COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP594 **Cir. Ct. No. 2010CV70**

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

KIMBERLY A. SIMONSEN,

PLAINTIFF-APPELLANT,

V.

LUMBER COMPANY BREW PUB & EATERY, LLC AND GERMANTOWN MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

MIKE SMITH,

DEFENDANT.

APPEAL from a judgment of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kimberly Simonsen appeals a summary judgment dismissing her direct-action claims against Germantown Mutual Insurance Company. Simonsen argues there was coverage for her claims because Tmar Novak injured her while acting in his capacity as a member of the limited liability company that employed her. We reject Simonsen's argument, and affirm.

BACKGROUND

¶2 Simonsen was employed as a bartender at the Lumber Company Brew Pub & Eatery, LLC. When she arrived at 5:30 on a Thursday evening to begin her shift, Novak was working behind the bar. Novak was a member of the LLC and also worked there as a bartender receiving wages and tips. Novak had consumed alcohol while working and remained at the pub drinking and socializing after Simonsen relieved him. Around 6:30 or 7:00, Novak shook dice for drinks with three patrons and consumed beers and whiskey shots. Novak's girlfriend, Amy Smith, tried to convince him to stop drinking and told Simonsen not to serve him any more shots. However, Novak explained he "talked [Simonsen] into giving me more shots …."

¶3 Simonsen and Smith became concerned that Novak should not drive a vehicle. After Novak placed his keys on the bar, he watched as Simonsen took them and placed them behind the bar. Later, when Smith and Novak got up to leave, Novak went behind the bar to retrieve his keys.

¶4 Novak testified he intended to leave with Smith, but did not want to leave behind his key ring, which also held his work keys. Novak intended to return at the end of the night to lock up the bar. He did not, however, inform Simonsen he was going to ride with Smith because he "[d]idn't feel I needed to. They were my keys, my property." Novak acknowledged he could have retrieved

his keys when he returned to close, but stated he did not feel comfortable leaving them and he would have needed them to drive back in a different car, unless he drove Smith's car back. Novak understood that Simonsen was merely trying to prevent him from driving home.

¶5 Novak and Simonsen both grabbed onto the key ring and they struggled over it for about thirty seconds. Simonsen's wrist and two of her fingers were dislocated. After Novak let go, Simonsen ran outside with the keys. Several minutes later, Smith came outside hysterical and called the police. Simonsen could hear Novak inside cursing and yelling. After a few more minutes, when the yelling stopped, Simonsen returned inside to check on the patrons. Novak started yelling at her, calling her names, telling her to leave, and was "[s]aying the F word a lot." The police then arrived.

¶6 Simonsen sued, and the Lumber Company's insurer, Germantown Mutual, moved for summary judgment. Germantown Mutual argued an employer's liability exclusion in its policy, coupled with the policy definition of insured, applied to bar coverage for Simonsen's injuries. The issue was whether Novak was acting in his capacity as a member of the LLC when he injured Simonsen. The circuit court determined that he was not acting in such a capacity and, therefore, that there was no coverage. Simonsen appeals.

DISCUSSION

¶7 Simonsen argues the circuit court erroneously granted summary judgment dismissing her claims against Germantown Mutual. This case involves

a narrow issue concerning an insurance policy definition of who is an insured.[1] We review summary judgment decisions de novo. ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).[2] In examining the material presented, all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the summary judgment motion. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). The interpretation of a contract presents a question of law, also subject to de novo review. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). The ultimate aim in contract interpretation is to give effect to the parties' intentions, which we ascertain by looking to the language of the contract itself. ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 351, 241 N.W.2d 158 (1976).

¶8 There is no dispute that the policy's employer's liability exclusion applied to bar coverage for claims against the Lumber Company. Simonsen argues, however, that there is coverage for claims against Novak as an individual.[3] The parties agree that, consistent with ***Gulmire v. St. Paul Fire & Marine***

[1] The circuit court also granted Germantown Mutual summary judgment on an alternative rationale, which Simonsen also challenges on appeal. Because we resolve the case on the policy definition issue, we need not reach the second issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] This appeal involves a direct-action claim against the insurer; Novak is not a named party.

Insurance Co., 2004 WI App 18, 269 Wis. 2d 501, 674 N.W.2d 629, and ***United States Fidelity and Guaranty Co. v. PBC Productions, Inc.***, 153 Wis. 2d 638, 451 N.W.2d 778 (Ct. App. 1989), the employer's liability exclusion would not apply to bar coverage against Novak as an individual because he was not Simonsen's employer. Nonetheless, there is coverage for a claim against Novak only if he was an insured under the policy.

¶9 Unlike here, it was undisputed in ***Gulmire*** and ***U.S. Fidelity***, which involved coemployees, that the tortfeasors were acting in the course of their employment. The Lumber Company's policy provides: "If you are designated in the Declarations as … [a] limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business." The parties dispute whether Novak, a member of the LLC, was acting with respect to the conduct of the Lumber Company at the time he injured Simonsen.

¶10 Generally, when considering whether a person's liability arises with respect to the conduct of a business, we must determine whether the person's conduct was "either personal or business." ***Society Ins. v. Linehan***, 2000 WI App 163, ¶¶14-15, 238 Wis. 2d 359, 616 N.W.2d 918. In doing so, we must consider whether the activity was performed for the purpose of the business. ***Rayburn v. MSI Ins. Co.***, 2001 WI App 9, ¶¶13-15, 240 Wis. 2d 745, 624 N.W.2d 878.

¶11 Simonsen argues Novak was acting with respect to the business when attempting to obtain his keys because (1) he was located behind the bar, where mere patrons are customarily prohibited, and (2) he did not allow bartenders to lock up and did not feel comfortable leaving the business keys with an employee.

¶12 We easily reject Simonsen's arguments. First, while the location of Novak's conduct may be *relevant* to determining the nature of his conduct, the location does not ipso facto *establish* the nature of his conduct. Even assuming Novak's presence behind the bar was permitted, Simonsen fails to construct a bridge to span the inferential gap between Novak's location and his conduct. We will reject arguments that are inadequately developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶13 Second, we conclude Novak was not acting with respect to the conduct of the business simply because his key ring contained the business keys. If Novak intended to return to the bar at closing time to lock up, his keys would have still been there. He also acknowledged that he did not need the keys to return to the bar because he could have returned in Smith's vehicle. Regardless, Novak's conduct cannot be viewed as having a business purpose where his keys were taken from him by a bartender to prevent him from driving while intoxicated and he then engaged in a prolonged physical struggle with her over the keys. Novak never told Simonsen he did not intend to drive home or merely desired to have keys other than those to the vehicle he arrived in. Novak's explanation for concealing his intentions from Simonsen, that the keys were his property and he did not need to explain himself, cannot reasonably be viewed as conduct undertaken in furtherance of a business purpose. Thus, we hold that, as a matter of law, Novak's alcohol-fueled struggle for his keys was not an activity undertaken with respect to the conduct of the business.

¶14 Additionally, while we have rejected Simonsen's arguments on the merits, we would also affirm because she failed to file a reply brief. The Lumber Company's brief presented arguments that required a reply. As one example, Simonsen did not discuss, much less cite, cases such as ***Society Insurance*** or

Rayburn—both discussed by Germantown Mutual—that have applied insurance policy language similar to that here concerning conduct with respect to a business. Unrefuted arguments are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Judgment affirmed.

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