COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2016

Diane M. Fremgen
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. 2015AP2010 **Cir. Ct. No. 2014CV793**

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

STACEY RHYNER,

PLAINTIFF,

V.

MARVIN E. RYDBERG,

DEFENDANT-APPELLANT,

GENERAL CASUALTY COMPANY OF WISCONSIN,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. Marvin E. Rydberg appeals from an order granting declaratory and summary judgment to General Casualty Company of Wisconsin, finding it has no duty to defend Rydberg in this action. We affirm. Stacey Rhyner sued Rydberg for sexually groping her while both were at work at Veterinary Medical Services Corporation (VMS). Stated simply, Rhyner alleges an intentional tort committed upon her by Rydberg. Rydberg argues that General Casualty, as VMS's worker's compensation and employer's liability carrier, must defend him throughout this litigation. We disagree as Rydberg is not an insured under either General Casualty policy.

BACKGROUND

¶2 Rhyner and Rydberg were both employees of VMS. Rhyner alleges in her complaint that on October 5, 2012, Rydberg committed battery and intentional infliction of emotional distress when he sexually groped her at work. Rydberg argues that any contact he had with Rhyner was consensual. Rhyner makes no claim against VMS. Rydberg sought coverage for Rhyner's claims with VMS's worker's compensation and employer's liability carrier, General Casualty. General Casualty retained counsel; intervened in this action; and sought a determination that General Casualty had no initial duty to defend, no ongoing duty to defend, and no duty to indemnify Rydberg in the event he is found liable to Rhyner. The circuit court agreed and dismissed General Casualty from the case. Rydberg appeals.

DISCUSSION

¶3 The issue presented is whether General Casualty's worker's compensation and/or employer's liability policy provides coverage to Rydberg. We review summary judgment rulings de novo, using the same methodology as

the circuit court. ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶17, 311 Wis. 2d 548, 751 N.W.2d 845. Interpretation of an insurance contract is also a question of law, which we review de novo. ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). An insurer's duty to defend is determined by comparing the allegations in the complaint with the terms of the policy. ***Sustache***, 311 Wis. 2d 548, ¶20. "The duty to defend is triggered by the allegations contained within the four corners of the complaint." ***Newhouse v. Citizens Sec. Mut. Ins. Co.***, 176 Wis. 2d 824, 835, 501 N.W.2d 1 (1993).

¶4 To determine whether there is a duty to defend, we first consider whether the insurance policy initially grants coverage—i.e., whether the insurer has a duty to defend for the claims asserted. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. "If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there." ***Id.*** Only after concluding that coverage exists does the court examine the policy's exclusions to determine whether they preclude coverage. ***Id.*** General Casualty provides coverage to VMS under two policies pertinent to this appeal: worker's compensation coverage (WC policy) and employer's liability coverage (EL policy).[1]

The WC Policy

¶5 The WC policy provides insurance to VMS for liability in the event of a worker's compensation claim. Worker's compensation law in Wisconsin represents a public policy compromise in which an employee surrenders the right

[1] Rydberg concedes that no duty to defend is afforded under General Casualty's flexbiz policy.

to sue the employer in tort in exchange for the employer assuming strict liability and the obligation to provide a quick and certain remedy for injuries. ***Adams v. Northland Equip. Co.***, 2014 WI 79, ¶¶24-25, 356 Wis. 2d 529, 850 N.W.2d 272. The general rule of worker's compensation law is that if an employee has suffered a job-related injury under WIS. STAT. § 102.03(1) (2013-14),[2] then the right to recover worker's compensation benefits under WIS. STAT. ch. 102 "shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier." Sec. 102.03(2).[3] An exception to the exclusive remedy and recovery provision is that an employee injured by another employee by "an assault intended to cause bodily harm" is not limited to a worker's compensation remedy. *See* ***id.*** Rhyner brings her allegations of battery and intentional infliction of emotional distress under the assault exception of § 102.03(2).[4] Rhyner does not seek worker's compensation benefits in this action.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] WISCONSIN STAT. § 102.31 regulates insurance companies that issue worker's compensation coverage in Wisconsin. Section 102.31 provides that "[e]very contract for the insurance of compensation" is "subject to this chapter," and a policy issued under WIS. STAT. ch. 102 "shall be construed to grant full coverage of all liability of the assured under this chapter." Sec. 102.31(1). Liability "under this chapter" means liability of an employer to an employee for a work-related injury. *See* WIS. STAT. § 102.03(1). When an employee files a claim for worker's compensation, the employee must follow the procedures set forth in ch. 102, including filing a claim application with the Department of Workforce Development (DWD). *See* WIS. STAT. § 102.01(2)(ap); WIS. STAT. § 102.17. A corresponding worker's compensation benefit is made pursuant to DWD procedures, guidelines, and schedules. WIS. STAT. § 102.18. An employer must "insure payment for compensation under this chapter in an insurer authorized to do business in this state." WIS. STAT. § 102.28(2).

