

NO. A08-321

State of Minnesota  
 In Supreme Court

GENERAL CASUALTY COMPANY OF WISCONSIN,  
*Plaintiff,*

vs.

WOZNIAK TRAVEL, INC. d/b/a HOBBIT TRAVEL and  
 THE SAUL ZAENTZ COMPANY d/b/a TOLKIEN ENTERPRISES,  
*Defendants.*

**PLAINTIFF GENERAL CASUALTY COMPANY OF WISCONSIN'S  
 REPLY BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## INTRODUCTION

Wozniak and *Amici Curiae* make two unreasonable assumptions in opposition to General Casualty's positions. First, Wozniak mistakenly assumes that it is entitled to broad coverage for any error or omission committed in its advertising. In fact, however, the general liability and umbrella policies specifically provide that coverage is triggered only when a claim is made against the insured for certain enumerated offenses. Accordingly, the relevant question to be answered by this Court is whether the allegations of trademark infringement fall within the applicable definitions in those policies.

Second, Wozniak and *Amici Curiae* conflate the purpose of trademarks – to *identify* the source of goods, products or services – with the concept of an advertising idea – which is the *method* used to promote the trademarked goods, products or services. This case amply illustrates the point because word “hobbit” has allegedly been used simply to identify the *source* of certain goods, products and services by contrast to the methods use to promote them, such as painting characters on Air New Zealand planes.

Wozniak and *Amici Curiae* also focus on the *volume* of cases that reached an outcome they regard as favorable. Tellingly, they shy away from any analysis of the merits of those cases, preferring to rely on the argument that the various terms are ambiguous – because other courts have so ruled – and ambiguities are to be held against the insurer. In fact, the better reasoning establishes that the terms are not ambiguous, and the positions offered by Wozniak and *Amici Curiae* are strained and result-oriented.

Wozniak's suggestion to make the certified questions entirely theoretical would not be helpful to the parties or the District Court. The questions to this Court are not an

existential exercise but should address the actual controversy between General Casualty and Wozniak. Thus, to the extent that the questions should be re-formulated, they should be couched in terms of whether the claim *against Wozniak* falls within the coverage grant in the Policies issued by General Casualty.

Lastly, although not relevant to the certified questions, Wozniak repeats its allegation that General Casualty has somehow breached its defense obligations. In fact, General Casualty reached an agreement on rates with counsel defending Wozniak and has now incurred approximately \$900,000 to date in fees and costs on behalf of Wozniak. In any event, the issue has no bearing on the matter before this Court, but the Court should not be swayed by Wozniak's incomplete reference to it.

### ARGUMENT

#### **A. The Only Relevant Facts Needed To Answer The Certified Questions Are The Allegations Of The Underlying Complaint And General Casualty's Policies**

Wozniak takes issue – at some length - with the settled concept that the duty to defend is determined by comparing the allegations against the insured against the terms of the insurance policy. (Wozniak Brief, pp. 11-14). General Casualty does not dispute that Minnesota permits a court to consider extrinsic facts that show the existence or non-existence of insurance coverage, but what relevant extrinsic facts exist in this case? Tellingly, Wozniak does not offer any; the only “facts” offered by Wozniak are those that it characterizes as “reiterate[ing] and expand[ing]” on the allegations of the Underlying Complaint. (Wozniak Brief, p. 4). Wozniak asserts that Tolkien Enterprises “alleged that Wozniak misappropriated SZC's ... marketing techniques, as well as their labeling

and packaging, which purportedly was designed to make the ‘mythos’ of the association between hobbits and travel ... .” (Wozniak Brief, p. 6). The argument is misleading in several respects. First, Wozniak does not distinguish between “hobbit” – the fanciful creature created by Professor Tolkien – and “The Hobbit,” the book that ultimately became considered a prequel to “The Lord of the Rings” trilogy. Indeed, there are no allegations related to Tolkien Enterprises’ trademark infringement of the word “hobbit” in the material included in Wozniak’s appendix. Second, the references to Wozniak’s appendix establish only Tolkien Enterprises’ use of depictions of hobbits and Tolkien trademarks, but not once is there any assertion that Wozniak “misappropriated” any of these “techniques.”

Consequently, because there are no extrinsic facts that relate to advertising injury coverage, and as set forth more fully in General Casualty’s opening brief, the allegations of the Underlying Complaint control, and those allegations establish a claim for trademark infringement only.

