COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2008

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. 2007AP2249 **Cir. Ct. No. 2006CV5921**

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

RYAN M. LAMPE,

PLAINTIFF-APPELLANT,

V.

ALLSTATE INSURANCE CO. AND SCOTT CAMPBELL,

DEFENDANTS-CO-APPELLANTS,

WAUSAU UNDERWRITERS INS. CO. AND EMPLOYERS INSURANCE CO. OF WAUSAU,

DEFENDANTS-RESPONDENTS,

UNITED HEALTHCARE OF WISCONSIN AND MILWAUKEE COUNTY DEPT. OF HEALTH AND HUMAN SERVICES,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Reversed and cause remanded for further proceedings.*

Before Curley, P.J., Wedemeyer[1] and Fine, JJ.

¶1 WEDEMEYER, J. Ryan M. Lampe, Scott Campbell, and Allstate Insurance Co. (hereinafter "Allstate" when referring to all three appellants) appeal from an order granting Wausau Underwriters Insurance Co. and Employers Insurance Co. of Wausau's motion for summary judgment. The trial court ruled that the Wausau and Employers insurance policies for the Cudahy School District (District) did not provide coverage to volunteer wrestling coach, Campbell, for injuries Lampe sustained during a practice session Campbell was conducting in the wrestling room at Cudahy High School. Allstate asserts that the trial court erred in so ruling because the undisputed facts support a finding that Campbell satisfies the definition of a "volunteer worker," as that term is used in the policies at issue here. Because the undisputed facts give rise to competing inferences as to whether Campbell should be provided coverage as a "volunteer worker" under the insurance policies at issue, we reverse and remand for further proceedings.

BACKGROUND

¶2 On January 4, 2005, Lampe, a member of the Oak Creek High School wrestling team was invited to attend a practice session at Cudahy High School with Cudahy's wrestler, Jake Lisowski. The practice was being held by Cudahy's volunteer coach, Campbell. There were three high school wrestlers

[1] This opinion was circulated and approved before Judge Wedemeyer's death.

present at the practice, Lisowski, Lampe and another Oak Creek wrestler, Tony Megna. During the practice, Campbell and Lampe engaged in a take down maneuver, during which Lampe was seriously injured.

¶3 As a result of those injuries, Lampe sued Campbell and his insurance company, Allstate; as well as the two insurers who carried insurance coverage for the Cudahy School District: Wausau and Employers. Wausau provided the District with a commercial general liability policy and Employers issued an umbrella liability policy. Both Wausau and Employers filed motions seeking summary judgment on the ground that Campbell was not an insured under the District's insurance policies. The trial court granted the motion, ruling that Campbell did not satisfy the definition of "volunteer worker" as that term was used in the insurance policies, because at the time Lampe was injured, Campbell was not acting at the direction of, or within the scope of duties determined by, the District. The trial court reasoned that in order to fall within the District's coverage, the volunteer has to be engaged in acts directed by and required by the District. The trial court held that here, because Cudahy's wrestling coach, Quinn Elliott, did not *require* Campbell to conduct the practice at issue and did not control Campbell's activities at the practice, Campbell cannot be considered a "volunteer worker" and therefore was not insured under the District's policies.

¶4 Lampe, Campbell, and Allstate appeal from the trial court's order granting summary judgment to Wausau and Employers.

DISCUSSION

A. Standard of Review.

¶5 The issue in this case is whether the trial court erred in granting summary judgment. Our review in cases on appeal from summary judgment is well-known. We review orders for summary judgment independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates that 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) (2005-06).[2]

¶6 Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Id.*** Courts examine summary judgment motions in a three-step process. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139.

¶7 First, it must be determined that the pleadings set forth a claim for relief as well as a material issue of fact. ***Id.*** Second, the court must determine whether the moving party's affidavit and other proofs present a *prima facie* case

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

for summary judgment. ***Id.*** A defendant states a *prima facie* case for summary judgment by showing a defense that would defeat the claim. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material fact exists, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. ***Grams***, 97 Wis. 2d at 338. The court proceeds to each succeeding step only if it determines that the appropriate party has satisfied the preceding one.

¶8 The party moving for summary judgment must explain the basis for its motion and identify those submissions and pleadings demonstrating the absence of a genuine issue of material fact. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 292, 507 N.W.2d 136 (Ct. App. 1993). If the non-moving party has failed to produce any evidence of an essential fact, it is not necessary for the moving party to produce affidavits or other submissions that specifically negate the opponent's claim. ***Id.*** A non-moving party may not rest upon the mere allegations of its pleadings—it must come forward with evidence supporting those allegations. WIS. STAT. § 802.08(3).

¶9 A motion for summary judgment may be used to address issues of insurance policy coverage. ***Calbow v. Midwest Sec. Ins. Co.***, 217 Wis. 2d 675, 679, 579 N.W.2d 264 (Ct. App. 1998). For summary judgment to be granted, there must be no genuine issue of material fact and the movant must be entitled to judgment as a matter of law. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

B. Pertinent Policy Language.

¶10 There are two insurance policies at issue in this appeal: Wausau issued a commercial general liability ("CGL") policy to the Cudahy School District and Employers issued an umbrella liability policy to the Cudahy School District, both covering the time period of the incident involved here.

