COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 6, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1310

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

MANDI MADOCHE,

Plaintiff-Respondent,

v.

MILWAUKEE MUTUAL INSURANCE COMPANY, THE MANITOWOC COMPANY, JOHN and KIMBERLY SELVICK and JOHN DOE INSURANCE COMPANY,

Defendants-Respondents,

WILSON MUTUAL INSURANCE COMPANY,

Intervening Defendant-Appellant,

HANS SCHMIDT AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendants-Third Party Plaintiffs-Respondents,

v.

ROBERT G. BABCOCK,

Third Party Defendant-Respondent,

ROBERTA SCHMIDT,

Plaintiff-Respondent,

v.

ROBERT G. BABCOCK, MILWAUKEE MUTUAL INSURANCE COMPANY, OVERLAND-BOLLING COMPANY and JOHN and KIMBERLY SELVICK, D/B/A THE MIAMI TAP,

Defendants-Respondents,

WILSON MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

HANS A. SCHMIDT,

Plaintiff-Respondent,

v.

ROBERT G. BABCOCK, JOHN and KIMBERLY SELVICK D/B/A THE MIAMI TAP, MILWAUKEE SAFEGUARD INSURANCE COMPANY, BROWNING-FERRIS INDUSTRIES, INC., and AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN,

Defendants-Respondents,

WILSON MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

APPEAL from an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Wilson Mutual Insurance Company appeals a nonfinal order denying portions of its motions for declaratory and summary judgment seeking to be dismissed from its duty to defend and indemnify its insureds, John and Kimberly Selvick. We granted leave to appeal the nonfinal order pursuant to § 808.03(2), STATS.

This case arose out of a two-car accident involving driver Robert Babcock and his passenger, Mandi Madoche, and driver Hans Schmidt and his passenger, Roberta Schmidt. Plaintiffs Madoche and the Schmidts allege that Babcock's vehicle negligently collided with the Schmidt vehicle. They also allege that Babcock, who was under the legal drinking age, was driving while under the influence of alcohol. The plaintiffs further allege that the Selvicks and/or their agents negligently sold or dispensed alcohol to Babcock and that this negligence was a substantial factor in causing the collision.

It is undisputed that Wilson issued a storekeeper's liability insurance policy insuring "JOHN SELVICK D/B/A MIAMI'S" and that the policy was in full force and effect on the date of the car accident.[1] In response to Wilson's motions for declaratory and summary judgment, the trial court concluded that: (1) Exclusion (h) of the storekeeper's policy is ambiguous and should therefore be construed in favor of the insured; (2) Wilson has a duty to defend its insured; (3) issues of fact prevent the court from concluding whether

[1] The trial court noted that the insurance policy lists only John Selvick and declined to address how that impacts Kimberly Selvick. The issue has not been raised on appeal, and we will not address it.

Wilson has a duty to indemnify John and Kimberly Selvick; (4) no product hazard coverage applies nor is there any responsibility to defend or indemnify with respect to product hazard; and (5) there is no coverage for punitive damages. Wilson appeals the trial court's conclusions regarding the ambiguity of exclusion (h) and Wilson's duty to defend and indemnify; the respondents have not cross-appealed the product hazard or punitive damage issues.

However, the respondents argue Wilson is liable to defend and indemnify the Selvicks because exclusion (h) of the storekeeper's policy is ambiguous. Additionally, plaintiff Roberta argues there is coverage under another section of the policy: the products hazard endorsement. Roberta argues alternatively that if there is no products hazard coverage, Wilson should nonetheless provide coverage because the products hazard endorsement is illusory and ambiguous. For the reasons discussed herein, we reverse the trial court's order denying summary judgment.

When we review a decision to grant or deny summary judgment, we apply the same methodology as the trial court. ***Ollhoff v. Peck***, 177 Wis.2d 719, 722, 503 N.W.2d 323, 324 (Ct. App. 1993). The first step of that methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated and a material issue of fact presented. ***Voss v. City of Middleton***, 162 Wis.2d 737, 747, 470 N.W.2d 625, 628-29 (1991). In testing the sufficiency of the complaint, the facts pleaded by the plaintiff and all reasonable inferences therefrom are accepted as true. ***Prah v. Maretti***, 108 Wis.2d 223, 229, 321 N.W.2d 182, 186 (1982).

If a claim for relief has been stated, the inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment under § 802.08, STATS. ***Voss***, 162 Wis.2d at 747-48, 470 N.W.2d at 629. To make a prima facie showing for summary judgment, a moving defendant must show a defense which would defeat the plaintiff. ***Id***. at 748, 470 N.W.2d at 629. If the moving party has made a prima facie case for summary judgment, the court must examine the opposing party's affidavits and other proof to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to a trial. ***Id***. Summary judgment should be granted only if there are no disputed issues of material fact and the moving party is entitled to summary judgment as a matter

of law. ***Ollhoff***, 177 Wis.2d at 722-23, 503 N.W.2d at 324 (citing § 802.08(2), STATS.).

At issue in this case is whether Wilson, as the moving party, has made a prima facie case for summary judgment under § 802.08, STATS. *See* ***Voss***, 162 Wis.2d at 747-48, 470 N.W.2d at 629. Specifically, we must determine: (1) whether Wilson has shown that exclusion (h) in its insurance policy would defeat the respondents' claims that it has a duty to defend and indemnify the Selvicks; (2) whether Wilson has shown that it is not required to provide coverage under the products hazard endorsement.

Interpretation of an insurance contract is controlled by general principles of contract construction. ***Sprangers v. Greatway Ins. Co.,*** 182 Wis.2d 521, 536, 514 N.W.2d 1, 6 (1994). The objective is to ascertain and carry out the intention of the parties. ***Id***. Of primary importance is that the language of an insurance policy should be interpreted to mean what a reasonable person in the position of the insured would have understood the words to mean. ***Id***. In the absence of extrinsic evidence, interpretation of an insurance policy is a matter of law which this court decides independently of other courts that may have examined the policy. ***Id***. at 532, 514 N.W.2d at 5.

A provision in an insurance policy is ambiguous if, when read in context, it is reasonably or fairly susceptible to more than one construction. ***Sprangers***, 182 Wis.2d at 536-37, 514 N.W.2d at 6. Generally, if the policy is ambiguous, the ambiguities should be construed in favor of coverage. ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis.2d 375, 382, 480 N.W.2d 1, 3 (1992).

EXCLUSION (H) OF THE STOREKEEPER'S LIABILITY POLICY

We begin with our analysis of the storekeeper's liability policy, which provides in relevant part:

STOREKEEPER'S LIABILITY

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies

> .... [T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage ....

Exclusions
This coverage does not apply:

> ....
> (h) to bodily injury or property damage for which the insured or his indemnitee may be held liable
> (1) as a person or organization *engaged* in the business of manufacturing, distributing, selling or serving alcoholic beverages, or
> (2) if not so *engaged*, as an owner or lessor of premises used for such purposes,

if such liability is imposed

> (i) *by, or because of the violation of, any statute, ordinance or regulation* pertaining to the sale, gift, distribution or use of any alcoholic beverage, *or*
> (ii) by reason of the selling, serving or giving of any alcoholic beverage to a *minor* or to a person under the influence of alcohol *or which causes or contributes to the intoxication of any person;*

but part (ii) of this exclusion does not apply with respect to liability of the insured or his indemnitee as an owner or lessor described in (2) above. (Bold emphasis deleted, italicized emphasis added.)

The trial court found exclusion (h) ambiguous in three respects. First, the trial court found that the term "engaged" is ambiguous as used in the phrase "engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages" in (h)(1) of the policy. The Selvicks explain:

The trial court noted that there is no clear definition as to that term

> and that it could be subject to two reasonable interpretations. First, it could be interpreted to reflect a situation where the Selvicks are in the business of selling and dispensing alcohol. Second, it could be interpreted to mean that they are, at the time of the incident alleged, actively dispensing or

> selling alcoholic beverages. The trial court recognized that there is a clear distinction and that in this case it is alleged that it was an employee of the Selvicks, and not the Selvicks themselves which supplied the alcohol to the underage person.

The respondents argue that under one interpretation of "engaged," the exclusion would apply only if the Selvicks personally served Babcock. Thus, if an employee, rather than the Selvicks, served Babcock, the exclusion under (h)(1) would not apply. Instead, (h)(2) would apply. This could affect whether Wilson is liable to the Selvicks because the policy states that (h)(ii) does not apply with respect to liability of the insured as an owner or lessor described in (h)(2).

Plaintiff Madoche also argues that (h)(1) and (h)(2) are inherently inconsistent, stating, "How can one not be 'engaged' in the business when 'owning' or leasing the premises." Plaintiff Hans makes a similar argument:

> Because John and Kimberly Selvick are <u>owners</u> of the insured premises, it would be reasonable for them to assume that the exclusion does not apply to liability imposed upon them as a result of selling, serving, or giving of any alcoholic beverage to a minor, the very allegations contained in the complaint.
>
> The distinction which the policy attempts to make between liability imposed upon the insured as the operator of a business and liability imposed on the owner of the premises is at best, ambiguous. (Emphasis in original.)

In response to the respondents' arguments, Wilson argues:

> [T]he Selvicks d/b/a Miami's clearly come within the language set forth in (h)(1) of the exclusion "as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages." Therefore, one does not even look to (h)(2) which begins, "if not so engaged". This

> is because the Selvicks as owners and operators of a tavern named Miami's are engaged in the business of selling or serving alcoholic beverages.

Additionally, Wilson argues that any interpretation that implies John Selvick is only "engaged" if he himself is selling and serving the alcoholic beverages is absurd.

We agree with Wilson. The word "engaged" is not defined in the policy. However, we may resort to a recognized dictionary in order to discern the plain meaning of the policy's language. *See* ***Oaks v. American Family Mut. Ins. Co.***, 195 Wis.2d 42, 48, 535 N.W.2d 120, 122 (Ct. App. 1995). The mere fact that a word has more than one dictionary meaning, or that the parties disagree about the meaning, does not necessarily make the word ambiguous if the court concludes that only one meaning applies in the context and comports with the parties' objectively reasonable expectations. ***Sprangers,*** 182 Wis.2d at 537, 514 N.W.2d at 7.

According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 751 (Unabr. 1976), "engaged" can be defined as: "occupied, employed," "pledged or promised esp. in marriage : betrothed," "greatly interested : earnest," "involved esp. in a hostile encounter," "partly embedded or bonded," and "fitted, framed." This court concludes that only one meaning applies in the context of the insurance policy: occupied or employed. *See* ***Sprangers***, 182 Wis.2d at 537, 514 N.W.2d at 7.

Would a reasonable person in the position of the insured have understood the word "engaged" to mean that he was engaged in the business of selling or serving alcoholic beverages only when he was personally serving them? We think not. When one is occupied or employed in a business, his or her engagement in the business does not end when he or she goes home for the night, takes vacation or stops personally serving drinks. The respondents' interpretation of (h)(1) and (h)(2) would mean the exclusion's coverage would vary with each and every drink sold. For instance, if both John and several employees personally sold a person drinks over the course of an evening, (h)(1) and (h)(2) would both appear to apply, because John would be "engaged" when he served drinks, but "not so engaged" when an employee sold the drinks.

Additionally, the respondents' interpretation of "engaged" would require an organization to physically serve drinks; that is not possible.

A provision in an insurance policy is ambiguous if, when read in context, it is reasonably or fairly susceptible to more than one construction. ***Sprangers***, 182 Wis.2d at 536-37, 514 N.W.2d at 6. In this case, we conclude there is only one reasonable interpretation of the word engaged when read in context: occupied or employed in the business of selling or serving alcoholic beverages. Thus, the word "engaged" is unambiguous. Its plain meaning does not imply John or Kimberly Selvick must physically serve drinks; they are engaged in the business of serving and selling alcoholic beverages because they own and operate a bar. Their business continues whether or not they are on the premises or physically serving drinks.

