COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

Nos. 95-3573, 96-0271

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III
No. 95-3573

BETH CALLOW AND WES CALLOW,

Plaintiffs-Respondents,

v.

DANIEL TORNIO AND PAM TORNIO,

Defendants-Respondents,

GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendant,

REGENT INSURANCE COMPANY,

Defendant-Appellant,

B. GILLESPIE, LTD., A LIMITED PARTNERSHIP, THRESHERMENS MUTUAL INSURANCE COMPANY, WISCONSIN MUTUAL INSURANCE COMPANY AND JEROME FOODS BENEFIT PLAN,

Defendants.

No. 96-0271

BETH CALLOW AND WES CALLOW,

Plaintiff-Appellant,

v.

DANIEL TORNIO AND PAM TORNIO,

Defendant-Appellant,

GENERAL CASUALTY COMPANY OF WISCONSIN, REGENT INSURANCE COMPANY, B. GILLESPIE, LTD., LIMITED PARTNERSHIP,

Defendants,

THRESHERMENS MUTUAL INSURANCE COMPANY, WISCONSIN MUTUAL INSURANCE COMPANY, JEROME FOODS BENEFIT PLAN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This appeal arises out of a personal injury action and presents issues of insurance coverage. Beth and Wes Callow sued Daniel and Pam Tornio and their insurers, claiming that Beth was injured in 1994 as a result of Daniel's 1986 negligent deck construction. The Callows and the Tornios (collectively "the Callows") appeal a summary judgment dismissing the

Callows' claims against the Tornios' insurer, Wisconsin Mutual Insurance Company for lack of coverage.

In a consolidated appeal, we granted leave to Regent Insurance Company to appeal a nonfinal order denying Regent's motion for a summary judgment of dismissal. The parties raise two issues: (1) does the Tornios' 1985-86 Regent policy provide coverage for Daniel's 1986 allegedly negligent acts; and (2) does the Tornios' 1994 Wisconsin Mutual policy cover the Tornios' liability stemming from the 1986 allegedly negligent acts.

We conclude that the Tornios' 1985-86 Regent policy does not provide coverage for injuries sustained in 1994. We conclude that the personal liability portion of the Tornios' 1994 Wisconsin Mutual policy provides coverage for liability for bodily injuries that occur within the time frame of the policy and that the premises exclusion does not apply. We therefore reverse the judgment and remand for further proceedings.

In 1986, Daniel Tornio built a wooden deck on his house on Cherry Street in Turtle Lake, Wisconsin. At that time, he had in effect a homeowner's insurance policy issued by Regent Insurance Company. The Regent policy was renewed annually until its eventual cancellation in 1992 when the Tornios sold their Cherry Street home and purchased a different home. In June 1994, while cleaning the pool at the Cherry Street home, Beth Callow fell through the deck. At that time, the Tornios had a Wisconsin Mutual policy insuring their residence at Highway 63 in Turtle Lake.

Claiming that her injuries were caused by Tornio's negligent deck construction, the Callows commenced this action. Regent and Wisconsin Mutual brought motions for summary judgment of dismissal on the issue of coverage. The trial court concluded that the Regent policy created an ambiguity with regard to coverage and denied Regent's motion, concluding that the negligent act occurred during the policy period. It concluded that the policy language did not eliminate the insured's reasonable expectation of coverage for liability stemming from acts within the policy period. The trial court granted Wisconsin Mutual's motion for dismissal, concluding that as an "occurrence" policy it was not within the contemplation of the parties to cover acts outside the time frame of the policy.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead only to one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

To determine whether an insurer is obligated to assume the defense of a third-party suit, we determine whether the complaint alleges facts that, if proven, would give rise to liability under the terms and conditions of the policy. ***Sola Basic Industries v. USF&G,*** 90 Wis.2d 641, 646, 280 N.W.2d 211, 213 (1979). When the facts are undisputed, the interpretation of a contract is a question of law that we review de novo. ***Schlosser v. Allis-Chalmers,*** 86 Wis.2d 226, 244, 271 N.W.2d 879, 887 (1978). The interpretation of an insurance contract is controlled by general principles of contract construction. ***Sprangers v. Greatway Ins. Co.***, 182 Wis.2d 521, 536, 514 N.W.2d 1, 6 (1994). Absent an ambiguity, its plain language governs. ***Garriguenc v. Love,*** 67 Wis.2d 130, 134-35, 226 N.W.2d 414, 417 (1975). Unambiguous policy language is read to mean what a reasonable person in the position of the insured would have understood the words to mean. ***Id.*** Whether an ambiguity exists is a question of law. ***Spencer v. Spencer,*** 140 Wis.2d 447, 450, 410 N.W.2d 629, 630 (Ct. App. 1987). A document is ambiguous if it is reasonably capable of different meanings. ***Id.***

1. The Regent Policy

Regent argues that the trial court erroneously denied it summary judgment because the Regent policy does not provide coverage. We agree. Regent's 1985-86 policy provides:

Section II—LIABILITY COVERAGES
COVERAGE E
PERSONAL LIABILITY

If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** to which this coverage applies, we will:

a. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
b. provide a defense at our expense by counsel of our choice. ...

