contractual duty to defend the school district and its employees against a lawsuit, and that the trial court therefore erred in granting summary judgment in favor of National Union. We conclude that National Union did not have a duty to defend against the underlying lawsuit, and thus, we affirm.

I. BACKGROUND

During the 1992–1993 school year, a teacher within the Wauwatosa public schools had a sexual relationship with a thirteen-year-old student. As a result of that sexual relationship, the teacher was convicted of second-degree sexual assault. In August of 1993, the student and her parents served the school district with a notice of claim. *See* § 893.80, STATS. Thereafter, the student and her parents filed a lawsuit against the school district, the teacher, and various other employees of the school district.

The school district gave notice of the impending lawsuit to National Union, seeking coverage under its "School Leaders Errors and Omissions" policy. National Union, however, asserted that the claims set forth in the lawsuit were not covered by the policy, and refused to defend the school district against the lawsuit. The lawsuit was, therefore, handled by the school district's general liability insurance carrier, United States Fire.

After the conclusion of the student's lawsuit, the school district sued National Union, asserting that the claims in the student's lawsuit were covered by the insurance policy National Union had issued to the school district, and that

[1] Throughout this opinion we refer to Wauwatosa School District and United States Fire Insurance Company collectively as "the school district."

National Union had breached its duty to defend the school district against the lawsuit. Both parties moved for summary judgment. The trial court granted summary judgment in favor of National Union, ruling that the plain language of the insurance policy excluded coverage of the claims in the underlying lawsuit.

II. DISCUSSION

We review *de novo* the trial court's grant of summary judgment. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"[W]hether an insurer has a duty to defend is a question of law, which we review *de novo*, and we make that determination on the basis of the allegations contained in the complaint." ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 231, 522 N.W.2d 261, 266 (Ct. App. 1994). If the complaint contains allegations that, if proven, would be covered, or if, based upon the allegations in the complaint, the issue of coverage is fairly debatable, then the insurer has a duty to defend. *See* ***Regent Ins. Co. v. City of Manitowoc***, 205 Wis.2d 450, 457, 556 N.W.2d 405, 407 (Ct. App. 1996); ***United States Fire Ins. Co. v. Good Humor Corp.***, 173 Wis.2d 804, 819–820, 496 N.W.2d 730, 735 (Ct. App. 1993).

> Although the "fairly debatable" standard is measured from the insurers' point of view, the policy language is still tested not by what the insurer intended the words to mean, but by what a reasonable person in the position of the insured would have understood the words to mean. Likewise, where ambiguities exist, courts will

> construe the language against the drafter and in favor of the insured. Thus[,] when deciding whether there is a duty to defend, insurers and courts must determine, in light of these construction rules favoring insureds, whether the particular coverage is fairly debatable.

United States Fire Ins. Co., 173 Wis.2d at 820–821, 496 N.W.2d at 735 (citations omitted). If an insurance company breaches its duty to defend against fairly debatable claims, it may not contest coverage of the claims. *See* ***Benjamin v. Dohm***, 189 Wis.2d 352, 365, 525 N.W.2d 371, 376 (Ct. App. 1994).[2]

The school district's insurance policy with National Union provided, in relevant part:

> In consideration of the premium charged, and in reliance upon the statements in the Application attached hereto and made a part hereof, and subject to the Limit of Liability stated in Item 3 of the Declarations and the terms and conditions contained herein, the Company hereby agrees as follows:
>
> **INSURING AGREEMENTS**
>
> 1. ERRORS AND OMISSIONS.
>
> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages resulting from any claim or claims first made against the Insured and reported to the Company during the Policy Period stated in Item 2 of the Declarations for any Wrongful Act (as herein defined) of the Insured or of any other person for whose actions the Insured is legally responsible, but only if such Wrongful Act first occurs during the Policy Period and in the performance of duties for the School District named in Item 1 of the Declarations.
>
> ….

[2] The school district asserts that National Union was required to adjudicate the coverage issue prior to the resolution of the underlying claims in order to preserve its right to contest coverage of the claims. Contrary to this assertion, the right to contest coverage is lost only if coverage of the claims was at least fairly debatable. *See* ***Benjamin v. Dohm***, 189 Wis.2d 352, 365, 525 N.W.2d 371, 376 (Ct. App. 1994).

DEFINITIONS

….

3. **Wrongful Act** means any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of duties for the School District named in Item 1 of the Declarations.

EXCLUSIONS

This policy does not apply:

….

b) to any claims arising out of … (3) assault and battery ….

The school district argues that two of the claims in the underlying cause of action were not excluded by the foregoing exclusion. Those two claims asserted as follows:

> 18. As principal and assistant principal of Longfellow Middle School, Mullins and Cosner, and the District, established, through action or inaction, a policy, practice or custom both in Longfellow School and District-wide, which permitted the violation of Jane Doe's civil rights alleged in ¶ 15 above. This policy, practice or custom included, among other things: (1) the absence of reasonable safeguards protecting against excessive intimacy developing teachers, mentors and/or advisors in the District and the students; (2) a failure to train teachers, mentors and/or advisors employed by the District regarding appropriate relationships with students; (3) an atmosphere in the District of disregard of appropriate standards of social and sexual conduct, and of the obligation of strict [sic] personnel to observe, promote and fulfill the laws; (4) a failure to appropriately train teachers, mentors and/or advisors in the District regarding the reporting requirements of Wis. Stats. § 48.981, as evidenced among other things by the individual defendants violating their statutory reporting duties and (5) a failure to investigate Livingston's conduct, prior to, during and after the assaults upon and abuse of Jane Doe. This policy, practice or custom in the District and in Longfellow School was established with deliberate or

> reckless indifference to the constitutional rights of students, including Jane Doe.[3]
>
> 19. The policy, practice or custom in the District and in Longfellow School alleged above directly permitted the deprivation of Jane Doe's liberty interest in bodily integrity in violation of 42 U.S.C. § 1983 and proximately caused Jane Doe's damages as alleged in ¶ 16 above.[4]
>
> ….
>
> 26. Prior to and at the time the District hired Livingston to teach at Longfellow School for the academic year 1992–93, the District was negligent in the investigation it made of Livingston and in hiring him, and thereafter was negligent in maintaining Livingston as an employee, which negligence was a proximate cause of the injuries and damages sustained by the plaintiffs as alleged herein.

(Footnotes added.) The school district argues that coverage of these two claims is fairly debatable because they are negligence claims, and, the school district asserts, the acts of negligence did not involve an assault; the school district further argues that the negligence claims did not arise from an assault because the acts upon which those claims were based occurred before the sexual assault of the student. We disagree. In the absence of the sexual assault, the student and her parents would not have had any claims against the school district or its employees,

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[3] Paragraph 15 provided:

> 15. The individual defendants and the defendant District (acting through its employees, administrators and others) engaged in the misconduct alleged herein while acting under color of law, and by their misconduct caused the plaintiff Jane Doe to suffer a deprivation of her liberty interest in bodily integrity, which is protected by the Due Process Clause of the Fourteenth Amendment, in violation of 42 U.S.C. § 1983.

[4] Paragraph 16 provided:

> 16. As a proximate result of the defendants' misconduct and the deprivation of Jane Doe's liberty interest and due process rights as alleged above, Jane Doe has suffered serious personal injury, extreme pain, suffering and disability, both physical and mental, a loss of ability to enjoy life and earning capacity, expenses for medical care and other consequential damages. These damages, to a substantial extent, are permanent.

and thus those claims were claims "arising out of assault," and, under the clear language of the policy, were not covered.

"In an action for negligence, the complaint must allege a duty of care on the part of the defendant; a breach of that duty; a causal connection between the conduct and the injury; and an actual loss or damage as a result of the injury." ***Grube v. Daun***, 173 Wis.2d 30, 52, 496 N.W.2d 106, 113 (Ct. App. 1992). It is clear from the allegations of the complaint that the injury sustained by the student was the sexual assault by the teacher, and that the damages sustained resulted from the sexual assault. Therefore, the claims clearly arose from the assault and are not covered by the policy. *See* ***Taryn E.F. v. Joshua M.C.***, 178 Wis.2d 719, 727, 505 N.W.2d 418, 422 (Ct. App. 1993) (holding that although a statute imposed liability on the parents of a minor, the parents' statutory liability was based upon the damages resulting from their son's sexual molestation of the plaintiff, and was therefore excluded from insurance coverage by clause excluding coverage of liability resulting from sexual molestation).

This conclusion is supported by our analysis in ***Berg v. Schultz***, 190 Wis.2d 170, 526 N.W.2d 781 (Ct. App. 1994).[5] In ***Berg***, a patron of a bar was assaulted by another patron, and sued the owner of the bar, asserting that the owner had "breached its duty to protect its patrons from injuries caused by other

[5] Although the school district attempts to distinguish ***Berg v. Schultz***, 190 Wis.2d 170, 526 N.W.2d 781 (Ct. App. 1994), on several grounds, we conclude that ***Berg*** applies despite the asserted distinctions. First, although ***Berg*** was not a duty-to-defend case, its resolution of a coverage issue applies to an analysis of whether or not coverage under the policy was fairly debatable. Second, we see no meaningful distinction between the type of policy at issue in ***Berg*** and the type of policy at issue here; in either case, our focus is on the specific language of the policy.

patrons." ***Id.***, 190 Wis.2d at 173, 526 N.W.2d at 782. The bar owner carried an insurance policy that provided, in relevant part as follows:

> "a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.
>
> ….
>
> b. This Insurance applies to 'bodily injury' and 'property damage' only if:
>
> (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory;' and
>
> (2) The 'bodily injury' or 'property damage' occurs during the policy period.
>
> ….
>
> This insurance does not apply to 'bodily injury' or 'property damage' or 'personal injury' arising out of Assault and/or Battery."

Id., 190 Wis.2d at 173–174, 526 N.W.2d at 782. The owner's insurance company sought a declaratory judgment that the policy did not cover Berg's lawsuit. *See* ***id.***, 190 Wis.2d at 174–175, 526 N.W.2d at 782. The trial court granted summary judgment against the insurer, finding that the assault and battery exclusion did not apply to the patron's lawsuit because the action was based on the bar owner's "negligent failure to protect its patrons, not on the theory of assault or battery." ***Id.***, 190 Wis.2d at 175, 526 N.W.2d at 782. We reversed the trial court, holding that coverage must be determined based on the incident giving rise to the claim rather than the theory of liability. *See* ***id.***, 190 Wis.2d at 177, 526 N.W.2d at 783. We explained:

> "It is undoubtedly true that for plaintiffs to recover in this suit, they must demonstrate that their injuries were caused by the allegedly negligent acts. But, although the injuries must, in this sense, have been caused by [defendant's] negligent acts, it does not follow that these

> same injuries did not 'aris[e] out of assault and battery.' Plaintiffs' real contention is that their injuries arose out of an assault and battery, which in its turn, arose out of [defendant's] negligence. Thus, plaintiff's [sic] injuries are unambiguously excluded from coverage by the assault and battery exclusion."

Id., 190 Wis.2d at 176–177, 526 N.W.2d at 783 (alterations in original) (citation omitted). We therefore concluded that "the assault and battery exclusion applies whenever the plaintiff's bodily injury 'arises out of' an assault or battery, regardless of the theory of liability." ***Id.***, 190 Wis.2d at 176, 526 N.W.2d at 783.

Like the patron in ***Berg***, the student's and her parents' injuries, as alleged in the complaint, arose out of the teacher's sexual assault of the student, which in turn, arose out of the alleged negligence of the school district and its employees. We therefore conclude that the exclusion for claims arising out of the assault applied, and the claims set forth above were clearly not covered by the policy. We thus also conclude that National Union did not have a duty to defend against the lawsuit brought by the student and her parents.[6]

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[6] The school district asserts that coverage under the policy was fairly debatable at the time National Union refused to provide a defense because, at that time, ***Berg*** had not yet been decided, and other jurisdictions had found coverage under the circumstances present here. We disagree. The policy language unambiguously excludes the claims at issue, and, even in the absence of the ***Berg*** decision, clearly leads to the conclusion that the asserted claims are not covered by the policy. As noted, the asserted claims clearly arise from the assault because the alleged injuries flowed directly from the assault; if there had been no assault, the plaintiffs would have suffered no damages and would not have had an actionable negligence claim. Further, this analysis is supported by case law that existed at the time National Union refused to defend the school district. *See* ***Taryn E.F. v. Joshua M.C.***, 178 Wis.2d 719, 727, 505 N.W.2d 418, 422 (Ct. App. 1993) ("The fact that financial responsibility is created by statute based on Michael and Beverly's status as parents does not change the basis for liability, which is the damages resulting from Joshua's sexual molestations of Taryn.").

The school district also argues that the policy covers "innocent insureds," despite the assault exclusion. The school district has failed to adequately develop this argument, and thus, we do not address it. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments). Significantly, in the cases that the school district cites within its less-than-two-page

(continued)

By the Court.—Judgment affirmed.

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

argument, the courts looked to the language of the policies at issue to determine whether the policies provided coverage to "innocent insureds"; the courts found coverage when the language of the policy at issue was read to provide separate, rather than joint, coverage to the "innocent-insureds," unless the policy unambiguously excluded coverage of the separately-covered "innocent-insured." *See* ***Hedtcke v. Sentry Ins. Co.***, 109 Wis.2d 461, 487–488, 326 N.W.2d 727, 740 (1982); ***Taryn***, 178 Wis.2d at 723–727, 505 N.W.2d at 420–422; ***Northwestern Nat'l Ins. Co. v. Nemetz***, 135 Wis.2d 245, 255–256, 400 N.W.2d 33, 37–38 (Ct. App. 1986). The school district, however, does not point to any language from the National Union policy that provides separate coverage to "innocent-insureds."