

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 28, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP698

Cir. Ct. No. 2007CV71

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DUSTIN J. HINZ,

PLAINTIFF-APPELLANT,

V.

WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

**JACOB R. PHILLIPS AND AMERICAN FAMILY MUTUAL INSURANCE
COMPANY,**

DEFENDANTS,

**ANTHEM BLUE CROSS & BLUE SHIELD AND BLUE CROSS BLUE SHIELD
OF MINNESOTA,**

SUBROGATED DEFENDANTS,

LINCOLN LANES, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

WHITNEY HINZ,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Lincoln County:
DOUGLAS T. FOX, Judge. *Affirmed.*

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

¶1 PETERSON, J. Dustin Hinz appeals a judgment declaring Wisconsin American Mutual Insurance Company has no responsibility to defend or indemnify Lincoln Lanes, Inc. The circuit court held Lincoln Lanes' policy with Wisconsin American excludes liability arising from causing or contributing to the intoxication of an individual, or from serving alcohol to a person under the legal drinking age. Hinz argues the policy is ambiguous. We disagree and affirm.

BACKGROUND

¶2 Hinz was injured while a passenger in a motor vehicle driven by Jacob Phillips. Before the accident, Hinz and Phillips were at Lincoln Lanes in Merrill, Wisconsin. Lincoln Lanes is a bowling alley that also serves food and alcohol. Both Hinz and Phillips were underage at the time. Lincoln Lanes' bartender allegedly served Phillips several Jäger bombs¹ and beers. Hinz alleges Phillips was intoxicated at the time of the accident and Lincoln Lanes is liable to Hinz because it provided Phillips with alcoholic beverages.

¹ A "Jäger bomb" is a cocktail made by dropping a shot of Jägermeister into a glass of Red Bull Energy Drink.

¶3 At the time of the accident, Lincoln Lanes had a commercial general liability insurance policy with Wisconsin American. The declarations page of the policy states:

CLASSIFICATION DESCRIPTION
Restaurants – with sale of alcoholic
Product and Completed Operations Liability

The page then lists the corresponding exposure for this part of the operation as \$797,000 per year and the premium cost as \$224 per quarter.

¶4 Although the declarations page provides that one of the policy's covered operations is "[r]estaurants – with sale of alcoholic," paragraph seven of the exclusions states:

We do not pay for **bodily injury** or **damage** for which any **insured** may be held liable by reason of:

- a. causing or contributing to the intoxication of a person;
- b. the furnishing of alcoholic beverages to a person under the influence of alcohol or under the legal drinking age; or
- c. a law or regulation relating to the sale, gift, distribution, or use of alcoholic beverages.

This exclusion applies if **you** are in the business of manufacturing, distributing, selling, or serving alcoholic beverages.

The trial court concluded this provision unambiguously excludes coverage for the type of actions for which Hinz alleged Lincoln Lanes was liable. The court therefore declared Wisconsin American had no responsibility to defend or indemnify Lincoln Lanes.

DISCUSSION

¶5 The only issue on appeal is whether Lincoln Lanes' policy with Wisconsin American is contextually ambiguous.² Whether an insurance policy is ambiguous is a question of law we review independently. *Folkman v. Quamme*, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857 (citation omitted). If there is no ambiguity in the language of an insurance policy, we will not rewrite the policy by construction. *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, ¶51, 255 Wis. 2d 61, 647 N.W.2d 223. We also interpret the language of an insurance policy within the context of the policy. *State Farm Mut. Auto Ins. Co. v. Bailey*, 2007 WI 90, ¶21, 302 Wis. 2d 409, 734 N.W.2d 386. A policy is contextually ambiguous “when a provision is reasonably susceptible to more than one construction when read in the context of the policy’s other language.” *Id.*, ¶28.

¶6 Hinz argues the policy is contextually ambiguous because the declarations page appears to indicate Lincoln Lanes paid for and received liability coverage for the sales of alcoholic products,³ but the policy later negates this coverage with Exclusion 7. We disagree.

² In his briefs, Hinz argues solely that the policy is ambiguous, and cites allegedly contradictory provisions as a source of the ambiguity. At oral argument, he recharacterized this assertion, contending the argument that the policy contains contradictory provisions is distinct from the contention the policy is ambiguous. Our analysis and result remain the same no matter how Hinz packages his argument.

