



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

August 20, 2015

To:

Hon. Daniel T. Dillon
Circuit Court Judge
Rock County Courthouse
51 S. Main St.
Janesville, WI 53545

Mark K. Longua
SmithAmundsen LLC
Tower 1
330 E. Kilbourn Ave., Suite 1100
Milwaukee, WI 53202

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main St.
Janesville, WI 53545

Scott K. McCarthy
McCarthy Law Firm
205 S. John Paul Rd.
Milton, WI 53563

Timothy J. Casper
Murphy Desmond, S.C.
P. O. Box 2038
Madison, WI 53701-2038

You are hereby notified that the Court has entered the following opinion and order:

2014AP2643

K. B. Sharpening, LLC v. Stateline Recycling, Inc.
(L.C. # 2012CV1235)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Stateline Recycling appeals a circuit court order granting Western National Mutual Insurance Company's motion for summary judgment and declaratory judgment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

This is an insurance coverage case. K.B. Sharpening, LLC is in the business of sharpening carbide steel and other metal for cutting tools. K.B. sued Stateline Recycling, Inc., alleging that Stateline purchased carbide that was stolen by one of K.B.'s employees from K.B., that Stateline knew the carbide was stolen, and that Stateline negligently trained and supervised its employees with respect to the purchase of goods that might be stolen. Western National Mutual Insurance Company, Stateline's insurer, intervened and bifurcated the insurance coverage issues from the liability and damages issues. Western National then filed a motion for summary judgment and declaratory judgment, seeking a ruling that it had no duty to defend or indemnify Stateline. The circuit court granted the motion, ruling that Western National had no responsibility to defend or indemnify Stateline because the "occurrence" of property damage, as contemplated by the insurance policy, was the theft of the carbide by K.B.'s employee, not the negligent purchase of that stolen carbide by Stateline. Stateline now appeals.

The insurance policy issued by Western National to Stateline requires that there be an "occurrence" in order to trigger coverage for property damage. "Occurrence" is defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." On appeal, Stateline argues that the unintentional, negligent purchase of stolen carbide by Stateline and the negligent training and supervision of the employees who purchased the carbide were each an occurrence and that the resulting losses should be covered by the insurance policy. Western National argues that there was no occurrence, as that term is defined in the policy and that, even if there was, several exclusions apply that preclude coverage in this case.

For purposes of our analysis we will assume, without deciding the issue, that there was an "occurrence" and that the Western National policy provides an initial grant of coverage to

Stateline. We turn, then, to Western National's argument that several different exclusions in the policy apply, precluding coverage under the facts of this case.

Stateline fails to address any of the exclusion arguments directly in its reply brief, arguing instead that the circuit court did not consider those arguments and that, therefore, they are not properly before this court. Stateline cites *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983), in support of its assertion that issues not considered by the circuit court will not be considered for the first time on appeal. This is an incorrect statement of the law. In *Holland Plastics*, 111 Wis. 2d 497 at 504, we stated "Generally, issues *not raised or considered* by the [circuit] court will not be considered for the first time on appeal." (Emphasis added). Here, there is no dispute that Western National's arguments about the policy exclusions were raised in the circuit court. Stateline concedes in its reply brief that the parties briefed the issues regarding the exclusions. Therefore, we are satisfied that the issues are properly before us. The fact that the circuit court based its decision on other grounds does not matter for purposes of our review, since this court reviews summary judgment decisions de novo. See *Tomlinson v. MidAmerica Mut. Life Ins. Co.*, 168 Wis. 2d 92, 95, 483 N.W.2d 234 (Ct. App. 1992).

A proposition asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Thus, the result of Stateline's failure to rebut Western National's arguments regarding the policy exclusions is that those arguments are taken as conceded, and we affirm the order of the circuit court on that basis.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals