

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 00-1336

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

GEORGENE A. WILLIAMS,

PLAINTIFF,

v.

CITY OF NEW HOLSTEIN AND WAUSAU
UNDERWRITERS COMPANIES,

DEFENDANTS-RESPONDENTS,

WAYNE L. SOHN AND WILSON MUTUAL
INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

STATE FARM INSURANCE COMPANIES,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
FRED H. HAZLEWOOD, Judge. *Reversed.*

Before Brown, Anderson and Snyder, JJ.

¶1 SNYDER, J. Wayne L. Sohn and his insurer, Wilson Mutual Insurance Company (Wilson), together with State Farm Insurance Companies (State Farm), appeal a judgment of the trial court in which the trial court found that Sohn was not acting as a “volunteer” for the City of New Holstein (City) as defined in the City’s general liability insurance policy issued by Wausau Underwriters Companies (Wausau). Wilson and State Farm argue that Sohn was a “volunteer” and therefore an insured under Wausau’s policy. We agree and therefore reverse the judgment.

FACTS

¶2 On June 8, 1993, in Calumet county, a storm toppled a large tree, which in turn brought down electrical wires and blocked a portion of County Trunk Highway T. The Calumet County Sheriff’s Department asked Officer Mark Grove of the City of New Holstein Police Department to travel to and remain at the scene of the fallen tree until sheriff’s department personnel could arrive. Although the electrical wires were outside the city limits, they were within the service area of the City’s electric utility. The foreman of the electric utility, Melvin Meier, came upon the scene on his way into the city and spoke with Grove.

¶3 After Meier’s departure, Sohn, a local resident, approached the scene on foot and asked Grove if he could haul away the tree for firewood. Grove ordered Sohn to stay away from the tree and refused Sohn’s offer to haul away the tree with his tractor. Sohn was noticeably intoxicated at the time.

¶4 Shortly thereafter Lieutenant Jeffrey Williams from the Calumet County Sheriff’s Department arrived at the scene. While Williams and Grove

were talking, Sohn reappeared and again offered his assistance in removing the tree from the road. Grove refused the offer and informed Williams that he thought Sohn was intoxicated. Grove eventually left the scene and Williams remained to keep the area clear until the utility crew arrived.

¶5 Sohn returned to the area with his tractor after Grove's departure. When the utility crew arrived on the scene, Sohn had connected a chain from his tractor to the tree and was preparing to cut the tree from the stump. Williams was observed in his squad car on the north side of the road. The utility crew told Sohn to stay away from the tree; however, no one told Sohn that he could not haul the tree away nor did anyone remove the chain from the tree. No one with the utility crew ever spoke to Williams but just assumed that Sohn was acting with Williams's authority. Williams did not assist in hooking up the tree and did nothing to arrange for Sohn to pull the tree away.

¶6 The utility crew then grounded the electrical wires and cut the tree from its stump. Crew foreman Meier disconnected Sohn's chain from a small, insubstantial branch on the tree and reattached it to a larger branch. In order to do so, Meier signaled for Sohn to back up the tractor to take tension off the chain, and once the chain was reconnected, motioned for Sohn to haul the tree away. Meier cautioned one of the crew members to avoid getting in between Sohn's tractor and the tree because Sohn appeared drunk. Ronald Gruel, the superintendent of public utilities for the City, observed Meier adjust the chain connecting Sohn's tractor to the tree. While no one with the utility crew explicitly asked Sohn to help remove the tree, neither did anyone object to his removing the tree. Sohn dragged the tree away using his tractor, escorted by Williams in his squad car with the squad car's red and blue flashing emergency lights activated.

¶7 While Sohn had removed the portion of the tree blocking the roadway, a large portion of the tree, a ten-to-twenty-foot length of tree measuring approximately two feet in diameter, remained over a ditch and further cutting was necessary to retrieve all the electrical wires. After pulling the tree onto his property and disconnecting the chain, Sohn started to return to the scene on his tractor. On his way back to the scene, Sohn struck and killed Williams. The parties have stipulated that Williams's death was caused solely by the negligence of Sohn.

¶8 On April 17, 1995, Georgene A. Williams, Williams's widow, together with her minor children, initiated this wrongful death action against Sohn and his insurer Wilson, the City and its insurer Wausau, and State Farm, with whom Williams had two policies of insurance. After Wilson tendered its policy limits, State Farm eventually paid Georgene \$135,000 in benefits to settle her claim in full and substituted its underinsured motorist coverage funds to Georgene; State Farm then became subrogated to Georgene's rights. The case proceeded on issues pertaining to insurance coverage. All the parties then stipulated that if Sohn was found to be an additional insured under Wausau's policy with the City, Wausau's policy would be primary. The trial court was specifically asked whether Sohn had been a "volunteer" for the City and its utility as that term is defined in Wausau's policy.

¶9 An evidentiary hearing was held on February 9, 1999. The trial court issued its findings of fact and a decision on June 30, 1999, determining that Sohn was not a "volunteer" under Wausau's policy. An order was signed by the trial court on July 28, 1999, dismissing the action. Post-trial, the parties formalized their admissions and stipulated to the judgment which was signed by the trial court on March 28, 2000. State Farm, Sohn and Wilson appeal.