With respect to the respondents' argument that (h)(1) and (h)(2) are inherently inconsistent because one can be engaged in the business of selling alcohol and, at the same time, own the premises, we agree with Wilson's analysis: because the Selvicks clearly fall under (h)(1), one does not need to consider (h)(2). While (h)(2) contemplates the situation where one who owns the premises may not be in the business of selling alcohol, it is erroneous to conclude that (h)(1) precludes ownership. We conclude (h)(1) and (h)(2) are consistent and therefore do not constitute an ambiguity in the policy.

The three complaints allege that the Selvicks own and operate The Miami Tap. The complaints also allege that the Selvicks and/or their agents negligently sold or dispensed alcohol to Babcock and that this negligence was a substantial factor in causing the collision. By alleging these facts, the plaintiffs have alleged the Selvicks are liable as "a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages," under (h)(1) of the policy. Because the complaints allege facts that would place the Selvicks under (h)(1), we never reach the issue whether the Selvicks also own or lease the premises under (h)(2).

The second and third provisions of the exclusion that the trial court found ambiguous were the phrase "by, or because of the violation of any statute, ordinance or regulation," found in (h)(i), and the word "minor," found in (h)(ii). Because we conclude Wilson's exclusion could apply in this case regardless of whether this phrase or the word "minor" are ambiguous, we need

not determine whether they are ambiguous. Instead, for the reasons explained below, we conclude Wilson, as the moving party, has made a prima facie case for summary judgment under § 802.08, STATS., by establishing a defense which would defeat the plaintiffs' action. *See* ***Voss***, 162 Wis.2d at 748, 470 N.W.2d at 629.

We have already concluded that (h)(1) applies. Next, we consider (h)(i) and (h)(ii). If the Selvicks' liability may be imposed under either section, the exclusion applies. Part (h)(ii) lists three situations where liability is imposed: "by reason of the selling, serving or giving of any alcoholic beverage [1] to a minor *or* [2] to a person under the influence of alcohol *or* [3] which causes or contributes to the intoxication of any person." (Numbers and emphasis added.) We conclude the third situation in (ii) is alleged in the complaints, making the exclusion applicable.

All of the complaints allege that Babcock unlawfully operated his motor vehicle while under the influence of alcohol after drinking alcohol at The Miami Tap. These allegations, although worded differently in each complaint, constitute allegations that the Selvicks, by reason of the selling of alcohol, caused or contributed to Babcock's intoxication. Because the facts as alleged satisfy the conditions listed in (h)(1) and (h)(ii), the exclusion applies and Wilson has effectively established a defense against the respondents' claims.

The next step is to examine the affidavits and other proof of the opposing parties to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing parties to a trial. ***Voss***, 162 Wis.2d at 748, 470 N.W.2d at 629. The respondents argue that there are issues of material fact which would prevent this court from granting summary judgment for Wilson. Specifically, they argue, as the trial court found, that two issues of fact exist: (1) whether the Selvicks should be treated under (h)(1) as engaged in the sale of alcoholic beverages, or under (h)(2) as owners of the tavern; and (2) whether there was a violation of § 125.07(1)(a), STATS.[2] Because we have

[2] Section 125.07, STATS., provides in relevant part:

> **(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

concluded that the Selvicks clearly fall under (h)(1), and because the complaints allege facts which under the policy would impose liability under (h)(ii), these issues are immaterial. Consequently, there are no issues of material fact that must be determined in order to decide whether Wilson has a duty to defend or indemnify the Selvicks. *See* ***Voss***, 162 Wis.2d at 748, 470 N.W.2d at 629. Therefore, we conclude Wilson is entitled to summary judgment as a matter of law. *See* ***Ollhoff***, 177 Wis.2d at 722-23, 503 N.W.2d at 324 (citing § 802.08(2), STATS.).

THE PRODUCTS HAZARD ENDORSEMENT

Roberta argues that even if exclusion (h) applies, the Wilsons should be required to defend and indemnify the Selvicks because of a products hazard endorsement that was also part of the policy. Roberta argues that the following products hazard endorsement either affords coverage, is illusory,[3] or is confusing and therefore ambiguous:

> It is agreed that with respect to bodily injury or property damage arising out of the named Insured's products manufactured, sold, handled or distributed
> (1) on, from or in connection with the use of any premises described in this endorsement, or
> (2) in connection with the conduct of any operation described in this endorsement, when conducted by or on behalf of the named insured, the definition of "products hazard" is amended to read as follows:
> "products hazard" includes bodily injury and property damage arising out of (a) the named Insured's products or (b) reliance upon a representation or warranty made

(..continued)

> attained the legal drinking age.
> 2. No licensee or permittee may sell, vend, deal or traffic in alcohol beverages to or with any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age.

