COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

Nos. 99-3330 and 00-0295

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

NICOLE L. SHEA,

PLAINTIFF-APPELLANT,

V.

ARIC P. HAAS, BUCKEYE STATE MUTUAL INSURANCE COMPANY, MATTHEW S. MARSH, KEVIN J. STARK, WILSON MUTUAL INSURANCE COMPANY, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY, AND LA CROSSE COUNTY HUMAN SERVICES,

DEFENDANTS,

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Roggensack and Dillon,[1] JJ., and William Eich, Reserve Judge.

¶1 ROGGENSACK, J. Nicole Shea, who was injured in a motor vehicle accident caused by the intoxication of an underaged drinker, appeals two orders granting summary judgment dismissing Allstate Insurance Company, Kevin Stark, and Wilson Mutual Insurance Company from a personal injury lawsuit. She claims that an Allstate mobile home insurance policy, under which Matthew Marsh was an insured, provides coverage for her injuries and that Stark was negligent as a matter of law, thereby affording coverage for her injuries from Wilson Mutual as well. However, because Shea's bodily injury arose from the use or occupancy of a motor vehicle, we conclude it was excluded from coverage under Allstate's mobile home insurance policy. Additionally, because we also conclude that Stark's permitting the use of a keg tapper[2] that had been in his possession to dispense beer to underage drinkers does not constitute procuring alcohol for them, we affirm both circuit court orders granting summary judgments of dismissal.

[1] Circuit Judge Daniel T. Dillon is sitting by special assignment pursuant to the Judicial Exchange Program.

[2] A "tapper" is a device used to dispense beer from kegs.

BACKGROUND

¶2 Nicole Shea and Karie Kast[3] attended a party at a farm near Sparta at which beer was served from kegs.[4] Matthew Marsh paid for all of the beer consumed at the party, and Kevin Stark allowed the organizers of the party to use a keg tapper that had been in his possession to dispense the beer. Shea left the party in a car driven by Kast that subsequently was involved in an accident in which Shea was injured. Kast, who was eighteen years old, had a blood alcohol concentration of .123 when the accident occurred. Her intoxication was a cause of the accident.

¶3 Shea sued Marsh and Allstate, the issuer of a mobile home insurance policy under which Marsh was an insured, in negligence for providing alcohol to Kast. At the time of the accident, Allstate's policy provided the following coverage: "**We** will pay all sums arising from the same loss which an **insured person** becomes legally obligated to pay as damages because of **bodily injury** or **property damage** covered by this part of the policy." (Emphasis in original.) However, the policy also contained an exclusion for bodily injury if it arose from the occupancy or use of an automobile. The circuit court granted summary judgment dismissing Allstate,[5] reasoning that the policy excluded bodily injuries caused by the operation of an automobile. The court also concluded that Marsh's

[3] Some of the depositions submitted in the summary judgment proceedings in circuit court identified "Carrie Cast" as an attendee of the party. The circuit court identified her as "Karie Kast," so we do also.

[4] This case reaches us on a stipulation of facts for the purposes of the summary judgment motions.

[5] The order dismissing Allstate did not affect Marsh's potential liability to Shea.

provision of beer to an underage drinker was not an independent concurrent cause of Shea's injuries.

¶4 Shea also sued Stark and his insurance carrier, Wilson Mutual, arguing that Stark's permitting the party organizers to use a keg tapper he had in his possession to serve beer to underage drinkers constituted procuring alcoholic beverages for a minor and therefore he was negligent as a matter of law. The circuit court granted summary judgment dismissing Stark and Wilson Mutual, reasoning that Shea had not shown a sufficient connection between Stark and serving the beer. Shea appeals both orders granting summary judgments of dismissal.

DISCUSSION

Standard of Review.

¶5 We apply the same summary judgment methodology as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. ***Id.*** If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.*** at 233, 568 N.W.2d at 34.

¶6 The interpretation of an insurance policy is a question of law that we decide *de novo*. ***Filing v. Commercial Union Midwest Ins. Co.***, 217 Wis. 2d 640,

644, 579 N.W.2d 65, 66 (Ct. App. 1998). Statutory construction and the application of a statute to undisputed facts are questions of law. ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315, 317 (Ct. App. 1997).

Policy Exclusion.