**B. Advertising Injury Coverage Requires Allegations Of An Enumerated Offense**

The central flaw in Wozniak’s argument is revealed by its argument that it had a “reasonably objective expectation ... of broad protection against its errors or omissions during the course of its advertising, rather than against specific causes of action that might be based on that conduct.” (Wozniak Brief, p. 26). In fact, Wozniak’s expectations are plainly and objectively *unreasonable*, because the insuring agreements in the CGL and CUL policies provide coverage for certain

enumerated acts only: “misappropriation of advertising idea or style of doing business,” “infringement of copyright, title or slogan,” “use of another’s advertising idea in your ‘advertisement’” and “infringing upon another’s copyright, trade dress or slogan.”<sup>1</sup> Accordingly, Wozniak must establish coverage under one of these grants, and must establish each element thereof.

**C. The Sixth And Eighth Circuit Opinions As To Misappropriation Should Control**

One of the enumerated offenses included in the CGL policy is “misappropriation of advertising ideas or style of doing business.” This requires a showing by Wozniak of a “misappropriation” claim, as well as establishing that the claim is based on an “advertising idea or style of doing business.” As set forth in General Casualty’s opening brief, “misappropriation” has been construed by the Sixth and Eighth Circuits as referring to the common law tort. For the reasons stated in the opening brief, General Casualty requests that this Court adopt the reasoning explained at length by the Sixth Circuit in *Advance Watch*.

**D. The Trademarked Word “Hobbit” Is Not An Advertising Idea Or Style Of Doing Business**

Wozniak and *Amici Curiae* criticize the Sixth Circuit’s opinion in *Advance Watch*, and cite to numerous authorities that have declined to follow that opinion. The criticism leveled at *Advance Watch* focuses primarily on its holding with respect to one element of one of the “advertising injury” offenses: “misappropriation.” See, e.g., *Adolpho House*,

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<sup>1</sup> Likewise, General Casualty contends that there are several applicable exclusions that bar coverage, but those matters are not before this Court.

*supra*, 165 F.Supp.2d at 1339 (*Advance Watch*'s "restrictive gloss on the concept of 'misappropriation' conflicts with basic rules of insurance contract interpretation"); *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 747 (3<sup>rd</sup> Cir. 1999); *Westfield Ins. Co. v. Factfinder Marketing Research, Inc.*, 860 N.E.2d 145, 152. (Ohio Ct. App. 2006); *American Employers' Ins. Co., v. DeLorme Publishing Co.*, 39 F.Supp.2d 64, 76-77 (D. Me. 1999); *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of America*, 343 F.3d 249, 255-257 (4<sup>th</sup> Cir. 2003).

Notably, however, there is little criticism of *Advance Watch* with respect to whether trademark infringement is a claim based on an "advertising idea or style of doing business." Thus, although Wozniak and *Amici Curiae* rely primarily on the alleged "weight" of authority that purportedly finds that trademark infringement is inherently a claim for misappropriation of an advertising idea or style of doing business (Wozniak Brief, p. 22-30; *Amici Curiae* Brief, p. 7-8), the cases cited by them belie the contention.

First, many of the authorities they cite relate to *trade dress*, but trade dress and trademark are not synonymous. Indeed, trade dress and trademark are distinct claims. Trade dress refers to the *total overall image* of a product or its packaging. See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764, n.1, 120 L.E.2d 615, 112 S.Ct. 2753 (1992). By "total image," courts mean that trade dress is the overall impression of a product and not any one element:

In examining trade dress the focus is on the entire look of the product or packaging. Individual aspects of a trade dress may be eligible for trademark protection in their own right, but in an action for trade dress infringement, *each aspect should be viewed in relation to the entire trade dress.*

*Bristol Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 24 U.S.P.Q.2d 1161, 1167 (2<sup>nd</sup> Cir. 1992) (emphasis added). Accordingly, trade dress may refer to various aspects of a product or package design, including “features such as size, shape, color or color combinations, texture, graphics or even particular sales techniques” but it is more than just any one component. *Id.*

A leading treatise on trademark law provides numerous examples of trade dress, including the cover of a book, a magazine cover design, the layout and appearance of a mail order catalog, the appearance and décor of a chain of Mexican restaurants, the design of a handbag, the shape and appearance of a golf club head, and the shape and appearance of a video game console. *McCarthy on Trademarks*, § 8.4.50, pp. 8-19 – 8-23 (4<sup>th</sup> Ed. 2008).

