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DISTRICT II

July 28, 2021

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Racine County
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You are hereby notified that the Court has entered the following opinion and order:

2020AP237 West Bend Mutual Ins. Co. v. Ixthus Medical Supply, Inc. (L.C. #2016CV1414)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

West Bend Mutual Insurance Company appeals from an order of the circuit court. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

Background

In 2016, West Bend filed a declaratory judgment action in circuit court seeking a declaration that it owed no duty to defend or indemnify Ixthus Medical Supply, Inc. or Karl Kuntsman (collectively, Ixthus) in relation to the lawsuit of ***Abbott Laboratories, et al. v. Adelphia Supply USA***, ***et al.***, No. 15-CV-5826 (CBA) (MDG) (E.D.N.Y.). The circuit court agreed with West Bend, concluding that the underlying lawsuit includes allegations of willful misconduct by Ixthus and thus the "knowing violation" exclusion of its insurance contract with Ixthus applies and relieves West Bend of its duty to otherwise defend or indemnify Ixthus. Ixthus and other interested parties—Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp. (collectively, Abbott)—appealed.

In our decision on that appeal, we reversed the circuit court, observing that "[s]ome of the ten surviving claims [in the underlying lawsuit] expressly allege a knowing violation of another's rights; others do not." ***West Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc.***, No. 2017AP909, unpublished slip op. ¶16 (WI App Mar. 28, 2018). While most of our legal discussion focused on the question of whether West Bend had a duty to *defend* Ixthus, in our final paragraph of the decision, we stated:

> As there are claims set forth in the complaint that survive the "knowing violation" exclusion, the inclusion of allegations of intentional conduct does not relieve the insurer of its duty to defend. We therefore reverse the circuit court's grant of summary judgment and its order declaring that West Bend has no duty to defend or indemnify Ixthus. We remand with directions that declaratory relief be entered in Ixthus's and Abbott's favor, such that West Bend must defend the suit *and indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation*.

West Bend Mut. Ins. Co., No. 2017AP909, ¶20 (emphasis added; citation omitted). In our mandate, we wrote: "Judgment reversed and cause remanded with directions." ***Id.*** Those "directions" for remand were, obviously, that the circuit court enter declaratory relief "in Ixthus's and Abbott's favor, such that West Bend must defend the suit *and indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation*." ***Id.***, ¶20 (emphasis added). West Bend did not move for reconsideration or clarification of our decision, but instead appealed to our supreme court.

Like us, the supreme court focused its legal discussion only on the question of whether West Bend had a duty to *defend* Ixthus. But in its final sentence of the decision, the court stated, "We affirm the decision of the court of appeals," and in its mandate wrote only: "The decision of the court of appeals is affirmed." ***West Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc.***, 2019 WI 19, ¶40, 385 Wis. 2d 580, 923 N.W.2d 550. That affirmed "decision of the court of appeals" of course was, again, that we "remand with directions that declaratory relief be entered in Ixthus's and Abbott's favor, such that West Bend must defend the suit *and indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation*." ***West Bend Mut. Ins. Co.***, No. 2017AP909, ¶20 (emphasis added). West Bend did not move for reconsideration or clarification of the supreme court's decision.

The case was remanded to the circuit court, and the court entered a final judgment and order "based on" the supreme court's decision affirming our decision. Precisely tracking the language from our affirmed decision, the circuit court's order states that West Bend has a duty to defend Ixthus, "as well as a duty to indemnify [it] against any damages awarded to [Abbott] as

compensation for advertising injury on claims that do not require proof of a knowing violation." The court then dismissed the action. West Bend appeals again.

Discussion

West Bend claims this matter is governed by the "law of the case." We agree, but this does not aid West Bend.

"The law of the case is a 'longstanding rule' that requires courts to adhere to an appellate court's ruling on a legal issue 'in all subsequent proceedings in the trial court or on later appeal.'" ***State v. Jensen***, 2021 WI 27, ¶13, 396 Wis. 2d 196, 957 N.W.2d 244 (citation omitted). Our supreme court has further stated:

> Whether a decision establishes the law of the case is a question of law that we review de novo. Although lower courts have the discretion to depart from the law of the case when a "controlling authority has since made a contrary decision of the law," whether such a contrary decision has been made is a question of law that we review de novo.

Id., ¶12 (citations omitted). In this case, our decision in the first appeal established the law of the case that bound the circuit court to issue the final order it did. Our supreme court's decision on appeal did not make a "contrary decision of the law," but instead affirmed our decision. The circuit court acted properly in issuing its order, which exactly adhered to our "directions" in the first appeal.

