COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2008

David R. Schanker
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. 2007AP2920 **Cir. Ct. No. 2006CV303**

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

MULLINS' CHEESE, INC.,

PLAINTIFF,

WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,

INTERVENING-PLAINTIFF,

MCMILLAN WARNER MUTUAL INSURANCE COMPANY,

INTERVENING-PLAINTIFF-RESPONDENT,

V.

GARY A. SCHUMACHER,

DEFENDANT-APPELLANT,

THOMAS J. BOOR, TOMMY J. PLOECKELMAN, DALE C. PLOECKELMAN, DENNIS GEIGER, ROBERT E. THELL, KENNETH F. TESCH, DAVID SEARER AND KEVIN MEWS,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gary Schumacher appeals a summary judgment concluding McMillan Warner Mutual Insurance Company has no duty to defend or indemnify him in this action. We conclude the allegations in the complaint fit squarely within McMillan's policy exclusion for losses resulting from "the sale of milk or milk-derived products which do not meet the expectations of the purchaser or consumer." We therefore affirm the judgment holding that McMillan has no duty to defend. However, the court prematurely decided McMillan has no duty to indemnify Schumacher. We reverse that portion of the judgment and remand for further proceedings.

BACKGROUND

¶2 Mullins' Cheese filed this suit in March 2006. The suit named nine defendants. All defendants were either farmers or were affiliated with Mews Trucking, Inc., a business that delivered the farmers' milk to Mullins. Schumacher was one of the farmers named as a defendant.

¶3 Mullins paid the farmers based on the quality and weight of their milk. The quality of the milk was determined based on samples of each farm's milk collected by the milk hauler. According to the complaint, the farmers and one of Mews' employees manipulated and switched samples to show the farmers' milk was higher quality than it actually was. The farmers also added water to their milk to increase its weight. As a result, Mullins paid substantially more than it

should have for the milk. The complaint alleged seven claims against the defendants, including breach of contract, fraud, unjust enrichment, and civil conspiracy.

¶4 McMillan was granted leave to intervene in June 2007. It moved for summary judgment, arguing it had no duty to defend Schumacher under the "Farm & Country Home Liability Policy" it issued to him. The circuit court concluded three different exclusions barred coverage for the allegations in the complaint: an exclusion for damages resulting from the sale of milk products, an exclusion for damages resulting from criminal and intentional acts, and an exclusion for damages resulting from the sale of personal property. The court's written decision referred only to McMillan's duty to defend. However, the court granted judgment dismissing McMillan from the suit, stating McMillan had "no duty to defend or indemnify" Schumacher.

DISCUSSION

¶5 Whether summary judgment is appropriate is a question of law reviewed without deference to the circuit court, using the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2);[1] ***Green Spring Farms***, 136 Wis. 2d at 315.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 Whether an insurer has a duty to defend its insured is a question of law reviewed without deference to the circuit court. ***Delta Group, Inc. v. DBI, Inc.***, 204 Wis. 2d 515, 522, 555 N.W.2d 162 (Ct. App. 1996). A duty to defend exists if "there are allegations in the complaint which, if proven, would be covered" under the policy. ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992). Ambiguities in policy language are construed in the insured's favor. ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 43-44, 577 N.W.2d 366 (Ct. App. 1998). Similarly, doubts on whether allegations give rise to coverage are resolved in the insured's favor. ***Delta Group***, 204 Wis. 2d at 522.

¶7 Here, the McMillan policy includes the following exclusion:[2]

> 23. [McMillan does] not cover "property damage," "bodily injury," or economic loss resulting from:
>
> > a. the sale of milk or milk-derived products which do not meet the requirements or expectations of the purchaser or consumer; or
> >
> > b. the expense of any remedial measures taken by the purchaser or consumer of the milk or milk-derived products to dispose of the milk or milk-derived products from equipment, vehicles, or storage vessels and piping.
>
> This exclusion applies even if a contract or agreement requires any "insured person" to indemnify or hold harmless the purchaser or consumer from loss caused by the milk or milk-derived products.

¶8 We agree with the circuit court that Mullins' allegations here, if proven, would fall squarely under the first paragraph of this exclusion. Mullins'

[2] Because we conclude there is no duty to defend under this exclusion, we need not decide whether the other exclusions apply. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

complaint alleges Schumacher combined with others to misrepresent the quality of the milk he sold to Mullins, and as a result Mullins overpaid for the milk. This was a "sale of milk." Because the milk was of poorer quality than the tests represented, the milk did not "meet the … expectations" of Mullins, the purchaser. Mullins' damages—the overpayments—resulted directly from the sale.

¶9 Schumacher does not refute the court's interpretation of this first paragraph or offer any explanation of how the facts here could fall outside that language. Instead, he argues the first paragraph is rendered ambiguous by the second and third paragraphs. He first contends ambiguity exists because the second paragraph could "reasonably be interpreted to mean that if a purchaser or consumer became ill from the unwholesome milk, the policy would not cover those damages."

¶10 We disagree. Policy language is interpreted from the perspective of a reasonable insured. ***Brown County v. OHIC Ins. Co.***, 2007 WI App 46, ¶11, 300 Wis. 2d 547, 730 N.W.2d 446. A reasonable insured would realize the word "or" between the two paragraphs means that they set out two distinct conditions under which coverage would be excluded. Even assuming a reasonable insured could read the second paragraph as limited to the scenario Schumacher suggests, the insured would understand that liability could still be excluded under the first paragraph.

¶11 Schumacher also argues the third paragraph could be read as requiring the loss to be caused by the milk itself, rather than the actions of a person handling the milk. However, the phrase "caused by the milk" refers to the contents of a "contract or agreement" entered into by an insured. It is not a prerequisite for liability. In addition, the clause states the exclusion applies "even

if" a certain kind of contract exists. A reasonable insured would recognize that nothing in the clause applies to the facts here.

¶12 However, the allegations in the complaint are relevant only to duty to defend. That is, when deciding duty to defend, we compare the policy and the facts alleged in the complaint. *See* ***Grube***, 173 Wis. 2d at 72. When deciding whether there is a duty to indemnify—that is, whether there is coverage—we compare the policy and the facts alleged in the parties' affidavits and other summary judgment submissions. *See*, *e.g.*, ***Schleusner v. IMT Ins. Co.***, 2006 WI App 240, ¶5 n.1, 297 Wis. 2d 368, 724 N.W.2d 430. While in most cases the two sets of facts will be the same, there may be coverage but no duty to defend when "the true facts of the event under inquiry call for coverage but the third party's complaint fails to reveal those facts." ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2007 WI App 144, ¶20, 303 Wis. 2d 714, 724, 735 N.W.2d 186.

¶13 Here, the court considered only the facts alleged in the complaint. Neither side argued indemnification, and McMillan does not respond to Schumacher's argument that the court prematurely decided this issue. Arguments not refuted are deemed admitted. *See* ***State v. Alexander***, 2005 WI App 231, ¶15, 287 Wis. 2d 645, 706 N.W.2d 191. Because the court prematurely decided the indemnification issue, we reverse that portion of the judgment and remand for further proceedings on indemnification.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings. No costs.

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