With this distinction in mind, a federal district court in Illinois recently recognized the difference between trademark and trade dress in the context of advertising injury coverage. *Central Mut. Ins. Co. v. StunFence, Inc.*, 292 F.Supp.2d 1072 (N.D. Ill. 2003). In that case, the insured was sued for trademark infringement; the underlying plaintiff alleged that the insured advertised products using the same trademark – “Power Fence.” The insured also allegedly sold plaintiff’s products with its [the insured’s] own label attached to the product. The policies at issue contained the same relevant coverage and exclusion language as in the General Casualty Policies.

The court first rejected the insured’s argument that coverage for trade dress included trademark infringement. *Id.* at 1077. As the court noted, trade dress is a *subset*

of trademark law, but the policies clearly intended trademark and trade dress to be treated separately. *Id.* The insured next argued that trademark and trade dress were really synonymous. *Id.* at 1078. The court rejected that argument too because, as it stated:

while this Court must read the Underlying Action’s allegations as broadly as possible, **it should not bend those underlying allegations or the Primary Policy’s provisions entirely out of shape just to find coverage.** [Citation omitted]. Absent any Underlying Action allegations that allude to the misuse of the overall impression, or some distinct feature, of StunFence’s product, StunFence fails in its attempt to squeeze into the trade dress language.

*Id.* (Emphasis added).

And, even in the trade dress cases, most of those courts simply held that infringement may – but does not inherently – constitute misappropriation of an “advertising idea or style of doing business.” For example, in *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179 (11<sup>th</sup> Cir. 2002) the court stated that trade dress “may, under certain circumstances, constitute a ‘misappropriation of advertising ideas or style of doing business.’” *Id.* at 1191. Significantly, the court stated that it did not reach a conclusion as to whether trade dress inherently involves advertising. *Id.* at 1194, n. 11. See also, *Pizza Magia International LLC v. Assurance Co. of America*, 447 F.Supp.2d 766, 773 (W.D. Ky. 2006) (trade dress may, but not always, constitute an “advertising idea” or “style of doing business”); *Cincinnati Ins. Cos. v. Pestco, Inc.*, 374 F.Supp.2d 451 (W.D. Pa. 2004).

In *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group*, 50 Cal.App.4<sup>th</sup> 548 (Cal. Ct. App. 1996), a California Court of Appeal found only that a “trademark

could reasonably be considered to be **part of** either an advertising idea or a style of doing business.” *Id.* at 565. In effect, the court read additional language into the insuring agreement to find coverage, i.e., misappropriation of **part of** an advertising idea or style of doing business, thereby violating California’s rules of insurance contract interpretation.

Other cases cited by Wozniak and *Amici Curiae* simply assume that trademark is inherently an “advertising idea.” *Adolfo House Distributing Corp. v. Travelers Prop. & Cas. Ins. Co.*, 165 F.Supp.2d 1332 (S.D. Fla. 2001); *American Employers’ Ins. Co., v. DeLorme Publishing Co.*, 39 F.Supp.2d 64, 76-77 (D. Me. 1999); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins., Inc.*, 818 F.Supp. 553, 557 (W.D.N.Y. 1993), *vacated at attorneys’ request*, 153 F.R.D. 36 (W.D.N.Y. 1994); *CAT Internet Services, Inc. v. Providence Washington Ins. Co.*, 333 F.3d 138, 142 (3<sup>rd</sup> Cir. 2003).<sup>2</sup>

Moreover, a finding of the trademarked word “hobbit” is an “advertising idea or style of doing business” is unreasonable because it conflates the *identifier* of goods, products and services with the *method* of promoting those trademarked goods, products and services. As pointed out by the Fifth Circuit in *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453 (5<sup>th</sup> Cir. 2003), trademarks are used to identify, and the law “classifies marks into five different categories [including] (5) fanciful.” 335 F.3d at 460,

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<sup>2</sup> The court reached the same conclusion in *Bay Electric Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F.Supp.2d 611, 618 (S.D. Tex. 1999), but that holding is now questionable in light of the Fifth Circuit’s opposite finding in *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453 (5<sup>th</sup> Cir. 2003).