¶11 The insuring agreement of the CGL policy states: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The insuring agreement of the umbrella policy has a similar provision, which states: "We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' or 'property damage' to which this insurance applies."

¶12 Both policies define who is an insured to include: "Your 'volunteer workers' only while performing duties related to the conduct of your business," and both policies define "volunteer worker" as:

> a person who is not your 'employee', and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

"Your" refers to the Cudahy School District in both policies.

C. Analysis.

¶13 In reviewing the record, we conclude that the *facts* in this case are not in dispute. What is *disputed* is what inferences can and should be drawn from the facts. Accordingly, summary judgment should not have been granted because

the competing inferences create a factual issue for the jury to resolve. *See* ***Reserve Life Ins. Co. v. La Follette***, 108 Wis. 2d 637, 650, 323 N.W.2d 173 (Ct. App. 1982).

¶14 The undisputed facts demonstrate that the interscholastic athletics program, including the high school wrestling team, is part of the business of the District. The high school principal at the time of the accident, Kay Marks, testified to this fact. She also testified that the two components of the athletics program include competition and practice. It was not disputed by any testimony that volunteer coaches in the athletics program are a vital part of the program, and thus, a part of the business of the District because they provide assistance to the paid coaches, and bring additional knowledge, skills and experience to the program.

¶15 It is also not disputed that Campbell was a volunteer wrestling coach for the Cudahy high school team. Over the years, he had volunteered his time to Cudahy's wrestling at various times and at different levels. He had helped at Cudahy's wrestling practices a couple of times a week. When he attended the wrestling practices, he would work with a certain weight group, teaching wrestling techniques. He was not directly supervised or told what to do by Elliott, the head coach at these practices. Rather, because Campbell had been a wrestler himself, was experienced and skilled in teaching wrestling and had been a part of Cudahy's wrestling program for many years, he basically worked on his own with the weight group Elliott asked him to help with.

¶16 It is also not disputed that Lampe's injury did not occur during a regular Cudahy wrestling practice. Rather, the injury occurred during an extended practice following the regular team practice. The record reflects that Elliott knew

that Campbell would occasionally conduct the extra practice, that at times Elliott would tell the team that Campbell was staying after regular practice, and encouraged wrestlers to stay to work out with Campbell. Elliott never stayed for the extra practices because of concerns that it would violate league rules. However, Elliott gave permission to Campbell to hold the extra practices in Cudahy's wrestling room and either gave permission or knew that wrestlers from other high schools would be present. It was not disputed that Elliott believed the extra workouts would benefit Cudahy's wrestling team, or at least a Cudahy wrestler.

¶17 The record also clearly demonstrates that the practice occurred directly after the regular Cudahy wrestling team practice, which Campbell had attended and assisted at, and that the Oak Creek's wrestlers were entering the school and/or wrestling room as Elliott and the Cudahy team were leaving the regular practice. It is also undisputed that at this particular extended practice, only Lisowksi was going to be staying and working out with the Oak Creek wrestlers, that Elliott did not announce this extra practice to the other members of the Cudahy team or suggest that any other Cudahy wrestlers stay. It is also clear from the record that Campbell was the only Cudahy "coach" at the extended practice and that what to do at the extra practice was determined entirely by Campbell, without specific direction from Elliott. Further, whether and when to conduct the extra practice was left up to Campbell, without any specific direction from Elliott. Finally, no one disputes that Lampe was injured during the extended practice, while wrestling with Campbell.

¶18 Based on all of these undisputed facts, the trial court concluded:

> The critical facts are not in dispute. Mr. Lampe was injured during a practice session directed by Mr. Campbell

that took place at Cudahy High School. This practice session was an extra practice session that was initiated and arranged by Mr. Campbell himself.

He set the time. He invited the participants. He was not assigned or instructed by the District or any of its employees to hold the session or how to run the session or what to do at the session.

No district employees attended. The District was aware that the session was taking place and Mr. Campbell had the District's permission to hold the session. It might even be inferred from the circumstances that wrestlers were encouraged by the District to attend such sessions, although there was no evidence that wrestlers were encouraged to attend the particular session at which Mr. Lampe was injured.

The issue before me is whether the District's insurance policies covered the actions of Mr. Campbell and the decisive questions is whether he was a volunteer worker who could be considered an insured under those policies.

….

The policies define a volunteer worker as "a person who is not your 'employee,' and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary, or other compensation by you or anyone else for their work performed for you."

If coverage turns only on the words of this provision, making the call in this case would be relatively easy. While there is no dispute that Mr. Campbell fit this definition in most respects, his conduct does not fit the definition in one key respect.

At the time of Mr. Lampe's injury, Mr. Campbell was not "acting at the direction of" the District. The term "direction" is not defined in the policy nor was I able to uncover an authoritative, applicable definition of the term in any Wisconsin case law.

In the absence of a controlling definition, courts are required to give words in insurance policies their common and ordinary meaning, that is, the meaning a reasonable person in the position of the insured would have understood the words to mean.