DISCUSSION

¶10 The interpretation of an insurance contract presents a question of law that we decide de novo. *Oaks v. Am. Family Mut. Ins. Co.*, 195 Wis. 2d 42, 47, 535 N.W.2d 120 (Ct. App. 1995). Our goal in interpreting the language of the policy is to ascertain and carry out the intention of the parties. *Sprangers v. Greatway Ins. Co.*, 182 Wis. 2d 521, 536, 514 N.W.2d 1 (1994). To determine the contracting parties' intent, we consider the language used to express their agreement. *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 455, 485 N.W.2d 426 (Ct. App. 1992). “[P]olicy language should be given its common everyday meaning and should be interpreted as a reasonable person in the insured’s position would understand it.” *Filing v. Commercial Union Midwest Ins. Co.*, 217 Wis. 2d 640, 648, 579 N.W.2d 65 (Ct. App. 1998). If the terms are plain and unambiguous, the agreement is construed as it stands. *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 115, 479 N.W.2d 557 (Ct. App. 1991).

¶11 The supreme court has very recently summarized the proper approach for a court to take when it is called upon to interpret language in an insurance policy:

An insurance policy is construed to give effect to the intent of the parties, expressed in the language of the policy itself, which we interpret as a reasonable person in the position of the insured would understand it Where the language of the policy is plain and unambiguous, we enforce it as written, without resort to rules of construction or principles in case law.

Danbeck v. Am. Family Mut. Ins. Co., 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150 (citations omitted).

¶12 The City’s policy states, in relevant part:

Each of the following is also an insured:

a. Any person who is a “volunteer” or an employee, other than those employees named in paragraph 1.b. above, but only with respect to their liability as “volunteers” or employees.

“Volunteer” is defined as “any person providing services to your business at your request or with your knowledge and consent and without remuneration.”

¶13 State Farm and Wilson argue that Sohn was a “volunteer,” and therefore an insured, under the City’s insurance policy with Wausau because Sohn assisted in removing the tree with the knowledge and consent of the City’s utility crew. We agree.

¶14 The City utility crew’s primary responsibility was not to clear the road, but to free the lines and the area where the lines were located; however, to accomplish this, the tree needed to be removed from the road and the wires untangled from the tree. The utility crew had the equipment to remove the tree and without Sohn’s help would have had to remove the tree from the roadway themselves. While no one from the utility crew made an explicit request for Sohn to help remove the tree, no one objected or made any attempts to stop him. Meier admitted that Sohn’s removal of the tree saved the utility crew some work that night.

¶15 Had the utility crew decided that Sohn should not haul the tree away, there was nothing to prevent them from talking to Williams about the situation. Brian Moore, a member of the utility crew, admitted that had the utility crew not wanted Sohn to haul the tree away, the crew could have asked him to unchain the tree and go away; instead, the crew did nothing to stop him, thus implicitly consenting to Sohn’s assistance.

¶16 Furthermore, as the trial court noted, everyone present at the scene knew that Sohn was going to haul the tree away. Crew foreman Meier, having warned a fellow crew member to avoid getting in between Sohn's tractor and the tree because Sohn appeared drunk, disconnected Sohn's chain from a smaller branch and reconnected it to a larger branch. To do so, Meier directed Sohn to back up the tractor, and then motioned for Sohn to haul the tree away once the chain was reconnected. The utility crew, through their actions, acquiesced to Sohn assisting them with the removal of the tree. Sohn was clearly working with both the knowledge and consent of the City's utility crew.

¶17 The utility crew acknowledged that they had no personal knowledge that Williams had asked Sohn to remove the tree. In fact, no one from the utility crew ever spoke to Williams despite the obvious signs of Sohn's intoxication. Williams was available for the utility crew to consult with, as he was noted in the area while the tree was being hooked up. The utility crew simply assumed that Sohn was acting with Williams's authority.¹ This assumption proved to have tragic consequences.

¶18 The City and Wausau argue that Sohn was no longer a "volunteer" at the time of the accident because the tree had already been hauled away, there was no further work for Sohn to do so he had no reason to return to the scene, and the utility crew had no reason to believe Sohn would return to the scene. However, while the road itself was clear, a ten-to-twenty-foot long piece of tree remained in

¹ Because no one with the utility crew ever bothered to talk to Williams, the only evidence we have regarding Sohn's authority to remove the tree comes from Sohn himself, a less than credible witness. Sohn was highly intoxicated that evening and later had difficulty remembering much of the events of the evening, his memory lapses most likely attributable to his .25% blood alcohol concentration.

the ditch and further cutting was necessary to retrieve all the electrical wires. More branches needed to be removed and more tree trimming needed to be completed. No one told Sohn not to return or that his services were no longer needed.

¶19 Sohn claimed that he was returning because “[t]he job wasn’t done so I go back out and get other part and get it off the road.... I was helping my neighbor and everybody out.... I figure I was over working together with the power and light company” Sohn admitted that no one had told him to return after dragging the tree away, but also stated no one had told him *not* to return. Sohn testified that he was returning to the scene because he thought there was still work to be done and that the utility crew needed more help. The City’s only evidence contradicting Sohn is the utility crew’s testimony that they saw no reason for Sohn to return; however, the utility crew failed to provide Sohn with this information. The utility crew had accepted Sohn’s assistance in commencing the clean-up and removing the tree, a great deal of clean-up work remained, and no one had told Sohn that his services were no longer necessary. We conclude that when Sohn returned to the scene, he did so in his capacity as a volunteer for the City.

CONCLUSION

¶20 Because Sohn assisted in removing the tree with the knowledge and consent of the City’s utility crew, because further clean-up work remained, and because no one from the utility crew told Sohn that his services were no longer needed, Sohn was a “volunteer” for the City as “volunteer” is defined in Wausau’s policy and therefore an insured under the policy. We therefore reverse the judgment of the trial court.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