³ At oral argument, Hinz argued an endorsement expanding the definition of products/completed work hazard also brings the operation described as restaurants – with sale of alcoholic specifically within the scope of the products/completed work coverage. We agree the policy generally covers this business operation. The real question, however, is whether an exclusion applies to preclude coverage, and Hinz's argument does not aid that discussion.

¶7 A policy may provide coverage for a business that sells alcoholic beverages but exclude coverage for certain situations. Exclusion 7 excludes liability arising from three discrete situations involving alcohol, but it does not exclude coverage for all liability related to the sale or distribution of alcohol. Businesses that sell alcohol are subject to risks beyond simply the circumstances enumerated in Exclusion 7. For example, selling alcohol could increase the risk of theft to the business because the alcohol or cash receipts from alcohol sales present tempting targets. Likewise, a business that serves alcohol could attract rowdy or aggressive individuals who became intoxicated elsewhere but later came to that business for another drink. Additionally, alcoholic beverages—like the other beverages and food Lincoln Lanes serves—are products that could potentially injure customers in ways unrelated to the scenarios specified by Exclusion 7. Thus, it is neither contradictory nor ambiguous for a policy to provide liability coverage for a restaurant that serves alcoholic beverages, but qualify that coverage by excluding liability in particular circumstances.

¶8 We are also not persuaded by Hinz’s argument that Exclusion 7 applies to only one of the policy’s liability coverages. Lincoln Lanes’ policy consists of four types of liability coverage, among them: Coverage L – Bodily Injury/Property Damage, and Coverage N – Products/Completed Work. Coverage N affords coverage for “all sums which an insured becomes legally obligated to pay as damages due to bodily injury or property damage arising out of the products/completed work hazard.” The policy defines products hazard as “bodily injury or property damage arising out of products after physical possession of the products has been relinquished to others.” Thus, both Coverages L and N cover bodily injury and property damage. The difference is that Coverage N applies

after the insured has relinquished control of a product; as in the case of a customer sickened by tainted food.

¶9 However, Hinz contends Coverage N also provides liquor liability coverage because Exclusion 7 only excludes liquor liability from coverage under Coverage L. He points out that Exclusion 7 appears under the subheading, “Exclusions that Apply to Bodily Injury and Property Damage,” which echoes the title of Coverage L, “Bodily Injury/Property Damage.” He contends it follows that the exclusions within this subheading apply only to Coverage L and the policy therefore provides liquor liability coverage under Coverage N – Products/Completed Works.

¶10 As Wisconsin American correctly points out, however, the policy sets forth all of the coverages before enumerating the exclusions. Thus, it is clear that the exclusions under the subheading, “Exclusions that Apply to Bodily Injury and Property Damage,” apply to all of the coverages that include bodily injury and property damage. Coverage N includes such coverage. Therefore, Exclusion 7 pertains to Coverage N.

¶11 Further, although insurance policies must be read as a whole, Hinz’s own interpretation defies this principle of construction. To adopt his explanation that Exclusion 7 applies only to Coverage L would render the exclusion incomprehensible. It is difficult to understand why a policy would exclude liquor liability coverage under Coverage L, but include it under Coverage N. Additionally, an endorsement to the policy expands the definition of “products/completed work hazard.” To fit within the scope of the original definition, bodily injury or property damage had to occur away from the premises rented or owned by the insured. The endorsement, however, removes this

requirement, specifying only that a products hazard “means a bodily injury arising out of products after physical possession of the products has been relinquished to others.” Under the expanded definition, the situations enumerated in Exclusion 7 would almost certainly fit exclusively within the scope of Coverage N, because these scenarios would likely occur after the insured relinquished control of the product and the expanded definition makes immaterial the location of the injury. It would therefore make no sense for the policy to provide an exclusion that applies to a coverage under which the corresponding liability would likely not arise (Coverage L), but fail to include such an exclusion for the coverage for which there would be liability (Coverage N).

¶12 The interpretation that comports with the organization of the policy is that Wisconsin American excluded from coverage any liability arising from the circumstances articulated in Exclusion 7. Therefore, the policy unambiguously excludes all liability arising from causing or contributing to the intoxication of a person and serving alcohol to a person under the legal drinking age.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

