COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP224 **Cir. Ct. No. 2016CV219**

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

SOCIETY INSURANCE, A MUTUAL COMPANY,

PLAINTIFF,

SCOTT FRIEDLE,

INVOLUNTARY-PLAINTIFF,

V.

BESSEMER PLYWOOD COMPANY,

DEFENDANT-THIRD-PARTY
DEFENDANT-APPELLANT,

HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

DEFENDANT-APPELLANT,

V.

GREAT WEST CASUALTY COMPANY,

INTERVENING-DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT.

APPEAL from a judgment of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Bessemer Plywood Company and Harleysville Lake States Insurance Company (collectively, "Bessemer") appeal a grant of summary judgment in favor of Great West Casualty Company ("Great West"). Bessemer contends that the circuit court erred by determining that Great West had no duty to defend or to indemnify Bessemer against claims arising from a slip and fall accident in which Scott Friedle, an employee of Great West's insured, Maki Trucking & Logging ("Maki"), suffered severe injuries at a Bessemer facility. We conclude that an exclusion in Great West's policy precludes coverage of Bessemer for Friedle's injury as a matter of law, and Great West therefore had no duty to defend or to indemnify Bessemer. Accordingly, we affirm.

BACKGROUND

¶2 In October 2016, Bessemer hired Maki to pick up a load of plywood from Bessemer's facility in Bessemer, Michigan. To that end, Friedle drove a Maki-owned truck from Tomahawk, Wisconsin, to the Bessemer facility. After

the plywood "was loaded" onto the truck's flatbed trailer,[1] Friedle climbed on top of the load so that he could pull a tarp over the plywood. He subsequently suffered severe injuries when he slipped and fell from the trailer.

¶3 At the time of this incident, Maki had a worker's compensation insurance policy with Society Insurance ("Society"). In addition, Maki had a commercial automobile, general liability, and inland marine insurance policy with Great West. As relevant to this appeal, Maki's Great West policy contained the following language:

> B. EXCLUSIONS
>
> This insurance does not apply to any of the following:
>
> ….
>
> 4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY
>
> "Bodily injury" to:
>
> a. An "employee" of the "insured" arising out of and in the course of:
>
> (1) Employment by the "insured"; or
> (2) Performing the duties related to the conduct of the "insured's" business[.[2]]

¶4 Society subsequently brought this suit against Bessemer to recover worker's compensation payments it made to Friedle. Society's complaint asserted

[1] The parties ascribe much significance to the fact that the complaints at issue in this case state only that the plywood "was loaded" onto the truck, without specifying who actually loaded the plywood. In particular, the complaints do not allege that Bessemer employees were involved in loading the plywood, such that Bessemer could be considered a permissive user of the truck. For reasons set forth below, the complaints' failures to allege who loaded the plywood is not relevant to our analysis.

[2] We refer to this quoted language from the insurance policy as "the employment exclusion" for the remainder of this opinion.

claims of negligence and negligence per se. It also requested punitive damages. Friedle was named as an involuntary plaintiff in Society's action, and he subsequently filed his own complaint in the case. The allegations in Friedle's complaint were substantially similar to those in Society's complaint, and Friedle also asserted the same claims and requested substantially the same relief as Society.

¶5 Bessemer tendered its defense of the lawsuit to Great West under the theory that Bessemer was a permissive user of the Maki-owned truck at the time of the accident, and therefore it was an insured under Great West's policy. As grounds for its claim that it was a permissive user of the truck, Bessemer alleged that its "employees loaded the Maki truck with plywood."

¶6 Great West denied the tender, and it filed a third-party complaint seeking a judgment declaring that it owed no duty to defend or to indemnify Bessemer. The circuit court granted Great West's motion to bifurcate "the liability issues in this matter from the coverage issues, and to stay all liability proceedings until all coverage issues are resolved." Further, based on Bessemer and Great West's stipulation that the "claim of Bessemer that Great West has a duty to defend it in this action … may be appropriately decided on Cross-Motions for Summary Judgment," the court entered a briefing schedule "[i]n order to bring the duty to defend issue to disposition."

