

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 2014

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. 2013AP1303

Cir. Ct. Nos. 2009CV2478
2009CV4611
2010CV1506
2011CV2087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ACUITY, A MUTUAL INSURANCE COMPANY,

THIRD-PARTY PLAINTIFF-RESPONDENT,

v.

**CHARTIS SPECIALTY INSURANCE COMPANY, SUED AS AND F/K/A
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,**

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. This is an insurance-coverage dispute between Chartis Specialty Insurance Company¹ and Acuity, A Mutual Insurance Company. Chartis issued Dorner, Inc., a Contractors Pollution Liability (CPL) policy; Acuity issued Dorner a standard Comprehensive General Liability (CGL) policy. The circuit court concluded that, like Acuity, Chartis also had a duty to defend and indemnify Dorner in four consolidated lawsuits in which the plaintiffs sought recovery for bodily injury and property damage caused by a gas explosion that occurred when, during excavation, Dorner employees disturbed an underground natural gas line. Chartis appeals on grounds that the complaints neither alleged “pollution conditions,” as defined in the CPL policy, nor that “pollution conditions” caused the bodily injury or property. We reverse and remand.

¶2 The explosion from the ruptured gas line destroyed a church, damaged nearby houses, and seriously injured two Wisconsin Electric employees. Acuity did not contest its duty to defend and indemnify Dorner pursuant to the CGL policy it issued to Dorner but contended that Chartis also had a duty to defend and indemnify Dorner pursuant to the CPL policy. Chartis disagreed, asserting that it was liable for bodily injury and property damage only if caused by pollution conditions, and neither the explosion, the bodily injury, nor the property damage was a “pollution condition” under the policy. Chartis denied coverage and declined Dorner’s/Acuity’s tenders of defense.

¶3 Acuity and Chartis both moved for summary judgment. On January 28, 2011, the circuit court granted Acuity’s motion and denied Chartis’s.

¹ Chartis was sued under its former name, American International Specialty Lines Insurance Company.

It concluded that Chartis breached its duty under the CPL policy and ordered Chartis to defend Dorner, but did not allocate the defense and indemnity payments at that time. On May 25, 2012, the court ordered the insurers to share defense costs and indemnity settlements or judgments on a fifty-fifty basis.

¶4 The last of the underlying cases was settled in May 2013. The parties stipulated that: (1) Dorner's defense costs were \$283,073.94; (2) Chartis already had paid Acuity \$141,486.08, its fifty-percent share; (3) the indemnity settlements Acuity had paid on Dorner's behalf amounted to \$1,531,761.80; (4) Chartis' fifty-percent share of the settlements was \$765,880.90; and (5) taxable costs were \$905.75. The circuit court entered an order for judgment against Chartis and in favor of Acuity in the amount of \$766,786.65, Chartis' fifty-percent share of the indemnity settlements plus taxable costs. Chartis appeals.

¶5 Our standard of review is de novo because we review summary judgment de novo and the interpretation of an insurance contract is a question of law. *Klinger v. Prudential Property & Cas. Ins. Co.*, 2005 WI App 105, ¶7, 282 Wis. 2d 535, 700 N.W.2d 290. 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) (2011-12).²

¶6 Where, as here, the facts are undisputed, the determination of whether an insurer has breached its contractual duty to defend is a question of law we decide independently of the circuit court. *See Elliott v. Donahue*, 169 Wis. 2d 310, 316, 485 N.W.2d 403 (1992). There is a logic to Chartis's comparison of the

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

coverages provided by the CPL and CGL policies and its assertion that they were meant to dovetail so that each would cover liability for causes of damage or injury the other did not. It is an interesting notion, but determining the existence of a duty to defend, we must apply the following analysis.

¶7 An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. *Estate of Sustache v. American Fam. Mut. Ins. Co.*, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. The duty to defend "is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666. The duty is triggered if the allegations, if proved, "give rise to the possibility of recovery" under the policy. *Id.*, ¶19. The existence of coverage under the facts in the complaint need only be "fairly debatable." See *Baumann v. Elliott*, 2005 WI App 186, ¶¶8-9, 286 Wis. 2d 667, 704 N.W.2d 361. If even one theory in a complaint appears to fall within the policy's coverage, the insurer is obligated to defend the entire action. *State Farm Fire & Cas. Co. v. Acuity*, 2005 WI App 77, ¶8, 280 Wis. 2d 624, 695 N.W.2d 883.

¶8 The Insuring Agreement in the Chartis CPL policy provides coverage for "all sums that [Dorner] shall become legally obligated to pay ... as a result of Claims for Bodily Injury [or] Property Damage ... caused by Pollution Conditions." "Pollution Conditions" is defined as:

the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land ... provided such conditions are not naturally present in the environment in the concentration or

amounts discovered. **Pollution Conditions** shall include **Microbial Matter** in any structure on land and the atmosphere within that structure.

“Microbial Matter” is defined as “fungi, mold or mildew.”

¶9 The first underlying complaint alleged that Dorner damaged a gas line, such that “natural gas ... leaked out of the ... gas line [and] exploded. The explosion caused damage to property owned by the involuntary plaintiffs [nearby residents].”

¶10 The second complaint alleged that the “natural gas that had leaked out of the ... pipe sparked an explosion at the First Baptist Church, destroying the church and damaging two residential homes also owned by the church.”

¶11 The third complaint alleged that “the natural gas explosion and fire” caused Ross Phillips and Dan Staffeldt to “sustain[] serious injuries and damages, including, but not limited to, physical injuries, conscious pain and suffering, disability, mental distress and anguish, medical expenses, loss of earnings and benefits and will continue to suffer such losses into the future as well as other compensable injuries.”

¶12 The fourth complaint alleged that the “natural gas[-]fueled explosion and fire” caused plaintiff John M. Johnson to sustain

personal injuries which required extensive medical care and attention and treatment at a hospital with resulting expense thereof, occasioned great pain, suffering and shock to his nervous system, resulted in a loss of earnings and earning capacity, will cause future pain, suffering, disability and loss of earning capacity, will limit his future capacity for the enjoyment of the fruits of life, and will require future medical care and attention

It also alleged that Johnson's wife and three minor daughters were, and in the future will be, deprived of Johnson's "aid, comfort, society and companionship."

¶13 The court concluded that the natural gas was a pollution condition under the policy because, as a "gaseous combustible fuel" people do not want "loose in the environment," which exploded due to a chemical reaction, a reasonable person would consider "a gas leak like this ... a contaminant[]" and, therefore, pollution."

¶14 Even assuming all reasonable inferences in the allegations and resolving any doubts as to the duty to defend in Dorner's favor, we are persuaded otherwise. The complaints allege significant property damage and personal injury due only to the explosion and fire, not to contact with the escaped natural gas itself because the gas intrinsically is an "irritant or contaminant" in the manner of "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land," or "fungi, mold or mildew." It is the nature of the claim being asserted against the insured, not the merits, that determines the existence of the duty to defend. *Radke v. Fireman's Fund Ins. Co.*, 217 Wis. 2d 39, 43, 577 N.W.2d 366 (Ct. App. 1998). We do not deem it fairly debatable that any of the complaints allege even one theory to trigger Chartis' duty to defend.

¶15 Accordingly, we reverse and remand this matter to the circuit court with directions that the May 8, 2013 money judgment and the January 28, 2011 and May 25, 2012 orders be vacated and that judgment be entered in favor of Chartis and against Acuity for \$141,486.08, the amount Chartis paid Acuity toward Dorner's defense. Chartis's request for costs and fees is denied.

By the Court.—Judgment reversed and cause remanded with directions.

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

