COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-2124

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

REGENT INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

SHERI TANNER,

DEFENDANT-APPELLANT,

PROSTYLE, INC., KAY TANNER, NATIONAL FOOTBALL LEAGUE PROPERTIES, INC. AND GREEN BAY PACKERS, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sheri Tanner, d/b/a ProStyle, Inc., appeals from the circuit court judgment granting summary judgment to ProStyle's insurer, Regent Insurance Company, declaring that ProStyle's policy with Regent did not provide coverage for claims arising out of a federal lawsuit, ***National Football League Properties, Inc. and Green Bay Packers, Inc. v. ProStyle, Inc. and Sheri Tanner***, and, therefore, that Regent had no duty to defend ProStyle. Tanner argues that "the allegations … were, at the very least, potentially covered under the 'advertising injury liability' coverage in the policy." We conclude, however, that the policy exclusion for "'advertising injury[]' … [a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity" precluded coverage. Therefore, we affirm.

¶2 The facts relevant to resolution of this appeal are undisputed. In 1996, NFL Properties and the Packers sued Tanner in the United States District Court for the Eastern District of Wisconsin for eight intellectual property violations including unfair competition, trademark infringement and dilution, deceptive advertising, and misappropriation of trade secrets, related to ProStyle's marketing of sports apparel bearing various Packers insignias. The complaint alleged that the violations were willful, knowing, and intentional. Tanner tendered its defense to Regent. Regent accepted the defense of the action subject to a reservation of its right to dispute coverage.

¶3 In 1997, Regent brought an action in Wisconsin Circuit Court seeking a declaratory judgment to establish that the policy provided no coverage. Granting Regent's motion for summary judgment, the circuit court concluded that the federal case was "really" an action for "misappropriation of trade secrets," falling outside any "property damage or advertising injury as defined in the policy," and, therefore, that Regent had no duty to defend.

¶4 On appeal, Tanner contends only that the claim for misappropriation of trade secrets is covered under the "advertising injury liability" coverage of its Regent policy.[1] Tanner maintains that the Regent policy provides coverage by defining "advertising injury" as "misappropriation of advertising ideas or style of doing business," and by applying to "oral or written publication of material." We conclude, however, that even if those provisions encompass misappropriation of trade secrets, coverage is precluded by the policy exclusion for "'advertising injury[]' … [a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity."

¶5 When the material facts are undisputed, and resolution of the parties' dispute requires only the interpretation and application of an insurance contract, the issue is a legal one appropriate for summary judgment. *See* ***Smith v. State Farm Fire & Cas. Co.***, 127 Wis.2d 298, 301, 380 N.W.2d 372, 374 (Ct. App. 1985). We review summary judgment *de novo*, employing the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

¶6 In construing insurance policies, we attempt to ascertain and carry out the parties' intentions. *See* ***Sprangers v. Greatway Ins. Co.***, 182 Wis.2d 521, 536, 514 N.W.2d 1, 6 (1994). To do so, we determine what a reasonable person in the position of the insured would have understood the policy to mean. ***Id.*** Where

[1] In very confusing arguments, the parties seem to disagree about the scope of this appeal and the impact of our decision on other claims. We note: (1) the circuit court judgment from which Tanner appeals declares that the Regent policy "does not provide coverage *for the claims alleged in the underlying lawsuit*" in the federal court (emphasis added); and (2) the only specific claim Tanner addresses in this appeal is the claim for misappropriation of trade secrets. Therefore, although the court's judgment referred to "claims," Tanner, on appeal, presents only one issue: whether the court erred in concluding that the misappropriation claim was not covered by the Regent policy. That is the single issue we address.

the policy terms are unambiguous, we do not interpret them but, rather, simply apply them to the facts. *See* ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis.2d 722, 736, 351 N.W.2d 156, 163 (1984). Further, "advertising injury" is narrowly construed, providing coverage only for claims arising from specifically enumerated violations. *See* ***Atlantic Mut. Ins. Co. v. Badger Med. Supply Co.***, 191 Wis.2d 229, 237-38, 528 N.W.2d 486, 489 (Ct. App. 1995).

¶7 In this case, the policy covered "'advertising injury' caused by an offense committed in the course of advertising … goods, products, or services." The policy defined "advertising injury" as, *inter alia*, "[m]isappropriation of advertising ideas or style of doing business." Citing several supportive decisions from other state and federal courts, Tanner contends that the definition encompasses misappropriation of trade secrets. What Tanner fails to acknowledge, however, is the policy exclusion: "This insurance does not apply to … 'advertising injury[]' … [a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." As Regent argues:

> Here, the [federal court complaint] is replete with allegations of knowing and willful conduct. "ProStyle and Tanner, acting in concert, acted intentionally, willfully, and in bad faith with the intent to affect NFLP's nationwide promotion, licensing, and merchandising by diminishing NFLP's property rights and control over the PACKERS marks and with the intent to deceive and mislead the public into believing that Defendants' business and products are sponsored, licensed, or authorized by or affiliated, connected or otherwise associated with NFLP or the Packers[.]" Specifically, the underlying plaintiffs allege Tanner knowingly misappropriated trade secrets, and that her actions were willful, malicious, and deliberate. Because the alleged conduct was done by or at the direction of Tanner and ProStyle with knowledge of its falsity, this exclusion applies.

(citations omitted).

¶8 The exclusion in the Regent policy unambiguously precludes coverage for intentional conduct. *See* ***Mulberry Square Prod., Inc. v. State Farm Fire and Cas. Co.***, 101 F.3d 414, 422 (5th Cir. 1996) (construing identical exclusion in policy providing coverage for advertising injury). While vigorously replying to Regent's other arguments, Tanner offers absolutely no reply to Regent's contention that the exclusion precludes coverage. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (unrefuted arguments deemed admitted). Accordingly, we conclude that Tanner has conceded that the exclusion precludes coverage and, therefore, that Regent had no duty to defend.

By the Court.—Judgment affirmed.

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