n. 7. Fanciful marks are not real words, but ones made up to identify a product. *Id.* By contrast, “advertising” refers to “a device for the solicitation of business.” *Id.* at 462. The cases cited by Wozniak and *Amici Curiae* holding that trademarks are inherently advertising ideas do so in the abstract. *Id.* at 463-465. In fact, this case highlights the level of abstraction; the term “hobbit” was created not to advertise, or even label, but as part of a literary work. The fact that Tolkien Enterprises later acquired a trademark for “hobbit” (and other words from the Tolkien Works) to identify the source of certain goods, products and services is very different from the “devices” used to broadcast or advertise those goods, products and services. For example, the pictures painted on Air New Zealand jets depict certain identifiable hobbit *characters* but there are no allegations – or facts set forth by Wozniak – that the word “hobbit” is used to advertise. (Wozniak Brief, p. 5). See also, *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 618-619 (2<sup>nd</sup> Cir. 2001).

**E. Trademark Infringement Does Not Constitute Infringement of Title**

The California Supreme Court has held that a trademark name is not a “title” or a “slogan.” *Palmer v. Truck Ins. Exchange*, 21 Cal.4<sup>th</sup> 1109 (Cal. 1999). In that case, the insured was sued for the use of the trademark name “Valencia” to identify real property developments. The Court held that the insuring agreement for “advertising liability” including “title” and “slogan” covers “infringement of names of literary or artistic works or names that are slogans – and no other names.” *Id.* at 1112. As to “title” infringement, the Court discussed the meaning of title at length in connection with the subject policy

exclusion for trademark exclusion, but notably, the Court also expressly held that its definition “gives effect to each term of the coverage clauses – which provides coverage for ‘infringement of copyright, title or slogan’ – because the name of a literary or artistic work is not protectible by copyright.” *Id.* at 1118, n. 8; *ShoLodge, Inc. v Travelers Indem. Co. of Illinois*, 168 F.3d 256, 259 (6<sup>th</sup> Cir. 1999).

The argument proffered by Wozniak and *Amici Curiae* ignore the context of the group of offenses: copyright, title or slogan. Each of these is the result of authorship of creative material. Copyright refers to literary material, for example, and title refers to the non-copyrightable name of the material. Slogan is another similarly non-copyrightable creative work. Both Wozniak and *Amici Curiae* argue that because “title” is not defined, it should be given a layman’s understanding. Curiously, however, both cite to Black’s Law Dictionary, which, coincidentally, contains a broad definition that purportedly provides a favorable result to them. The first definition provided in most lay dictionaries, however, refers to title in its literary sense: “the distinguishing name of a book, poem, picture, piece of music, or the like.” Random House Unabridged Dictionary, 2006. The fact that “title” has other definitions in the abstract is not significant because the issue in this case is determining “title” in the context of “advertising injury” in a CGL policy. As explained recently, “courts often took to the greater context or purpose of a clause in order to determine its meaning.” *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 153-154 (Minn. Ct. App. 2001), citing *Henning Nelson Const. Co. v. Fireman's Fund Am. Life Ins. Co.*, 361 N.W.2d 446, 450 (Minn. Ct. App. 1985). Thus, because of its inclusion with “copyright” and “slogan,” and as explained in *Advance Watch* and

*ShoLodge*, General Casualty requests that this Court similarly find “title” to be unambiguous and refer to the literary title of a book or other work of art.

Wozniak and *Amici Curiae* rely on two Wisconsin state cases: *Acuity v. Bagadia*, 2007 WI App 133, 302 Wis. 2d 228, 734 N.W.2d 464 and *Western Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc.*, 2007 WI App 188, 305 Wis. 2d 217, 738 N.W.2d 114. Both of those cases, in turn, rely on the Seventh Circuit opinion in *Charter Oak Fire Ins. Co. v. Hedeem & Cos.*, 280 F.3d 730 (7<sup>th</sup> Cir. 2002). *Charter Oak* tried to predict how the Wisconsin Supreme Court would interpret “title.” Notably, the Wisconsin Supreme Court has granted review of the decision in *Acuity*, and accordingly, it would be premature to give weight to *Charter Oak*. Moreover, *Charter Oak* proffers no explanation for its holding, other than relying on dicta in two earlier opinions. In short, because the Seventh Circuit strained to find an ambiguity in “title” outside of its context in the CGL policy, its holding in *Charter Oaks* should not be given persuasive value.