West Bend asserts that the supreme court "unambiguously and repeatedly stated that whether West Bend had a duty to indemnify would have to await facts developed at trial or further proceedings," and it suggests that the supreme court decision indicates that it was

inappropriate for us, in our first decision, to have made an indemnification ruling at that stage of the proceedings. West Bend misreads the supreme court's decision.

The supreme court noted that a fact finder in the underlying lawsuit would ultimately determine whether or not Ixthus acted "knowingly" in relation to any of the allegations lodged against Ixthus by Abbott and that if the fact finder determined that Ixthus did act knowingly, such a determination "would "reliev[e] West Bend of its indemnification obligation under the knowing violation exclusion." ***West Bend Mut. Ins. Co.***, 385 Wis. 2d 580, ¶37. In our first decision, we stated only that "West Bend must … indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do *not* require proof of a *knowing violation*." ***West Bend Mut. Ins. Co.***, No. 2017AP909, ¶20 (emphasis added). So, according to our decision, West Bend must indemnify Ixthus if a fact-finder determines damages for Abbott related to "its advertising injury on claims that do not require proof of a knowing violation," whereas the supreme court stated that West Bend would be "reliev[ed] ... of its indemnification obligation" if the fact finder alternatively finds that Ixthus "acted knowingly." Thus, we preemptively ruled that West Bend would have to indemnify Ixthus in relation to claims that do not involve knowing violations, and the supreme court preemptively ruled that West Bend would not have to indemnify Ixthus in relation to claims in which Ixthus is found to have acted knowingly. The supreme court merely pointed out that the fact finder in the underlying lawsuit would make the finding as to whether or not West Bend committed knowing

violations. In short, the supreme court addressed the opposite side of the same coin we addressed, and did so in a way that is consistent with our decision.[2]

In sum, we mandated in our decision in the first appeal that the circuit court enter declaratory relief "in Ixthus's and Abbott's favor, such that West Bend must defend the suit *and* indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation." ***Id.*** (emphasis added). On appeal, our supreme court affirmed our decision with no indication that it was reversing the indemnification part of this mandate. Thus, our mandate remained the law of the case, which the circuit court properly followed upon remand from the supreme court.[3]

[2] Despite now claiming in its brief-in-chief in this appeal that our decision in the first appeal "strayed into commentary, *dicta*, on duty to indemnify in [our] remand directions," West Bend did not move for reconsideration or clarification of our decision, but instead appealed the decision to our supreme court. Reviewing the supreme court's decision, there is no indication that West Bend raised before that court any concern about our mandate or remand directions relating to West Bend's duty to "indemnify Ixthus" against "any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation." *See* ***Veritas Steel, LLC v. Lunda Constr. Co.***, 2020 WI 3, ¶42, 389 Wis. 2d 722, 937 N.W.2d 19 (party forfeited claim/argument by failing to raise it before appellate court). Despite the supreme court's affirmation of our decision—which affirmation was without any explicit limitations, restrictions or reservations—West Bend failed to move for reconsideration or to clarify any concerns it might have had related to the supreme court's decision affirming our decision. *See* ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶¶48-49, 303 Wis. 2d 94, 735 N.W.2d 418 (expressing that if a party believes a mandate by an appellate court is unclear, the party "should … file[] a motion under [WIS. STAT. RULE] 809.14 to clarify the effect of our mandate or a motion for reconsideration under [WIS. STAT. RULE] 809.64…. Parties should follow this procedure because it promotes finality and protects scarce judicial resources by permitting the court that issued the mandate to resolve any ambiguity"); *see also* ***Johann v. Milwaukee Elec. Tool Corp.***, 270 Wis. 573, 579, 72 N.W.2d 401 (1955) (stating that where party finds any portion of an opinion or mandate to be ambiguous, the party should raise the matter with the court that issued the mandate, not the circuit court). At a minimum, West Bend needed to raise any concerns about our mandate or remand directions in its appeal of our decision to the supreme court. Its failure to do so constitutes forfeiture of any such concerns.

[3] Both Ixthus and Abbott request that we find West Bend's appeal frivolous and award costs and fees. While we conclude that West Bend does not prevail with its appeal, we do not find the appeal to be frivolous; as a result, we do not award the requested costs and fees.

IT IS ORDERED that the order of the circuit court is hereby summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals