COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2558-FT

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

ROBERT VERIHA AND JAMES VERIHA,

PLAINTIFFS-APPELLANTS,

v.

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

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

CANE, P.J. Robert and James Veriha appeal from a declaratory judgment dismissing their action against Wisconsin Mutual Insurance Company, the liability insurer for Daniel Imig.[1] Their claim arose from a transaction where

[1] This is an expedited appeal under RULE 809.17, STATS.

Imig sold a bull to the Verihas for breeding their heifers. Because it turned out the bull was sterile, no calves were produced and, consequently, the Verihas sued Wisconsin Mutual as Imig's insurer under theories of breach of warranty and negligent misrepresentation. Wisconsin Mutual sought a declaratory judgment, contending there was no coverage. The trial court concluded that because there was no occurrence resulting in bodily injury or property damage as those terms are defined in the insurance policy, the action must be dismissed. It also concluded that because Imig was selling bulls, it was a business activity excluded under the contracts and agreements portion of the policy. Because the insured's act did not cause bodily injury or property damage, we affirm the judgment.

The underlying facts are undisputed. The Verihas operate a dairy farm and needed a bull to breed their heifers. They contacted Imig to purchase a registered jumper bull, which is a bull to breed heifers. After negotiating a price, Imig sold them "Imline Future Pete" for breeding the heifers. The Verihas accepted the bull on June 30, 1993, and on September 1, 1993, the bull was placed with the heifers in order to have the later stages of the heifers' pregnancies occur during the late spring or summer rather than during the winter months when there are additional risks associated with splitting and calving.

In mid-March 1994, the Verihas noticed there was an unusual number of heifers not bred. Because Imline Future Pete was determined to be sterile, the Verihas obtained a different bull the following month for breeding their heifers. The Verihas allege a loss of earnings and profits due to the failure of any of their heifers to become pregnant from the bull sold to them by Imig. They also claim that because of the delayed breeding through a different bull, calving occurred in extreme winter weather conditions while the heifers had a weakened pelvis, causing falls resulting in broken bones, mastitis, muscle tearing and death.

Additionally, they claim that because of the delayed breeding, they were forced to cull additional heifers due to the problems with the other heifers.

The issue on appeal is whether Wisconsin Mutual's liability policy issued to Imig provides coverage for the claim. The relevant provisions state:

> ***We*** pay, up to ***our*** limit of liability, all sums for which any ***insured*** is legally liable because of ***bodily injury*** or ***property damage*** caused by an ***occurrence*** to which this coverage applies.

The policy defines occurrence and property damage as:

> ***Occurrence*** means an accident, including continuous or repeated exposure to substantially similar conditions.
>
> ***Property damage*** means injury to or destruction of tangible property including the loss of its use.

Additionally, the policy provides coverage for:

> ***Contracts and Agreements Coverage—We*** pay for damages for ***bodily injury*** or ***property damage*** resulting from liability assumed by an ***insured*** under a written contract made before the loss or a warranty of goods and products. This coverage does not apply to a contract or warranty in connection with ***business*** activities of an ***insured***.

The trial court concluded that because under the undisputed facts there was no accident, there was no occurrence nor any bodily injury or property damage as defined in the policy. It also concluded that because Imig was selling bulls, it was a business activity excluded under the contracts and agreements portion of the policy. Consequently, it dismissed the complaint holding there was no coverage.

When there are no factual disputes, questions of insurance coverage may be decided on motions for summary judgment. ***Smith v. State Farm Fire & Cas. Co***., 127 Wis.2d 298, 301, 380 N.W.2d 372, 374 (Ct. App. 1985). When reviewing a grant of summary judgment, we must follow the same methodology as the trial court. Because that methodology is well known, it need not be repeated here. ***Paape v. Northern Assur. Co.,*** 142 Wis.2d 45, 50, 416 N.W.2d 665, 667 (Ct. App. 1987); *see also* ***Preloznik v. City of Madison***, 113 Wis.2d 112, 116, 334 N.W.2d 580, 582-83 (Ct. App. 1983).

Absent any stated legislative policy to the contrary, an insurance company's liability is based upon the contract between the parties and must be governed by its terms and conditions. ***Paape***, 142 Wis.2d at 51, 416 N.W.2d at 668. When there is no ambiguity in the terms of the policy, we will merely apply the terms and not engage in construction. ***Western Cas. & Surety Co. v. Budrus,*** 112 Wis.2d 348, 351, 332 N.W.2d 837, 839 (Ct. App. 1983). Words or phrases are ambiguous when they are susceptible to more than one reasonable meaning. ***Smith v. Atlantic Mut. Ins. Co.,*** 155 Wis.2d 808, 811, 456 N.W.2d 597, 598-99 (1990).

It must be kept in mind that here the occurrence is the sale of a bull that turned out to be sterile. This is not a case where the bull passed on some disease to the heifers, causing injury to the heifers. Nor is it a case where the bull became uncontrollable because of some defect and damaged the heifers or property. Simply stated, Imline Future Pete failed to impregnate the heifers.

The causes of action relate to breach of contract or warranty and misrepresentation of the bull's sterility. Here, Imig's policy explicitly limits its liability to bodily injury or property damage, none of which occurred as a result of

the bull's sterility. As we held in ***Ehlers v. Johnson***, 164 Wis.2d 560, 564, 476 N.W.2d 291, 293 (Ct. App. 1991), diminution in market value as well as use value is not property damage. Additionally, in a similar insurance coverage issue involving claims for breach of contract and misrepresentation because of the reduced value of a home sold with structural defects, we held in ***Qualman v. Bruckmoser***, 163 Wis.2d 361, 367, 471 N.W.2d 282, 285 (Ct. App. 1991), that the claims were for economic loss resulting from the seller's alleged failure to disclose facts relevant to the property's value and, therefore, there was no coverage. Similarly, here the damage is the economic loss resulting from the bull's failure to impregnate the heifers.

Next, the Verihas contend that the policy's definition of property damage does not require physical damage to property when it uses in its definition the language, "including the loss of its use." In ***Ehlers***, we previously rejected such an interpretation. We held:

> The Frisches argue that the alleged diminution in market value as well as use value to the Ehlers constitutes "property damage" as defined in their homeowner's policy. "Property damage" is defined as "physical injury to or destruction of tangible property, including loss of use of this property." The Frisches would interpret the clause "including loss of use of this property" to mean all tangible property, not just physically injured or destroyed property. We disagree. We conclude that the clause "including loss of use of this property" is unambiguous. The only reasonable meaning of the clause is that it defines property damage to include loss of use damage that accompanies physical injury or destruction. The Minnesota Court of Appeals reached the same conclusion from identical policy language in ***Dixon v. National Amer. Ins. Co***., 411 N.W.2d 32 (Minn. Ct. App. 1987).
>
> The loss of use clause is introduced by the verb "including." The dictionary defines "including" as "to take in or comprise as part of a whole …." The ***Mirriam-***

> ***Webster Dictionary*** 358 (1974). The loss of use clause is thus introduced as a subset of "physical injury to or physical destruction of tangible property." If the loss of use clause were interpreted as the Frisches would have it, i.e., as any nonphysical injury to tangible property, the definition of property damage would effectively read: "physical injury to … tangible property, including non-physical injury." We reject such a contradictory reading.

Ehlers, 164 Wis.2d at 564, 476 N.W.2d at 293.

Next, the Verihas argue that the heifers and calves suffered property damage after being impregnated by another bull with an unproved genetic background. They contend that those damages were caused by Imig's sterile bull since they had to find another bull to breed the heifers. It is an unacceptable stretch to reason that Imig's sterile bull caused property damage due to another bull's breeding. Those are separate damages related to the second bull, but certainly not caused by the first bull's sterility.

Additionally, as the trial court observed, the policy limits its liability to damages caused by an occurrence which is defined as an accident. Our supreme court reaffirmed the average man test in ***Stoffel v. American Family Life Ins. Co.,*** 41 Wis.2d 565, 570, 164 N.W.2d 484, 487 (1969), when it stated that Wisconsin has elected to follow the "average man test" in defining the word "accident" rejecting the narrower definition that requires an unforeseen event as well as an unanticipated result to constitute an accidental happening. Words used in an insurance contract should be given their common, everyday meaning. ***Schmidt v. Luchterhand,*** 62 Wis,.2d 125, 133, 214 N.W.2d 393, 396 (1974). AMERICAN HERITAGE DICTIONARY at 8 (1976), defines accident as an "unexpected and undesirable event; a mishap" and accidental as "[o]ccurring unexpectedly and unintentionally; by chance." WEBSTER'S NEW COLLEGIATE

DICTIONARY at 7 (1977), defines accident as: "an event occurring by chance or arising from unknown causes" and accidental as "occurring unexpectedly or by chance" or "happening without intent or through carelessness." We fail to see how the bull's failure to impregnate the heifers is an accident. The Verihas cite no authority for this proposition and we found none.

Finally, the Verihas contend the policy provides coverage under the contracts and agreements provision. Without deciding whether there was coverage under this contracts and agreements provision, the trial court concluded that because Imig was selling bulls, the provision stating, "This coverage does not apply to a contract or warranty in connection with business activities of an insured" excluded any possible coverage. The Verihas contend, however, that the business exclusion does not apply because in another portion of the policy business was defined to exclude farming.

We need not decide whether the trial court was correct in applying this exclusion or whether there was a written contract assuming liability because the contracts and agreements coverage provides liability coverage for *bodily injury* or *property damage* resulting from liability assumed by the insured. As discussed previously, there was no bodily injury or property damage and, therefore, this provision does not provide coverage.

Accordingly, we affirm the trial court's judgment dismissing the complaint against Wisconsin Mutual Insurance Company.

By the Court.—Judgment affirmed.

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