¶7 After briefing, the circuit court granted Great West summary judgment, declaring, "Great West does not have a duty to defend or indemnify Bessemer." The court reasoned that Great West's policy did not provide an initial grant of coverage to Bessemer because "Bessemer was not actively engaged in the use of the Maki vehicle at the time of Friedle's fall, so as to render Bessemer a

permissive user of the Maki vehicle." Further, the court concluded that, even assuming there was an initial grant of coverage, the employment exclusion would apply to preclude coverage. Bessemer now appeals.[3]

DISCUSSION

¶8 On appeal, Bessemer contends that the circuit court erred in granting summary judgment to Great West because the court improperly determined Great West had no duty to defend Bessemer.[4] We review a circuit court's decision to grant summary judgment independently, using the same standard applied by the circuit court. ***Water Well Sols. Serv. Grp., Inc. v. Consolidated Ins. Co.***, 2016 WI 54, ¶11, 369 Wis. 2d 607, 881 N.W.2d 285. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2017-18).[5]

¶9 This case involves interpretation of an insurance policy to determine the scope of an insurer's duty to defend its insured, which presents a question of

[3] Bessemer requests that we stay this appeal and remand this case to the circuit court for it to decide Friedle's pending motion to amend his complaint. We previously denied this request in a June 4, 2018 order, and we need not address the issue further. However, we note that Bessemer asserts that we should grant the stay because that complaint, as amended, would establish it was a permissive user of the Maki-owned truck. For reasons set forth below, that issue is immaterial to our disposition of this case.

[4] As indicated, Bessemer focuses its argument on Great West's duty to defend. Our supreme court has recognized that although Wisconsin law "supports the well-established principle that an insurer's duty to defend its insured is broader than its duty to indemnify ... there may be isolated instances in which an insurer has no duty to defend … but nevertheless owes a duty to indemnify …." ***Water Well Sols. Serv. Grp., Inc. v. Consolidated Ins. Co.***, 2016 WI 54, ¶30 n.17, 369 Wis. 2d 607, 881 N.W.2d 285. Given that Bessemer does not argue that this case presents one of those "isolated instances" where an insurer has no duty to defend but nevertheless has a duty to indemnify, we confine our analysis to Great West's duty to defend.

[5] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

law that we review de novo. *See* ***Water Well Sols.***, 369 Wis. 2d 607, ¶12. We construe policy language from the perspective of a reasonable insured, giving the words used in the policy their common and ordinary meanings. ***Id.***, ¶14. If policy language is unambiguous, we apply it as written. ***Marnholtz v. Church Mut. Ins. Co.***, 2012 WI App 53, ¶10, 341 Wis. 2d 478, 815 N.W.2d 708. However, if policy language is ambiguous—that is, susceptible to more than one reasonable interpretation—we resolve the ambiguity in the insured's favor. ***Id.***

¶10 In determining whether an insurance policy obliges an insurer to defend a party against a claim, we compare the four corners of the underlying complaints in a case to the terms of the entire insurance policy. ***Water Well Sols.***, 369 Wis. 2d 607, ¶15. In doing so, we employ a three-step process to determine if an insurer has a duty to defend. ***Id.***, ¶16. First, we examine the facts of the claim as alleged in the underlying complaints to determine whether the policy's insuring agreement makes an initial grant of coverage. ***Id.*** If so, we next consider whether any of the policy's exclusions preclude coverage. ***Id.*** Then, if a particular exclusion applies, we determine whether any exception to that exclusion reinstates coverage. ***Id.*** If coverage is not restored by an exception to an exclusion, then the insurer has no duty to defend a party against a claim. ***Id.***

¶11 Here, we begin by acknowledging that the parties dispute whether there is an initial grant of coverage to Bessemer under Great West's policy.[6] This dispute centers on whether Bessemer could be considered a permissive user of the

[6] We also note that Bessemer has not—either in the circuit court or on appeal—raised an argument that, assuming Great West does have a duty to defend Bessemer, Great West has breached that duty.