And, although the original book authored by Professor Tolkien is titled “The Hobbit,” there are no allegations against Wozniak that it has infringed on the title. Instead, and as set forth more fully in General Casualty’s opening brief, “hobbit” is the term created by Professor Tolkien to refer to a race of creatures that exist in Middle Earth. Wozniak blurs the distinction between the two, but because advertising injury is not as broad as Wozniak posits, the focus must remain on the allegations actually made by Tolkien Enterprises.

**F. The Allegations Of Trademark Infringement Against Wozniak Do Not Constitute A Claim Based On “Slogan”**

As a make-weight argument, Wozniak and *Amici Curiae* contend that the claim against Wozniak may be considered infringement of “slogan.” The argument is specious. Indeed, even using the dictionary definition cited by Wozniak and *Amici Curiae*, a slogan is a “word or phrase used to express a *characteristic position or stand or goal to be achieved* [or] a brief attention-getting *phrase* used in advertising and promotion.” *Amici Curiae* Brief, p. 18, emphasis added. *Amici Curiae* cites several such slogans – “Got Milk?,” “Keeps on Going,” and “Just Do It!” – but fails to explain how the word “hobbit” similarly expresses a “characteristic position” or “stand” or “goal to be achieved.” *Amici Curiae* also fails to explain how a word – hobbit- can be characterized as a “phrase.”

Wozniak contends that the word “hobbit” automatically triggers an image of travel in everyone’s mind. In fact, hobbits are to travel and adventure as house cats are to water:

We are plain quiet folk and have no use for adventures. Nasty disturbing uncomfortable things! Make you late for dinner!

Bilbo Baggins, Chapter 1, *The Hobbit*.

In short, the single word – hobbit – is not a “characteristic position” or “stand” or “goal to be achieve” or a “phrase” (of any kind). Consequently, the allegations against Wozniak do not trigger coverage for slogan infringement. See *Hugo Boss, supra*; *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546 (6<sup>th</sup> Cir. 2003).

**G. General Casualty Requests That This Court Ignore Wozniak's Attempt To Distract The Court With Extraneous Matters**

Lastly, General Casualty requests that the Court disregard all of the extraneous matters asserted by Wozniak. The rules of civil appellate procedure require that "[t]he facts must be stated fairly, with complete candor, and as concisely as possible." Minn. R. Civ. App. P. 128.02, subd. 1(c). As learned commentators have accurately advised, "a strained and inaccurate statement of the facts may irreparably impair a brief's credibility in the eyes of the appellate court." *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 179 (Minn. Ct. App. 2007), citing 3 Eric J. Magnuson & David F. Herr, *Minnesota Practice* § 128.6 (2006).

Wozniak disregards its obligation to this Court to fairly and accurately present the facts of the case by its assertion that General Casualty has breached its duty to defend Wozniak in the Underlying Action. More specifically, Wozniak fails to advise this Court that General Casualty and defense counsel reached an agreement as to the rate to be paid in defending Wozniak. See, Reply App., pp. 107-109.<sup>3</sup> General Casualty has paid all fees and costs in accordance with that agreement. In fact, General Casualty has paid approximately **\$900,000** in defending Wozniak. Significantly, Wozniak does not make any effort to explain to this Court how General Casualty's compliance with its defense obligation – or lack thereof – has anything to do with the specific certified questions posed by the District Court. Indeed, although Wozniak raised this issue before the

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<sup>3</sup> Tellingly, Wozniak attached defense counsel's letter confirming the agreement of fees to its own motion for summary judgment.

District Court, the District Court apparently gave it no credence, as the issue is not discussed in its opinion.

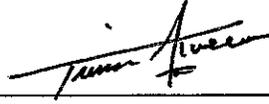
### CONCLUSION

Wozniak's belief that it is entitled to coverage for any and all wrongful conduct in the course of advertising is unreasonable and not based on the language in the subject policies. In fact, the subject policies specifically provide coverage for certain enumerated offenses only. There is no ambiguity in the insuring agreement, and to the extent that Wozniak expected that any type of advertising injury would be covered, that expectation is clearly unreasonable.

Accordingly, because the trademark infringement claim asserted by Tolkien Enterprises against Wozniak is not a claim for "misappropriation of an advertising idea or style of doing business" or "infringement of copyright, title or slogan" or "use of another's advertising idea," General Casualty respectfully requests that this Court answer the questions certified by the District Court in the negative.

Dated: May 19, 2008.

Respectfully submitted,  
General Casualty Company of Wisconsin



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