¶7 On appeal, Shea argues that we should conclude the Allstate mobile home policy provides coverage for her injuries because: (1) the language used in the exclusion is ambiguous; therefore, it must be construed against Allstate; (2) the provision of alcohol to Kast, an underage drinker, was an independent concurrent cause of Shea's injuries; and (3) the policy should be interpreted to prevent a "gap" in coverage between Marsh's and Kast's auto insurance policies.

1. Policy Ambiguity.

¶8 We interpret the terms of an insurance contract as a reasonable insured would have understood them. ***Filing***, 217 Wis. 2d at 644, 579 N.W.2d at 66. The test that we apply is an objective one. ***Bertler v. Employers Ins. of Wausau***, 86 Wis. 2d 13, 17, 271 N.W.2d 603, 605 (1978). Therefore, whether an ambiguity exists in a coverage exclusion depends on the meaning that the words used to describe the exclusion would have to a reasonable person of ordinary intelligence in the position of the insured. ***Kozak v. United States Fid. & Guar. Co.***, 120 Wis. 2d 462, 467, 355 N.W.2d 362, 364 (Ct. App. 1984). If an ambiguity exists, we construe the policy against the insurance company and in favor of the insured. ***Filing***, 217 Wis. 2d at 645, 579 N.W.2d at 66 (*citing* ***Stanhope v. Brown County***, 90 Wis. 2d 823, 849, 280 N.W.2d 711, 722 (1979)). And finally, an insurance policy must be interpreted as a whole to give reasonable meaning to all of its provisions. ***Berg v. Schultz***, 190 Wis. 2d 170, 175, 526 N.W.2d 781, 783 (Ct. App. 1994).

¶9 An insurance company has a duty to indemnify when the allegations set out in the complaint, if proven, would permit recovery under the policy. ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 364, 488 N.W.2d 82, 87 (1992). Therefore, we determine whether a policy excludes coverage by focusing on the incident and the injury described in the complaint. ***Berg***, 190 Wis. 2d at 177, 526 N.W.2d at 783. Examining the incident may be central to our analysis because the exclusions stated in an insurance policy often are driven by the incident that allegedly caused damage, rather than by the theory of liability set forth in the claim. ***Id.*** We also focus on the type of injury because it, too, may be the defining criterion for a policy exclusion. ***City of Edgerton v. Gen. Cas. Co.***, 184 Wis. 2d 750, 765, 517 N.W.2d 463, 470 (1994).

¶10 The Allstate policy, under which Marsh is an insured, contains an exclusion based on the type of injury sustained. It states: "**We** do not cover **bodily injury** arising out of the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, loading or unloading of any motorized land vehicle or trailer." (Emphasis in original.) Shea argues that those terms are ambiguous because a reasonable insured would interpret them to apply only when legal liability arises from *the insured's* ownership or use of a motorized land vehicle, rather than from the use of a motor vehicle by a third party. Therefore, she argues, the circuit court erred when it failed to construe the terms of the policy against Allstate.

¶11 Here, the complaint alleges that Shea was involved in a motor vehicle accident, that she suffered bodily injuries as a result, and that Marsh's negligence was a proximate cause of her injuries. Plainly, it alleges that her injuries arose from the "use" or "occupancy" of a motorized land vehicle. As we examine Shea's claimed ambiguity, we note that interpreting the exclusion as she

urges would require us to add words to the terms used in the policy because the exclusion, as written, excludes bodily injury caused by the use or occupancy of a motorized vehicle, regardless of whether an insured or another is using or occupying the motorized vehicle. However, we are not free to add words to a policy to create a limitation in the policy that its plain terms do not require. Additionally, the policy states that it excludes bodily injury caused by the use or occupancy of "any" motorized land vehicle, which cuts against Shea's argument that the policy excludes bodily injury only if it is caused by an insured's motor vehicle. Therefore, we conclude that the policy is not ambiguous because a reasonable person in the position of the insured would not have understood the terms "**bodily injury** arising out of the … use [or] occupancy … of any motorized land vehicle" to be limited to an insured's use or occupancy or an insured's automobile, rather than establishing a type of personal injury for which coverage is excluded no matter who was using or occupying any automobile causing the injury. Accordingly, we further conclude that Marsh did not have a reasonable expectation of coverage under the Allstate policy for any liability he may have for the bodily injury Shea suffered.

2. Independent Concurrent Cause.

¶12 Based on ***Lawver v. Boling***, 71 Wis. 2d 408, 238 N.W.2d 514 (1976), Shea also argues that Marsh's act of providing alcohol to a minor is an independent concurrent cause of her injuries and therefore they are covered under the Allstate policy. Lawver, Boling's son-in-law, was injured while helping Boling close off an opening in the side of his barn. To lift Lawver up to the opening, the two rigged a swing chair that was tied to the back of Boling's pick-up truck with a rope. Boling drove back and forth to raise and lower the chair, but the rope broke, causing Lawver to fall. Boling's farm owner's policy contained a

clause stating, "This policy does not apply … to the ownership, maintenance, operation, use, loading or unloading of … automobiles." ***Id.*** at 412, 238 N.W.2d at 517. The circuit court granted summary judgment to Boling's insurer. The supreme court reversed, stating:

> We conclude [the insurer] should not be excused from its obligation to defend the action or pay benefits until it has been determined that the injuries did not result, even in part, from a risk for which it provided coverage and collected a premium. That determination presents a question of fact which cannot be answered on a motion for summary judgment.

Id. at 422-23, 238 N.W.2d at 522. In reaching this conclusion, the court noted that "[t]he rule which ordinarily limits strict construction to instances of ambiguity should have no application where the danger it is designed to avoid is not present, namely, coverage for which the insurer has not received a premium." ***Id.*** at 423, 238 N.W.2d at 522.

¶13 However, "an independent concurrent cause must provide the basis for a cause of action in and of itself and must not require the occurrence of the excluded risk to make it actionable." ***Smith v. State Farm Fire & Cas. Co.***, 192 Wis. 2d 322, 332, 531 N.W.2d 376, 380 (Ct. App. 1995). In ***Smith***, an intoxicated Baumann took Smith's son snowmobiling without putting a helmet on him. Baumann crashed, and Smith's son died. Smith sued State Farm, which had issued Baumann's homeowner's policy. Although the policy excluded coverage for "**bodily injury** or **property damage** arising out of the ownership, maintenance, use … of … [a snowmobile] owned or operated by or rented or loaned to any **insured**" (emphasis in original), the circuit court denied summary judgment for State Farm, reasoning that Baumann's intoxication and failure to put a helmet on the child were independent concurrent causes of the death. ***Id.*** at 328,

531 N.W.2d at 379. The court of appeals reversed, concluding, "these acts are irrelevant without the operation of the snowmobile. Without the operation of the snowmobile … the injury would not have occurred, intoxication and lack of a helmet notwithstanding." ***Id.*** at 332, 531 N.W.2d at 380.

¶14 We conclude that the act of providing alcohol to Kast, an underage drinker who then drove the car in which Shea was injured, was not an independent concurrent cause of Shea's injuries because Shea's injuries would not have occurred without the excluded cause of the injuries, the use or occupancy of a motor vehicle. In ***Lawver***, operation of the truck—an excluded risk—and other acts for which coverage may have been available could have contributed to the injury simultaneously. Therefore, the supreme court determined that, in the context of a summary judgment motion, it was impossible to determine which acts caused the injury. Here, Shea's injuries resulted directly from the automobile accident. Although Marsh provided alcohol to Kast, Shea's injuries would not have occurred without the excluded cause of bodily injury. The policy concern identified in ***Lawver*** supports this conclusion. Allstate received a premium to issue a policy that specifically excluded bodily injuries resulting from the use or occupancy of an automobile. Therefore, because Marsh's act of providing alcohol to Kast was not an independent concurrent cause of Shea's injuries, we conclude that Marsh's Allstate policy does not provide coverage for Shea's injuries under this theory either.

3. Gap Theory.

¶15 Finally, Shea contends that we should interpret the mobile home policy to prevent a "gap" in coverage between Marsh's automobile policy[6] and Kast's automobile insurance policy. Shea cites no case law to support her "gap" theory, and we are not aware of any. "This court need not consider arguments unsupported by citation to legal authority." ***Hoffman v. Econ. Preferred Ins. Co.***, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590. We decline to do so here. Accordingly, we conclude the circuit court correctly concluded that any liability that Marsh may have for Shea's injuries is not covered by the Allstate policy.

Procuring Alcohol.