Maki-owned truck at the time of Friedle's accident.[7] We need not resolve this dispute, however, because "[i]f any exclusion clearly bars coverage, we need not examine [the] potentially more difficult question of whether the policy [initially] grants coverage." ***State v. GE-Milwaukee, LLC***, 2012 WI App 5, ¶7, 338 Wis. 2d 349, 808 N.W.2d 734 (2011). Therefore, we assume, without deciding, that the Great West policy afforded an initial grant of coverage to Bessemer under the theory that Bessemer was a permissive user of the Maki-owned truck, and we proceed to the second step of our duty to defend analysis—that is, whether any of Great West's policy exclusions preclude coverage. *See* ***Water Well Sols.***, 369 Wis. 2d 607, ¶16.

¶12 We conclude that is plainly the case here. As noted, the employment exclusion in Great West's policy precludes coverage for "bodily injury to … [a]n employee of the insured arising out of and in the course of … [e]mployment by the insured[.]" (Internal punctuation omitted.) When determining whether an exclusion bars coverage, we have explained that "the phrase 'arising out of' in an insurance policy is very broad, general, and comprehensive and is ordinarily understood to mean originating from, growing out of, or flowing from." ***Great Lakes Beverages, LLC v. Wochinski***, 2017 WI App 13, ¶21, 373 Wis. 2d 649, 892 N.W.2d 333 (citation omitted). Applying this broad and comprehensive interpretation of the phrase "arising out of" to the case at hand, the undisputed facts establish that Friedle's injuries arose out of the course of his employment and, therefore, the circuit court did not err in granting summary judgment.

[7] The parties agree that if Bessemer were considered a permissive user of the truck, there would be an initial grant of coverage under the Great West policy.

¶13 Our conclusion is based on the following facts alleged in the Society and Friedle complaints, none of which are disputed. Maki dispatched Friedle to the Bessemer facility with directions to pick up and transport a load of plywood. To that end, Maki supplied Friedle with a hard hat, steel-toed shoes, and a harness. Further, both complaints state that "Bessemer's facility stands in contrast to facilities operated by Bessemer's competitors, all of whom provide harness lines and other means by which truck drivers can protect themselves from falls when they are *standing on the loads they are preparing to transport.*" (Emphasis added.)

¶14 The only reasonable inference from these allegations is that when Friedle fell from the truck, he was performing a task "originating from, growing out of, or flowing from" his employment. To explain, the allegation that Maki supplied Friedle with a safety harness shows that Maki anticipated Friedle performing, and intended for him to perform, the very task he was injured while performing—i.e., standing on the load of plywood when preparing it for transport.

¶15 This conclusion is further supported by the fact that the Society complaint states on its face that Friedle "was working within the scope of his employment" when Maki sent him to Bessemer. Further, both the Society and Friedle complaints state that Friedle made a claim for benefits with Society, Maki's worker's compensation insurer, which is an allegation that Friedle was acting within the scope of his employment for Maki at the time of the injury.

¶16 Bessemer raises two arguments as to why the circuit court erred by concluding that the employment exclusion precluded coverage for Bessemer under the Great West policy. First, Bessemer contends Great West did not "argue for the application of the [exclusion] as part of its summary judgment motion" and

therefore "waived its argument." This argument fails because it "is well recognized that courts may *sua sponte* consider legal issues not raised by the parties."[8] ***Leonard v. State***, 2015 WI App 57, ¶13, 364 Wis. 2d 491, 868 N.W.2d 186. This authority is a reflection of the court's function to do justice between the parties. ***Id.*** Further, any objection on grounds of theoretical unfairness to the litigants is diminished when the litigants have notice of the consideration of an issue. ***Id.***