Regent's policy defines bodily injury as "bodily harm, sickness or disease, including required care, loss of services and death resulting therefrom." The policy further provides:

Section I and Section II—CONDITIONS
POLICY PERIOD

This policy applies only to loss under Section I or **bodily injury** or **property damage** under Section II, which **occurs during the policy period**.

Regent contends that because it is undisputed that Beth's injury did not occur until 1994, it was not within the policy period and no coverage exists. Based upon the plain language of the policy, we reach the same conclusion.

According to the Wisconsin Supreme Court, if the insurer wanted to limit coverage to accidents that resulted in injury during the policy period, it must say so. ... ***Lund v. American Motorists Ins.***, 797 F.2d 544, 547 (7th Cir. 1986).

Nonetheless, the Callows argue that interpreting identical language, ***Lund*** concluded that negligence that occurs while the policy is in effect is covered regardless whether the injuries occurred after the policy expired. We disagree. In ***Lund,*** the policy applied to "accidents which occur during the policy period." ***Id.*** at 545. ***Lund*** stated:

We find that Wisconsin has adopted the 'negligent acts' rule of insurance coverage. Wisconsin courts have found that in general, the negligent act (such as the negligent design and construction of the roof) as

> opposed to the resulting damage (the collapse of the roof), triggers coverage under the insurance policy.

Id. at 546. Lund stated further: "The accident must have happened during the policy period. That is all that is required. What happens thereafter is a matter of cause, cause in fact and proximate cause." ***Id.*** at 547.

Although ***Lund*** correctly states Wisconsin law, the language it interprets is different from Regent's policy language. Because the Regent policy limits coverage to liability for "bodily injuries" that occurred during the policy period, and ***Lund*** refers to "accidents" during the policy period, ***Lund*** does not control.

An argument could be made that Regent's policy uses the word "occur" in the phrase "bodily injury ... which *occurs*" during the policy period. Because the policy does not define "occur," the Callows suggest that it relates to the legal connotation of "occurrence" found in ***Lund***:

Courts facing this issue have taken one of two positions: that the terms "accident" and "occurrence" refer to the cause, or that they refer to the result of the event to which liability is attributed. The Wisconsin Supreme Court, in ***Olsen v. Moore***, [56 Wis.2d 340, 351, 202 N.W.2d 236, 241 (1972)] joined the majority of jurisdictions by adopting the "cause" analysis. That is, where a single, uninterrupted cause results in all of the injuries and damage, there is but one "accident" or "occurrence."

Id. at 547 (quoting ***Welter v. Singer,*** 126 Wis.2d 242, 376 N.W.2d 84 (Ct. App. 1985)).

Lund, together with ***Welter*** and ***Olsen***, might lend support for the Callow's argument that the Regent policy could be construed as an "occurrence" policy, if not for ***Kremers-Urban Co. v. American Employers Ins. Co.,*** 119 Wis.2d 722, 351 N.W.2d 156 (1984). ***Lund*** also relied on ***Kremers,*** which examined several different policies and reached opposing results based upon the language

of each policy. "We restrict our interpretation of coverage of the various policies to the language of the insurance contracts." ***Kremers-Urban,*** 119 Wis.2d at 736, 351 N.W.2d at 164.

In ***Kremers,*** manufacturers of DES were seeking coverage for liability for injuries incurred years after the policies expired. In examining policies effective from 1973 to 1976, an "occurrence" was defined as "an accident ... which results ... in bodily injury ...." ***Id***. at 737, 351 N.W.2d at 164. "Bodily injury" was defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period ...."

Our supreme court concluded that the word "occurrence," which acts to trigger coverage, was tied to the bodily injury that results in the policy period. ***Id.*** at 737, 351 N.W.2d at 164. It concluded, under this language, "[a] reasonable insured would have understood that, in order for coverage to be invoked [under the policy in question], an injury, sickness or disease had to result during the policy period. ***Id.*** (emphasis added).