¶16 Shea also contends that the circuit court erred in dismissing her negligence claim against Stark and his insurer, Wilson Mutual. She reasons that beer could not have been dispensed at the party and consumed by Kast without the keg tapper that Stark permitted to be used and therefore he procured alcoholic beverages for an underage person in violation of WIS. STAT. § 125.07 (1997-98).[7]

---

[6] All parties agree that the policy that covered Marsh for accidents resulting from his use of an automobile has no obligation to cover Marsh for this accident.

[7] WISCONSIN STAT. § 125.07: **Underage and intoxicated persons; presence on licensed premises; possession; penalties. (1)** ALCOHOL BEVERAGES; RESTRICTIONS RELATING TO UNDERAGE PERSONS. (a) *Restrictions*. 1. No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.

Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶17 To withstand a motion for summary judgment, Shea's complaint must raise genuine issues of fact with regard to the following three elements:

> (1) the defendant procured alcohol beverages for an underage person in violation of [WISCONSIN STAT.] § 125.07(1)(a)1; (2) the defendant knew or should have known that the underage person had not attained the legal drinking age; and (3) the alcohol beverages provided to the underage person were a substantial factor in causing injury to a third party.

Miller v. Thomack, 210 Wis. 2d 650, 660, 563 N.W.2d 891, 895 (1997). The parties do not dispute that beer is an alcoholic beverage, that Stark saw the tapper being used to dispense beer to some persons who were underage, that the beer drunk by Kast was a substantial factor in causing Shea's injuries, or that Stark did not sell, give away, or dispense beer at the party. We focus our analysis on whether permitting the use of a keg tapper constituted "procuring" beer within the context of WIS. STAT. § 125.07.

¶18 The statute does not define the term "procure." Nevertheless, procuring alcohol does not require a person to directly purchase or dispense alcohol; a person who supplies money for someone else to buy alcohol with the intent that it be consumed by underage drinkers is considered to have procured alcohol within the meaning of the statute. ***Miller,*** 210 Wis. 2d at 667, 563 N.W.2d at 898. Shea cites no case law to support the proposition that permitting the use of a device to dispense beer to underage drinkers, in and of itself, constitutes procuring alcoholic beverages. Additionally, WEBSTER'S NEW COLLEGIATE

DICTIONARY 918 (1974) defines "procure" as: "to get possession of" or to "obtain," "acquire" or "to bring about."[8]

¶19 When Stark arrived at the party, the tapper was already in use. However, he does not deny that he told the organizers of the party that they could use it. It is also undisputed that whoever purchased the barrels could have obtained a tapper from the beer vendor. And, although a tapper was necessary for accessing the beer from within the barrels, it is not illegal for minors to possess one. Therefore, by permitting the use of the tapper, Shea did not bring about the consumption of beer by underage drinkers, but he may have saved Marsh, who paid for all the beer, the price of renting a tapper. Additionally, Stark never inserted the tapper into a barrel of beer or used the tapper to dispense beer to others. He did not buy the beer for the party, nor did he contribute money to buy it. He did not transport it to the farm. He did not sell or serve beer to any underage drinkers. His participation was limited solely to permitting the use of the keg tapper. We conclude this limited participation in the events leading up to and occurring at the party is insufficient to come within the statutory prohibition of "procuring" alcohol for underage drinkers within the meaning of WIS. STAT. § 125.07. Furthermore, because Stark did not violate § 125.07(1)(a)1., we conclude that Shea's complaint failed to state a claim for relief as to Stark. Accordingly, we conclude that the circuit court correctly ordered summary judgments of dismissal for Stark and Wilson Mutual.

[8] When not specifically defined in the statutes, a non-technical term must be given its ordinary and accepted meaning, and that meaning may be ascertained from a recognized dictionary. ***State v. Steenberg Homes***, 223 Wis. 2d 511, 519 n.3, 589 N.W.2d 668, 672 n.3 (Ct. App. 1998).

CONCLUSION

¶20 Because Shea's bodily injury arose from the use or occupancy of a motor vehicle, we conclude it was excluded from coverage under Allstate's mobile home insurance policy. Additionally, because we also conclude that Stark's permitting the use of a keg tapper that had been in his possession to dispense beer to underage drinkers does not constitute procuring alcohol for them, we affirm both circuit court orders.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.