[4] The issue of whether the assault exception to the exclusive remedy is applicable in this case is not currently before this court. Rydberg filed a motion for summary judgment, arguing that Rhyner's claim was barred by the exclusive remedy provision in the Worker's Compensation Act (WCA). The circuit court denied summary judgment, arguing that the issue of "intent[] to cause bodily harm" was best determined by a jury.

¶6 Rhyner's complaint alleges that Rydberg committed offensive bodily contact battery and intentional infliction of emotional distress—intentional tort claims. Rydberg contends that the factual circumstances arguably place this case within the purview of the WCA. *See* ***Jenson v. Employers Mut. Cas. Co.***, 161 Wis. 2d 253, 266-67, 468 N.W.2d 1 (1991) (finding that an injury causing "extreme and disabling emotional distress" is compensable under the WCA). According to Rydberg, because Rhyner could recover worker's compensation based on her allegations if the claim were brought as a worker's compensation claim, General Casualty's WC policy must provide a defense in this civil intentional tort claim brought under the assault exception pursuant to WIS. STAT. § 102.03(2). We disagree.

¶7 Rhyner is not seeking a worker's compensation claim. General Casualty's WC policy does not cover individual employees, it provides worker's compensation coverage to VMS for worker's compensation claims. This action is not a worker's compensation claim, and Rydberg is not the insured under General Casualty's WC policy. Worker's compensation insurance only applies with respect to liability under WIS. STAT. ch. 102, which conveys exclusive original jurisdiction over any claim for worker's compensation benefits to the DWD. *See* WIS. STAT. § 102.14. General Casualty's policy language states that it has "the right and duty to defend at our expense any claim, proceeding or suit against [VMS] for benefits payable by this insurance," and the benefits payable by this insurance are only "benefits required of [VMS] by the workers compensation law." As it is clear that General Casualty's WC policy was "not intended to cover the claim asserted, the analysis ends [here]." *See* ***American Girl, Inc.***, 268 Wis. 2d 16, ¶24.

The EL Policy

¶8 Rydberg argues in the alternative that General Casualty owes a duty to defend Rydberg under the EL policy, which provides coverage for "bodily injury by accident" arising "out of and in the course of the injured employee's employment." Like the WC policy, the EL policy provides that "[y]ou are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees." As previously explained, Rhyner's complaint alleges intentional tort claims solely against Rydberg: Rhyner is not suing VMS. Nevertheless, according to Rydberg, this lawsuit triggers a duty by General Casualty to defend him personally under the plain terms of the policy. We disagree.

¶9 Rydberg has no coverage under General Casualty's EL policy as Rydberg is not an "insured" under the policy. VMS is listed as the only named insured.[5] VMS is a Wisconsin corporation that employs Rydberg.[6] Rydberg is not the employer under these facts and is not a named insured under the policy. VMS is not a party to this lawsuit. Rhyner's action is an intentional tort claim against Rydberg, personally. Since Rydberg is not a named insured and since there is "no duty to defend a claim, proceeding or suit that is not covered by this insurance," the EL policy does not provide a duty to defend Rydberg against Rhyner's

[5] General Casualty's policy also lists 1st Veterinary Clinic, Inc., another veterinary clinic owned by VMS, as an additional named insured.

[6] Rydberg is the owner of VMS. However, neither Rydberg nor General Casualty argue that Rydberg was Rhyner's employer, rather than her coemployee. The parties also do not argue that Rydberg is a sole proprietor or a member of a partnership forming VMS. Rydberg's brief notes that Rhyner and "Rydberg, were employees of [VMS], a Wisconsin corporation."

intentional tort claim. As the EL policy provides no coverage to Rydberg, we need not reach the issue of whether the alleged bodily injury to Rhyner was "by accident" or whether there are exclusions in the policy that preclude coverage.

CONCLUSION

¶10 For the foregoing reasons, we affirm the circuit court as neither General Casualty's WC policy nor EL policy provide coverage to Rydberg given the allegations in Rhyner's complaint.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.