COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP603 **Cir. Ct. No. 2005CV63**

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

KERRY M. GAGNON AND KIM GAGNON,

PLAINTIFFS-APPELLANTS,

V.

ALIAS INSURANCE COMPANY NO. 2,

DEFENDANT,

WEST BEND MUTUAL INSURANCE COMPANY,

NOMINAL-DEFENDANT,

CHARLES E. ROBINSON, BURLINGTON SANDERS, INC., F/K/A WILL KRUMBACH CORP.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

TRAVELERS INFORMATION SERVICES, INC., F/K/A AETNA INFORMATION SERVICES, INC., PREVIOUSLY DENOMINATED AS ALIAS INSURANCE COMPANY NO. 1,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kerry and Kim Gagnon appeal a summary judgment dismissing Travelers Information Services as a third-party defendant in a products liability and negligence action. The circuit court concluded there was no genuine issue of material fact regarding whether Travelers' predecessor, Aetna Information Services,[1] issued liability insurance covering Burlington Sanders, Inc.,[2] for the loss alleged by the Gagnons. We affirm the summary judgment.

BACKGROUND

¶2 In March 2005, the Gagnons filed a complaint alleging that a belt sander manufactured by Burlington Sanders injured Kerry Gagnon on July 19, 2002. Burlington Sanders and its former president, Charles Robinson, filed a third-party complaint against Travelers, alleging that Burlington Sanders was covered by an insurance policy issued by Travelers' predecessor, Aetna. Travelers denied the existence of an insurance policy and moved for summary judgment.

[1] In 1996, Travelers Insurance Company combined with Aetna Casualty & Surety Company. As part of that transaction, Aetna Information Services, Inc., became known as Travelers Information Services, Inc.

[2] Burlington Sanders, Inc., was administratively dissolved in 1997.

¶3 The belt sander was manufactured in 1982, and the Aetna insurance policy allegedly existed at that time. However, no original or copy of the policy has been found, nor is there a declarations page, record of premium payments, or any other documentary evidence regarding the policy.

¶4 In a deposition, James Weis, Burlington Sanders' former insurance agent, testified that he believed Burlington Sanders would have had liability insurance through Aetna in 1982. However, he acknowledged that his agency gradually transitioned its business away from Aetna, and he could not remember whether Burlington Sanders was switched to another insurer before or after 1982. As for the terms of coverage, Weis could only state that it would have been a standard form "occurrence" policy.

¶5 Howard Fitts, Travelers' records custodian, stated in a deposition that while he found no record of the alleged insurance policy, Travelers' records of Aetna liability policies are incomplete for policies from the early 1980s because of Aetna's document retention policies. He estimated that Travelers has about one-half of the Aetna liability policies issued in 1980 and 1981, with records also being incomplete from 1982 through 1985.

¶6 Travelers also submitted an affidavit from Fitts, which stated that his review of Aetna commercial general liability policies from 1981 and 1982 revealed that Aetna was using standard Insurance Services Offices, Inc., (ISO) policy forms during that time. A copy of that policy form was attached to his affidavit.

¶7 The circuit court granted summary judgment to Travelers, concluding that there was insufficient evidence of the alleged policy's existence to create a genuine issue of material fact. The court also noted, though it did not

grant summary judgment on this basis, that it was unlikely the alleged policy would provide coverage even if it did exist, relying on the standard ISO policy form submitted by Travelers.

DISCUSSION

¶8 We review grants of summary judgment de novo, applying the same methodology as the circuit court. ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). 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.[3] In order for an issue of material fact to be "genuine," a reasonable jury must be able to find for the nonmoving party. ***Marine Bank v. Taz's Trucking, Inc.***, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90.

