

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1101

Cir. Ct. No. 2006CV255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

QUALITY ADDICTION MANAGEMENT, INC.,

PLAINTIFF,

V.

BELVA ZOCHER-BURKE,

DEFENDANT-APPELLANT,

**WISCONSIN COMMUNITY MENTAL HEALTH COUNSELING CENTERS, INC.
D/B/A ADDICTION RECOVERY TREATMENT CENTER,**

DEFENDANT,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Belva Zocher-Burke appeals from the order of the circuit court that dismissed Acuity, a Mutual Insurance Company, from the underlying action. Zocher-Burke argues that Acuity is required to defend her in this action under the terms of Acuity’s insurance policy with her employer. Because we agree with the circuit court that the insurance policy does not provide coverage to Zocher-Burke for this action, we affirm.

¶2 Quality Addiction Management, Inc. (“QAM”), sued Zocher-Burke and her employer, Wisconsin Community Mental Health Counseling Centers, Inc., d/b/a Addiction Recovery Treatment Center (“ARTC”), alleging that Zocher-Burke breached a confidentiality agreement with them by providing confidential information to ARTC. QAM owns and operates narcotic maintenance clinics in Southeastern Wisconsin. QAM employed Zocher-Burke as a counselor from 2002 to 2005. While she was employed by QAM, Zocher-Burke signed a confidentiality agreement acknowledging that certain QAM materials were proprietary, and she agreed not to distribute the materials. In October 2005, QAM terminated Zocher-Burke’s employment, and she was then employed by ARTC. ARTC allegedly convinced Zocher-Burke to share some of QAM’s confidential materials. ARTC then used some of these materials in an application it made to the State licensing agency to open its own clinic.

¶3 After QAM filed the suit against Zocher-Burke and ARTC, ARTC’s counsel notified Acuity, ARTC’s insurer, of the action. Acuity moved the circuit court to intervene, bifurcate, and stay the proceedings to determine the insurance coverage issues, and eventually for summary judgment arguing that it was not required to provide coverage for any of the claims. Acuity argued that its policy

with ARTC does not provide coverage because the complaint does not allege bodily injury, property damage, personal injury, or advertising injury. Acuity also argued that the failure of ARTC and Zocher-Burke to notify it of the claim in a timely manner, prejudiced Acuity and abrogated its duty to defend them in this suit.

¶4 Zocher-Burke argued in response that the complaint alleged misappropriation of “style of doing business” and “trade dress,” both of which are advertising injury within the meaning of the policy. She also argued that she timely notified Acuity of the action.

¶5 The circuit court granted summary judgment to Acuity. The court stated: “It is clear from an examination of the policy in question that no language in it speaks directly to coverage for the kind of conduct complained of.” The court concluded that the claim against Zocher-Burke was a claim for theft, and Acuity did not have a duty to defend under the policy. ARTC did not appeal from this order.

¶6 We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶7 The interpretation of an insurance contract is a matter that we review on a *de novo* basis. *Folkman v. Quamme*, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. “To determine whether a duty to defend exists, the complaint claiming damages must be compared to the insurance policy and a determination made as to whether, if the allegations are proved, the insurer would be required to

pay the resulting judgment. The insurer need only look at the allegations within the four corners of the complaint to make such a determination.” *Sustache v. American Fam. Mut. Ins. Co.*, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. We do not interpret insurance policies to provide coverage for risks that the insurer did not contemplate and for which it has not received a premium. *American Fam. Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

¶8 Our review involves a three-step process. *Id.*, ¶24. First, we determine whether the policy makes an initial grant of coverage. *Id.* If it is clear that there is no coverage, then our inquiry ends. *Id.* If the claim triggers the initial grant of coverage, we next examine the exclusions to determine if any of them preclude coverage. *Id.* If the particular exclusion applies, we then look to see if the exclusion has an exception. *Id.*

¶9 We agree with the circuit court that the insurance policy does not contain an initial grant of coverage. Zocher-Burke argues that the claim alleged against her is one for an advertising injury. She asserts that the complaint alleges that ARTC misappropriated QAM’s style of doing business and infringed its trade dress. We consider three factors to determine whether there is coverage for an advertising injury: (1) whether the complaint states an offense covered under the advertising injury provision of the insurance policy; (2) whether the complaint alleges that the insured engaged in the advertising injury; and (3) whether the complaint alleges a causal connection between the injury alleged and the insured’s advertising activity. *Fireman’s Fund Ins. v. Bradley Corp.*, 2003 WI 33, ¶26, 261 Wis. 2d 4, 660 N.W.2d 666. “The touchstone for determining whether the [] complaint alleged an advertising injury is the enumerated offenses in the insurance policy. Only those risks are insured, no others.” *Id.*, ¶27.

¶10 The insurance policy provides coverage for an advertising injury “caused by an offense committed in the course of advertising your goods, products or services.” The policy defines an advertising injury, in pertinent part, as “[m]isappropriation of advertising ideas or style of doing business.” The policy also provides that the insurance does not apply to an advertising injury arising out of: “(1) Breach of contract, other than misappropriation of advertising ideas under an implied contract.”

¶11 The claim in the complaint against Zoicher-Burke is that she signed a confidentiality agreement that stated that QAM’s materials were not to be shared or distributed outside of QAM or select regulatory/accreditation bodies, and that by distributing QAM’s materials to ARTC, Zoicher-Burke breached the terms of this agreement. Zoicher-Burke claims that because the forms she took from QAM were used by ARTC to get new licensing from the State, this is a form of advertising. We do not agree. The policy provides coverage for an injury that occurs “in the course of advertising your goods or products.” Submitting an application for licensing is not an activity done “in the course of advertising.” We conclude, as did the circuit court, that the claim against Zoicher-Burke was for breach of contract by theft, and not for an advertising injury as defined by the policy.

¶12 Because we conclude that the circuit court properly granted summary judgment on the issue of whether the insurance policy provided the initial grant of coverage, we need not address the question of whether Zoicher-Burke and ARTC timely notified Acuity of the action against them. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