Also, the supreme court examined 1966 to 1968 policies that covered "bodily injury, caused by an occurrence, sustained by any person." Its definition of "occurrence" included: "an accident, which *causes* bodily injury or property damage during the policy period ...." ***Id.*** at 739, 351 N.W.2d at 165 (emphasis in original). The insurer argued that the phrase, "during the policy period" modified the words "bodily injury." Our supreme court disagreed, concluding that it modified "causes." "A reasonable insured would understand that the phrase, 'during the policy period,' modifies when the occurrence (event or accident) must take place in order that coverage under the policy be invoked." ***Id.*** at 740, 351 N.W.2d at 165. "It should be noted that the language of the subsequent policy is different and makes it clear that the bodily injury must occur during the policy period." ***Id.*** at 740, 351 N.W.2d at 166.

We conclude that Regent's policy language is more like that of ***Kremer***'s later 1973-76 policies. We conclude that in order for coverage to be invoked, the bodily injury must have occurred during the policy period. The Callows' suggestion that a bodily injury that resulted in 1994 "occurred" in 1986 because that is when the negligence occurred, which started the whole chain of events allegedly leading to the injury, violates the policy's plain language. We

conclude the Regent policy affords no coverage for liability for injuries outside the policy period.[1]

2. Wisconsin Mutual Policy

The Callows argue that the personal liability portion of the Wisconsin Mutual policy provides coverage for liability incurred during the policy period, regardless when the negligent act occurred. Based upon the broad terms of personal liability coverage, we agree. The policy states:

> ***Coverage L-Personal Liability***
>
> **We** pay, up to **our** limit of liability, all sums for which any insured is legally liable because of **bodily injury** or **property damage caused by an occurrence** to which this coverage applies.
>
> *General Policy Provisions*
>
> ....
>
> 10. **Occurrence** means an accident, including continuous or repeated exposure to substantially similar conditions.
>
> ....
>
> This policy, subject to all of its terms, provides ... personal liability insurance and other described coverage during the policy period. ...

We note that there is no requirement that the occurrence happen during a policy period. As a result, ***Fidelity & Deposit Co. v. Verzal***, 121 Wis.2d 517, 361 N.W.2d 290 (Ct. App. 1984), does not apply. In ***Verzal***, the policy in question provided coverage for property damage "caused by or arising out of each occurrence ... during the policy period." ***Id.*** at 528, 361 N.W.2d at 295.

[1] The Callows also argue that two other parts of the policy can be construed in favor of coverage, first limits of liability and, second, location of applicable coverage. That there are other conditions of coverage that do not address the policy period does not negate the existence of the plain language that does address the policy period.

Verzal interpreted this language to require both the negligence and damage occur during the policy period. In contrast, Wisconsin Mutual's policy provides "personal liability coverage" during the policy period with no requirement that an "occurrence" take place during the policy period.

Also, a single cause plus resulting damages constitutes an occurrence. *See* ***American Motorist Ins. Co. v. Trane Co.,*** 544 F.Supp. 667, 679-81 (W.D. Wis. 1982), *aff'd* 718 F.2d 842 (7th Cir. 1983). There is no dispute that Beth suffered a bodily injury, as that term is defined, during the policy period. Because "occurrence" means accident, and because it is uncontested that the accident occurred within the policy period, a reasonable insured would expect coverage.

Next, Wisconsin Mutual argues that the premise exclusion denies coverage. We disagree. The exclusion provides:

This policy does not apply to liability:

....

g. resulting from premises owned, rented or controlled by an insured other than the insured premises.

The Callows argue that a reasonable interpretation is that the policy excludes properties owned during the policy period except the insured premises. We agree. Because during the policy period the Tornios no longer owned the house where the accident occurred, this exclusion does not apply.

Wisconsin Mutual argues that the tense "owned," permits a reasonable construction that excludes coverage resulting from premises the Tornios "owned" during and before the policy period. If so, more than one reasonable construction is possible resulting in an ambiguity. *See* ***Kaun v. Industrial Fire & Cas.,*** 148 Wis.2d 662, 669, 436 N.W.2d 321, 324 (1989). We reject Wisconsin Mutual's argument that ***Williams v. State Farm Fire & Casualty Co.***, 180 Wis.2d 221, 509 N.W.2d 294 (Ct. App. 1993), controls, because ***Williams*** did not require the interpretation of an ambiguity, but held that a passive investment was a business within the plain meaning of the policy exclusion. ***Id.*** at 232, 509 N.W.2d at 299. We conclude that the premise exclusion does not eliminate coverage for liability that resulted from 1994

injuries due to Daniel's 1986 negligent act because the liability does not stem from other premises owned during the policy period.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.