[3] A policy provision is illusory if it defines coverage so that, in practice, it will never be triggered. ***Allstate Ins. Co. v. Gifford***, 178 Wis.2d 341, 349, 504 N.W.2d 370, 373 (Ct. App. 1993). Where a policy provides illusory coverage, it may be expected to be reformed to conform to the insured's expectations. ***Id***.

> with respect thereto; but only if the bodily injury or property damage occurs after physical possession of such products has been relinquished to others. (Emphasis deleted.)

The trial court examined this portion of the policy and concluded:

> [I] find that there is no product hazard coverage under the facts in this case or the allegations in this case. Alcohol is legal and there [are] no allegations that it is hazardous, inherently dangerous or defective as pointed out by Wilson Mutual. There [are] no allegations of warranties and certainly no allegations of any violations or breach of warranty so I don't see that that comes in here at all.

Wilson argues the trial court's decision on the products hazard coverage is not before this court because neither Roberta nor Wilson has appealed the trial court's decision as it applies to products hazard coverage. We disagree. A respondent may raise an issue without filing a cross-appeal when all that is sought is the raising of an error which, if corrected, would sustain the judgment. *See* ***Auric v. Continental Cas. Co.***, 111 Wis.2d 507, 516, 331 N.W.2d 325, 330 (1983).

Roberta argues that either there is coverage under the products hazard endorsement or its presence makes the policy ambiguous. She explains:

> The products hazard [endorsement] must afford coverage for intoxicating liquor liability, because otherwise the endorsement is valueless and illusory.
>
> At a minimum, the presence of the products endorsement and the intoxicating liquor exclusion in the tavern keeper's policy makes the policy confusing and therefore ambiguous ....
>
> [A] reasonable person standing in the tavern owner's shoes would believe that its products were covered because they had specifically paid for that coverage. If a tavern owner in the Selvicks' position could be

> confused by these two contradictory portions of the policy, then the policy is ambiguous. An ambiguous policy is construed against the insurer who drafted the policy and in favor of the insured and coverage. (Citation omitted.)

We conclude Roberta's argument fails for several reasons. First, we agree with the trial court that the products hazard coverage does not apply in this case because the complaints do not allege the alcohol itself was defective in any way, or that there was reliance on a representation or warranty. Second, we conclude the products hazard endorsement is not ambiguous or illusory because there are circumstances under which the products hazard coverage could apply. For example, it could apply where a tavern sold food or beverages that were tainted and caused people to become ill. Because this exclusion could apply in other cases, it is not illusory and does not create an ambiguity; a reasonable insured would not have concluded that the only coverage provided by the products hazard endorsement is that related to coverage for alcohol-related accidents that occur after a patron has consumed non-defective alcohol. For these reasons, we reject Roberta's arguments with respect to the product hazard endorsement and agree with the trial court's conclusion that the endorsement is not applicable in this case.

Because the products hazard endorsement does not provide coverage and is not illusory or ambiguous, Wilson has made a prima facie case for summary judgment under § 802.08, STATS., by establishing a defense which would defeat the plaintiff. *See* ***Voss***, 162 Wis.2d at 748, 470 N.W.2d at 629. Next, we must examine whether there exist disputed facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing parties to a trial. ***Id.*** Roberta advances no argument that there are any disputed facts or undisputed material facts with respect to the products hazard endorsement and we conclude there are none. Thus, Wilson is entitled to summary judgment as a matter of law. *See* ***Ollhoff***, 177 Wis.2d at 722-23, 503 N.W.2d at 324 (citing § 802.08(2), STATS.).

Accordingly, we reverse that portion of the trial court's order denying Wilson's motion for summary judgment and remand the case to the trial court with directions to grant Wilson's motion for summary judgment and dismiss it from the case.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.