¶17 Here, Bessemer was clearly on notice that the employment exclusion could provide a basis for the circuit court to conclude that Great West did not have a duty to defend or to indemnify Bessemer. This notice was provided by a correspondence from Society's counsel to the court, sent three months prior to the court's grant of summary judgment, wherein counsel stated:

> As the attorney for the plaintiff, I am all for more insurance. Nonetheless, pursuant to SCR 20:3.3, I am compelled to state the following.
>
> ….
>
> Given the language of the [employment] exclusion and the facts of this case, there is no coverage. It does not matter whether or not the vehicle was being "used" at the time of the accident. Even if we assume it was being used, and therefore an initial grant of coverage is triggered, [the employment exclusion] takes it away. Regrettably, Society's position is that Great West does not have a duty to defend or indemnify Bessemer Plywood or anyone else.

[8] We observe that Great West disputes whether it "waived" any argument regarding the employment exclusion. We need not address any waiver argument, however, given our conclusion that the circuit court could properly raise the issue sua sponte, even assuming Great West had failed to do so. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when one issue is dispositive, we need not reach the other issues raised).

We therefore conclude the circuit court did not err by relying on the employment exclusion as an alternative basis for granting Great West summary judgment.

¶18 Second, Bessemer argues that the fact that Friedle was not wearing his safety harness when he was injured "give[s] rise to a reasonable inference that Friedle fell while performing a task outside his employment." In support, it points to a case from Georgia, ***Hoover v. Maxum Indemnity Co.***, 730 S.E.2d 413 (Ga. 2012).

¶19 In ***Hoover***, a "water extraction technician" was dispatched by his employer to "deliver a ladder to a job site." ***Id.*** at 415. Instead of simply delivering the ladder, however, the water extraction technician climbed onto the roof and assisted an independent roofing contractor with repairs, even though the employee's "duties as a water extraction technician … did not include climbing on ladders or making roof repairs." ***Id.*** The employee subsequently fell from the roof and suffered a severe head injury. ***Id.*** The Georgia Supreme Court ultimately held that an insurance policy's employment exclusion did not act to bar coverage because the employee "was not performing duties related to the conduct of the insured's business at the time of the accident." ***Id.*** at 418.

¶20 We are unpersuaded that ***Hoover*** provides any support for Bessemer's position, because it is wholly distinguishable from the facts of this case. The employee in ***Hoover*** was undisputedly engaged in a task that was unrelated to the duties of his employment. Conversely, as explained above, the fact that Maki provided Friedle with safety equipment to enable him to perform the very task he was injured while performing permits only one reasonable

inference: that Friedle was engaged in a task related to his employment when he sustained his injuries.[9]

¶21 In sum, we conclude the circuit court did not err in finding that the employment exclusion in Great West's policy precluded any insurance coverage to Bessemer and, therefore, it had no duty to defend or indemnify Bessemer.[10] Consequently, as Bessemer does not argue that any exception to the employment exclusion acts to restore coverage, we conclude that the court properly granted summary judgment in favor of Great West.

By the Court.—Judgment affirmed.

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

[9] To the extent that Bessemer intends to argue that an employee's failure to utilize employer-provided safety equipment may transform an employment-related task to one outside the course of his or her employment, it provides no citation to any legal authority in support of such a position. We will not further consider this undeveloped argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[10] Bessemer also raises a cursory argument in which it points to the fact that Bessemer required Friedle to tarp the load, appearing to argue that this fact shows Friedle was doing work on behalf of Bessemer, not Maki. However, even if we accepted that Friedle tarped the load as a loaned employee of Bessemer—and that there was an initial grant of coverage to Bessemer—the exclusion would still apply. In that case, the employee (Friedle) would still be performing the work of the purported insured (Bessemer) by performing a duty related to the course of Bessemer's business—i.e., tarping the load. Thus, in either case the employment exclusion applies to bar coverage. Moreover, Bessemer provides no citation to any legal authority in support of its position and, again, we need not consider undeveloped arguments. *See* ***id.***