¶9 While Wisconsin has no case law specifically addressing the issue of a lost insurance policy, other jurisdictions require the party seeking coverage to prove the existence of the policy and its terms. *See e.g* ***City of Sharonville v. American Employers Ins. Co.***, 846 N.E.2d 833, 838-39 (Ohio 2006); *see also* ARNOLD P. ANDERSON, WISCONSIN INSURANCE LAW § 7.1B (4th ed. 2001). Generally, the best evidence rule, codified in WIS. STAT. § 910.02, requires the existence of a writing to be proven with the original document. However, where a writing is lost or destroyed, as with the alleged insurance policy here, extrinsic evidence of the writing's contents may be considered. WIS. STAT. § 910.04.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶10 We conclude summary judgment was appropriate because, even assuming the policy existed, there was insufficient evidence of the policy's terms to create a genuine issue of material fact as to coverage.[4] The parties agree that the alleged policy would have been an "occurrence" policy and that there are two types of occurrence policies. In one type of occurrence policy, coverage is triggered if the negligent or wrongful act occurs within the policy period. *See* ***Lund v. American Motorists Ins. Co.***, 797 F.2d 544, 547 (7th Cir. 1986). In the other type of occurrence policy, coverage is triggered only if the resulting injury occurs within the policy period. ***Id.*** In Wisconsin, where an occurrence policy uses the word "occurrence" to describe a covered event, coverage is triggered by the tortious act unless the policy specifically states that the resulting injury must occur within the policy period. ***Id.***

¶11 The Gagnons rely on insurance agent Weis's statement that the policy would have been an occurrence policy. If a jury were faced with determining the type of occurrence policy based upon Weis's statement alone, the most it could do is guess. Because a guess would not satisfy the applicable burden of proof, *see* WIS JI—CIVIL 200, Burlington Sanders and the Gagnons would be

[4] While the circuit court concluded there was no genuine issue of material fact as to the policy's existence, we need not address the issue. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm on grounds other than those used by the circuit court).

unable to prove the policy's terms at trial.[5] As a result, Weis's statement is insufficient to create a genuine issue of material fact on this issue.

¶12 Relying on ***Lund***, the Gagnons suggest that because an occurrence policy is triggered by a tortious act unless the policy's language specifically requires the resulting injury to occur within the policy period, there is somehow a presumption that coverage under this policy would have been triggered at the time of a tortious act rather than injury. They contend that this proposition, when combined with Weis's statement, is sufficient evidence to show that their loss falls within the alleged policy's broad grant of coverage and therefore the burden of proof would shift to Travelers to show that coverage was precluded by an exclusion.

¶13 However, whether an occurrence policy is triggered by a tortious act or the resulting injury depends upon the policy's language. *See* ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 737-39, 351 N.W.2d 156 (1984). We therefore reject the Gagnons' suggestion that an occurrence policy is presumptively triggered by a tortious act regardless of the policy's language. Ultimately, Weis's statement that this policy would have been an occurrence

[5] The Gagnons contest the notion that a claimant in Wisconsin would have the burden of proving a lost policy's terms. They rely upon ***Kozlik v. Gulf Insurance Co.***, 2003 WI App 251, ¶8, 268 Wis. 2d 491, 673 N.W.2d 343, which states that a claim for benefits under an insurance policy is subject to a shifting burden of proof, where the claimant has the initial burden of showing that the loss falls within the policy's broad grant of coverage, after which the burden shifts to the insurer to show that coverage is precluded by an exclusion. ***Id.***, ¶8. The Gagnons suggest that, in Wisconsin, the claimant's burden of establishing a policy's terms would be limited to establishing that the loss falls within the policy's broad grant of coverage. We need not decide whether the burden-shifting rule in ***Kozlik*** would limit the claimant's burden of proving a lost policy's terms or whether it would only apply after the claimant established those terms. Here, there is insufficient evidence to create a genuine issue of material fact regarding either the policy's broad grant of coverage or its terms in their entirety.

policy means nothing more; his statement simply does not indicate the type of occurrence policy.

¶14 The only evidence indicating which type of occurrence policy would have existed came from Travelers' records custodian Fitts, whose affidavit stated that Aetna was using standard ISO policy forms in 1981 and 1982. A copy of that form was attached to his affidavit. Travelers contends that the terms of the standard policy require the bodily injury, rather than the tortious act, to occur within the policy period, thereby defining which type of occurrence policy Aetna was using at the time. The Gagnons do not dispute Travelers' interpretation of the standard policy's terms, and there is no evidence that Aetna was issuing any other type of occurrence policy in 1981 or 1982. This undisputed evidence that Aetna policies issued at the time would not cover injuries occurring after the policy period provides additional support for granting summary judgment.

By the Court.—Judgment affirmed.

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