> ….
>
> It cannot be said in this case that at the time Mr. Lampe was injured, Mr. Campbell's conduct was being directed by the District. There is no evidence that Mr. Campbell's conduct during the extra practice session was managed or regulated or controlled by the District or that the District took charge of the session or Mr. Campbell's work during the session or gave Mr. Campbell authoritative instructions to conduct the practice session or about how to conduct the session or about what activities should or should not take place during the session.

¶19 The trial court then addressed how the definition of "volunteer worker" affected its decision in this case as the insuring clause refers to an insured as a volunteer worker who is "performing duties related to the conduct of your business." The trial court then addressed the slight differences in the contract between the insuring clause language and the definition of volunteer worker language:

> In other words, Mr. Campbell might be a volunteer worker generally, as determined by the definition of volunteer worker, because generally speaking he was someone who did stuff for the District but didn't get paid, but he may be considered an insured under the who is an insured clause only in a situation in which his conduct meets the terms that are set forth in that clause.
>
> Thus, Mr. Campbell might be considered a volunteer worker, because he generally worked at the direction of the District, but that would leave open the question of whether, on the date Ryan Lampe was injured, he was an insured, and that comes down to whether at that particular time he was performing duties related to the conduct of the District's business to borrow the terminology--the operative terminology from the who is an insured clause.
>
> Having said all that I'm not sure whether my attempt to reconcile these skewed provisions is sound. What remained, though, is that Mr. Campbell's conduct is not covered unless the facts show that he was an insured under the terms of the who is an insured provision of each policy.
>
> To determine if Mr. Campbell was an insured under the terms of who is an insured policy--I should say provision, I

> must consider whether at the time Mr. Lampe was injured, Mr. Campbell was performing duties related to the conduct of the District's business.

The trial court proceeded to address whether Campbell's conduct at the time of Lampe's injury could be construed to be a "duty." The trial court found that under a broad definition of "duty," Campbell would be conducting the duty of the District's business, but under a narrow construction of the term "duty," Campbell would not be conducting the District's business because the extra practice was not required or assigned to him. The trial court then concluded that "duty" should be construed narrowly under the policy to include only the "work that was required of the volunteer worker or assigned to the volunteer worker." Thus, the ultimate conclusion of the trial court was that Campbell was not performing duties required of him and therefore was not a volunteer worker as that term is used in the District's insurance policies.

¶20 We agree with the trial court that under the facts and circumstances, one reasonable inference to reach was the one the trial court reached here. A reasonable insured might conclude that because the injury occurred at the extra practice, which was not specifically required by Elliott and that Elliott did not specifically instruct Campbell to conduct the practice, or what should take place at the practice, that the District's insurance policy language should not be construed to provide coverage for Campbell's conduct.

¶21 However, we hold that another, equally reasonable inference, also arises from the facts. That is, a reasonable jury could infer from the facts that Campbell did satisfy the definition of volunteer worker as that term is used in the District's insurance policies. As noted, the undisputed facts demonstrate that Campbell was a volunteer wrestling coach and helped out at practice whenever he

could, generally a couple of times a week. The paid coaches were glad to have Campbell's assistance because he was a well-qualified wrestler and coach. Campbell worked with a specific weight group at the regular practices during break-out sessions, and was not specifically instructed as to what to do at these regular team practices. He did the same thing at the extra practices as he did at the regular practices. Elliott knew about and permitted the extra practices and at times invited Cudahy's wrestlers to stay to practice further with Campbell. Thus, at the extra practices, he was working at the direction of the District and he was doing the duties assigned to him. Athletics in general, and wrestling in particular are fluid activities, which often do not require specific directions or assignment of duties. Campbell's "duties" were to help the wrestlers improve. The extra practice sessions were clearly meant to do just that. The "duties" of this volunteer worker were to help instruct the wrestling team. Thus, under these facts, another reasonable inference from the undisputed facts is that Campbell would satisfy the definition of volunteer worker under the District's policies.

¶22 Wausau and Employers argue vehemently that the extra practice was a private training session for one particular wrestler and thus, cannot be considered the District's business. That is one inference that can be drawn. But an equally reasonable inference is that Campbell's "volunteering duty" was coaching Cudahy's wrestling team. That is what he was doing at the extra practice … coaching wrestling. He was not having the wrestlers paint the walls of the gym or instructing them to cut down trees or dig ditches. When the injury occurred, he was coaching wrestling and he was doing it with the knowledge and permission of Elliott, who was given the authority by the athletic director and principal to manage the wrestling team and the assistants, including volunteer coaches. And he was doing it in the Cudahy wrestling room. Accordingly, one reasonable

inference based on these facts was that the District's insurance policy should provide coverage for Campbell as he was working at the direction of the District and engaging in the duties for which he had volunteered at the time Lampe was injured.

¶23 Because the facts of this case create two equally reasonable and competing inferences as to whether Campbell was indeed a "volunteer worker" as that term is used in the language of the Wausau and Employers insurance policies, the trial court erred in granting summary judgment. We reverse the order and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

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