COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0517

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

THE SHELBY INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

MICHAEL VERKUYLEN AND DENNIS MURPHY,

INVOLUNTARY-PLAINTIFFS,

V.

HERITAGE MUTUAL INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

V.

TODD J. DARLING,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Heritage Mutual Insurance Company appeals from a judgment granting declaratory judgment to The Shelby Insurance Company on Shelby's claim that it does not owe coverage for claims arising from a boating accident involving Shelby's insured. Because the circuit court properly concluded that Shelby does not owe coverage, we affirm.

¶2 The facts surrounding the accident are not disputed. On June 15, 1995, Joseph Zelinski, the chief executive officer and president of Custom Marine Service, Inc., was driving a power boat owned by Custom Marine. He and his four passengers were ejected from the boat. One passenger drowned, and the others were injured. Zelinski had homeowner's and umbrella insurance with Shelby; Custom Marine had commercial liability insurance with Heritage. Shelby and Heritage disagreed about the purpose of the boat's use at the time of the accident and disputed which insurer owed coverage for claims arising from the accident.

¶3 Shelby commenced a declaratory judgment action seeking a ruling that Heritage owed coverage for claims arising out of the accident. Shelby alleged that its business exclusion clause precluded coverage for claims arising out of the accident. Heritage conceded that it owed coverage for the claims arising out of the accident but counterclaimed that Shelby owed primary coverage because Zelinski was using the boat for pleasure. Shelby never replied to Heritage's counterclaim.

¶4 The parties filed declaratory judgment motions which the court denied because there were factual questions to be resolved. The parties then filed

trial briefs setting out their respective positions on coverage. The court held a trial.[1]

¶5 At the outset of the trial, the parties entered into various stipulations regarding evidence relevant to the coverage question. This evidence included deposition excerpts, the accident investigation documents and the insurance policies. Todd Darling, a mechanic employed by Custom Marine at the time of the accident, testified that he had serviced the boat but was a social guest on the boat the night of the accident. Darling testified that the participants did not discuss business on the trip, and the boat went to two restaurant-bars where its occupants drank alcohol. Darling considered the outing to be social, not business related.

¶6 Zelinski testified that the boat was used to test components built and installed by Custom Marine such as exhaust, muffler and cooling systems. The boat was purchased to test Custom Marine components and had numerous Custom Marine systems installed on it. Zelinski could not specifically recall which component he was testing on the night of the accident. However, durability is an issue with many of Custom Marine's components, and it was Custom Marine's habit to log hours on its components.

¶7 Zelinski testified that he did not own his own boat and used one of Custom Marine's boats when he wanted to go boating. The boat was generally stored at Custom Marine. Zelinski testified that Darling, the mechanic, would

[1] Heritage erroneously contends that the court decided the declaratory judgment on summary judgment.

have been asked to follow up had any problems with the components become apparent as a result of the outing.

¶8 Zelinski testified that his use of the boat "was usually always a mix of pleasure and business." He stated that none of the passengers did any business with him that evening; they were friends who occasionally joined him on the boat. The outing was not a client entertainment or business promotion activity. Part of the reason for the outing was to have a boat ride with friends. However, a consequence of the outing was to log hours on the boat's components. Zelinski also conceded that taking an employee out on the boat would advance Custom Marine's business interests and its relationship with its employees.

¶9 Another passenger, Dennis Murphy, testified that the outing was strictly for pleasure and was not business related.

¶10 In its written decision, the court first addressed Heritage's request for a default judgment because Shelby did not reply to its counterclaim. The court found that Heritage's counterclaim did not raise any new issues. The court also found that Heritage was not prejudiced by Shelby's failure to reply to the counterclaim because the parties tried the coverage issues. The court declined to enter a default judgment.

¶11 On appeal, Heritage challenges the circuit court's refusal to award a default judgment on its coverage counterclaim. However, the default judgment statute, WIS. STAT. § 806.02 (1997-98),[2] does not provide for a default judgment on a counterclaim. *See* ***Pollack v. Calimag***, 157 Wis. 2d 222, 235, 458 N.W.2d

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

591 (Ct. App. 1990). Even if the default judgment statute did apply, we would conclude that the court properly exercised its discretion in denying Heritage's request for a default judgment. *See* ***Riggs Marine Serv., Inc. v. McCann***, 160 Wis. 2d 846, 850, 467 N.W.2d 155 (Ct. App. 1991). The court correctly reasoned that Heritage's counterclaim did not raise any new issues to be decided by the court.

¶12 Turning to the substantive coverage question, the court noted Heritage's concession that it owes coverage for the boat when the boat is used with Custom Marine's permission. The court then turned to whether the boat was being used for business or pleasure at the time of the accident to determine whether Shelby might also owe coverage. The court found that there was little doubt that the trip had a pleasurable purpose. However, the court gave greater weight to Zelinski's testimony that part of the reason Custom Marine owned the boat was to test the durability of Custom Marine components. The court found that "[t]his necessarily meant that the boat had to be used in order to log hours on the equipment which [Custom Marine] had installed. Zelinski also stated that the boat was used for pleasure purposes while logging such hours. This appears to be what was happening on the night of the accident. The use of this boat for these purposes was specific-risk insured by Heritage."

¶13 Heritage challenges the circuit court's coverage decision. The parties sought a declaratory judgment on coverage. Whether to grant a declaratory judgment is within the circuit court's discretion. *See* ***Wisconsin Educ. Ass'n Council v. State Elections Bd.***, 156 Wis. 2d 151, 161, 456 N.W.2d 839 (1990). The circuit court's findings will be upheld unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶14 We start with the court's findings and conclude that they are not clearly erroneous based on the record before the court. The court found that there was little doubt that the trip had a pleasurable purpose. However, the court gave greater weight to Zelinski's testimony that part of the reason Custom Marine owned the boat was to test the durability of Custom Marine components. The court found that "[t]his necessarily meant that the boat had to be used in order to log hours on the equipment which [Custom Marine] had installed. Zelinski also stated that the boat was used for pleasure purposes while logging such hours. This appears to be what was happening on the night of the accident." These findings are amply supported in the record.

¶15 Having upheld the court's findings that the boat trip had an essential business purpose, we turn to Shelby's policy to determine whether the circuit court correctly concluded that its business exclusion provision bars coverage. The interpretation of an insurance policy is a question of law which we decide de novo. *See* ***Filing v. Commercial Union Midwest Ins. Co.***, 217 Wis. 2d 640, 644, 579 N.W.2d 65 (Ct. App. 1998).

¶16 The Shelby business exclusion excludes liability:

> Arising out of or in connection with a "business" engaged in by an "insured." This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered … because of the nature of the "business."

¶17 The court found that

> Simply because no business was discussed on this trip … does not negate the fact of the essential business purpose of [Custom Marine's] ownership and use of the boat. It was Joe Zelinski the CEO of [Custom Marine] who made the invitations and operated the boat, not Joe Zelinski the homeowner. The fact that the cruise was used to entertain

> or relax the CEO, an employee, or friends does not negate its connection with a business engaged in by an insured, particularly considering the [Shelby business] exclusion applies regardless of the nature or circumstances of the application. (Quotation marks in original omitted.)

Therefore, the Shelby business exclusion prevailed. Heritage objects.

¶18 The phrase "arising out of" has been litigated in Wisconsin. This phrase has been held to be "very broad, general and comprehensive." ***Garcia v. Regent Ins. Co.***, 167 Wis. 2d 287, 294, 481 N.W.2d 660 (Ct. App. 1992). The phrase is commonly understood to refer to a "causal relationship between the injury and the risk for which coverage is provided." ***Id.*** "[T]he focus of this 'causation' inquiry is on the risk for which coverage has been afforded." ***Id.*** at 295.

¶19 The court found that the boat trip had a business purpose even if the participants found it pleasurable. In light of the underlying reasons for Custom Marine's purchase and use of the boat, we conclude that Shelby, the homeowner's insurer, did not contemplate extending coverage under its homeowner's policy to Zelinski for claims arising from the accident. *See* ***id.*** The purpose of a homeowner's policy is to cover the activities associated with the insured's personal activities, not regular income-producing activities. *See* ***Bartel v. Carey***, 127 Wis. 2d 310, 317, 379 N.W.2d 864 (Ct. App. 1985). The context of the activity from which the accident claims arose was a business one. *See* ***id.*** Therefore, coverage is excluded under the Shelby policy.[3]

By the Court.—Judgment affirmed.

[3] Having so held, we need not address Heritage's arguments as to which policy is primary and which is excess.

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