COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 8, 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

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No. 96-0188

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

DAVID J. HOFFMAN AND MAYME HOFFMAN,

Plaintiffs-Appellants,

WEA INSURANCE CORPORATION,

Nominal-Plaintiff,

v.

J. DANIEL BENSON,

Defendant-Co-Appellant,

FIDELITY & GUARANTY INSURANCE CO.,

Defendant,

TWIN CITY FIRE INSURANCE COMPANY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Affirmed.*

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

PER CURIAM. David Hoffman and Mayme Hoffman, his wife, appeal a summary judgment dismissing Twin City Fire Insurance Company from this personal injury action arising out of a skiing accident in Utah. David was injured after colliding with J. Daniel Benson, who also appeals. The trial court ruled that Twin City's commercial general liability policy issued to Daniel Benson Builders, Inc., provided no coverage for David's damages caused by the skiing accident. The Hoffmans argue that coverage is available under three theories: (1) the plain language of the policy; (2) an act that is part personal and part business is covered; and (3) acts done by the insured acting within the scope of his employment at the time of the accident. They argue that the scope of employment is a jury question and, because competing inferences may be drawn, summary judgment is inappropriate.

Daniel, a co-appellant, files a separate brief and also makes three arguments: (1) the exclusionary language of the Twin City policy is ambiguous; (2) the policy is illusory; and (3) coverage under the Twin City policy, a commercial policy, does not exclude coverage under Daniel's homeowner's policy. We conclude that the Twin City policy is unambiguous and that coverage is not available for the damages alleged in this case. We therefore affirm the judgment.

The material facts are undisputed for purposes of this appeal. Daniel Benson is president of Daniel Benson Builders, Inc., a residential construction company. He is engaged in all facets of the business, except book work, and his duties are to "[e]ffectively run my business." Daniel and David, an employee of Custom Components, a residential building business, attended the National Association of Home Builders Convention in Las Vegas, Nevada. After attending the convention, Daniel and David went to Park City, Utah, to ski. They visited David's brother, Mark Hoffman, who worked for Daniel Benson Builders, Inc., in the summer and worked in Utah in the winter. Daniel characterized the trip to Utah as follows: "The object was for us to ski. ... I was not in Park City on my construction business. However, we did discuss some jobs that we had coming up this summer."

The accident occurred on an icy hill when Daniel hit a patch of icy snow and his ski slid out. He slid toward David, they became entangled and

David landed on Daniel. There was a steep drop off; Daniel picked up momentum and went down, sliding a long distance and slamming into some trees.

David initiated this personal injury action against Daniel and two insurance carriers. Twin City provided a commercial policy to Benson Builders, and Fidelity & Guaranty Insurance Company provided a homeowner's policy to Daniel. Fidelity admitted coverage to Daniel for the skiing accident, but Twin City denied coverage.

The issue is whether on summary judgment the trial court correctly interpreted the Twin City policy to deny coverage. This issue turns on whether Daniel was insured under the terms of the policy. Under the terms of the policy, Daniel is insured only with respect to his duties as an officer and director of Daniel Benson Builders.

The policy provides:

1. If you are designated in the Declarations as:
....

c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as officers and directors.

When facts are undisputed and the issue involves only the interpretation of an insurance policy, a question of law is presented appropriate for resolution on summary judgment. *See* ***Smith v. State Farm Fire & Cas.*** 127 Wis.2d 298, 301, 380 N.W.2d 372, 373 (Ct. App. 1985). We review summary judgment de novo, applying the standards in § 802.08(2), STATS. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment may be granted when material facts are undisputed and reasonable inferences drawn from the facts lead only to one conclusion. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 821, (1987). Insurance contracts are interpreted by the same principles as other contracts; in absence of an ambiguity, their plain meaning governs. ***Garriguenc v. Love,*** 67 Wis.2d 130, 134-35, 226 N.W.2d 414, 417 (1975). The policy is to be interpreted

according to what a reasonable person in the position of the insured would have understood the words to mean. ***Id.***

David argues that the Twin City policy should be broadly interpreted to provide coverage for damages incurred in the skiing accident for the following reasons.[1] Daniel testified that his duties were to run his business effectively and, therefore, a reasonable person in the position of the insured would have understood the Twin City policy to cover all those things he did to effectively run his business. Because the trip to Las Vegas was part business and part pleasure, and because he talked business and discussed building and design ideas while on the ski trip in Utah, he contends that Daniel's "acts on the trip are the acts of an officer and director of a small corporation performing his duties toward that corporation." David argues that because Twin City did not expressly deny coverage for activities with mixed business and pleasure purposes, the policy contemplated the risk. We disagree.

Here, the undisputed facts fail to raise an inference that the ski trip was part of Daniel's corporate duties. The corporation is a construction business. There is no suggestion that the skiing vacation was necessary or integral to running the construction business. David's attempt to hinge the ski trip to the builders' convention fails to recognize the distinction between the two. Assuming the trip to the Las Vegas builder's convention was business, the ski accident did not occur until after the parties left the Las Vegas convention to go to Utah to ski. The ski vacation's temporal and geographical proximity to the Las Vegas convention does not transform its nature.

Also, Daniel stated that the object of the trip to Utah was to ski and that he was not there on business, although he did discuss "some jobs ... coming up" while he was there. We conclude as a matter of law that the discussion of some jobs while on a ski vacation fails to bring the skiing activities into the realm of "duties as an officer and director" as those terms are ordinarily understood by a reasonable insured. We conclude that the plain language of the policy does not provide coverage under the facts of record.

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[1] David observes that neither the policy nor Wisconsin case law defines what conduct constitutes the duties of corporate officers or directors. Also, he observes that Wisconsin statutes provide minimal guidance. *Cf.* § 180.0841, STATS. ("Each officer ... shall perform the duties set forth in the bylaws"); *see also* § 180.0801(2), STATS. However, the bylaws and articles of incorporation are not part of this record.

Next, Daniel argues that coverage is available under a theory enunciated in ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis.2d 437, 492 N.W.2d 131 (1992). We disagree. ***Grotelueschen*** held that a comprehensive general liability policy issued to a partnership and its partners covered a partner's liability arising out of a lawn mowing accident. The partnership owned and operated an apartment building. The partners stored some of the apartment building materials at a storage shed on a lot that was owned by the partner but not operated as part of the partnership. While mowing the lawn at the shed, the partner injured his granddaughter.

Our Wisconsin Supreme Court relied on an "aggregate theory of partnership" to conclude that if the policy designates the named insured as a partnership and also lists the individual partners in describing the named insured, the policy covers the partners as individuals. ***Id.*** at 450, 492 N.W.2d at 136. Second, and "[m]ore importantly, because the declarations page lists [the partner] individually and his home address under 'Named Insured-Address' before designating the named insured as a partnership, the policy language alone supports finding coverage." ***Id.*** at 451, 492 N.W.2d at 136. Also, in acknowledged dicta, the court held that because the partner kept items at the shed used to maintain partnership property, maintaining the shed's premises benefitted the apartment building partnership, and therefore the partner "was acting in the ordinary course of the partnership at the time of the accident." ***Id.*** at 455, 492 N.W.2d at 137.

None of those factors is present in the case before us. Benson Builders is not a partnership but a corporation. Because it is a corporate entity, the aggregate partnership theory does not apply. Also, there is no showing that Daniel was listed as individually insured.

Next, we reject David's argument that the record raises a material issue of fact whether Daniel was acting in the ordinary course of business at the time of the accident. David contends that because an activity can further both business and personal purposes, and still occur in the ordinary course of business, a fact issue is presented whether Daniel was acting in regard to his corporate duties when skiing. We decline to so hold. Both legally and factually, this argument is unpersuasive. For legal authority, David relies on dicta. *Cf.* ***id.*** at 452, 492 N.W.2d at 136 ("Having concluded the policy covers Dimmer, we need go no further."). The facts on which David relies are essentially that the ski vacation followed a business trip and that business was discussed. We

conclude that these facts fail to raise a fact issue whether the ski accident occurred in the ordinary course of the corporate business.

Next, David argues that the "scope of employment" law supports a finding of coverage. An employer is liable for the torts of its employees that are committed while the employees are acting within the scope of their employment. ***Cameron v. City of Milwaukee,*** 102 Wis.2d 448, 456, 307 N.W.2d 164, 168 (1981). The act must be a "natural, not disconnected and not extraordinary, part or incident of the service contemplated." ***Id.*** at 457-58, 307 N.W.2d at 168. An employee is not acting within the scope of employment if he steps aside from the prosecution of the employer's business to accomplish an independent purpose of his own. ***Finsland v. Phillips Petroleum Co.***, 57 Wis.2d 267, 276, 204 N.W.2d 1, 6, (1973). Generally, the question of scope of employment is a factual question appropriate for jury determination. *See* ***Grotelueschen,*** 171 Wis.2d at 458-63, 492 N.W.2d at 139-41 (Abrahamson, J., dissenting).

Determining the existence of a genuine issue of material fact is a question of law for the court. ***Id.*** at 462, 492 N.W.2d at 141 (Abrahamson, J., dissenting). The facts on which Daniel relies consist essentially of the ski trip's proximity to the Las Vegas trip and conversations about business. We conclude that the skiing vacation is too little actuated by a purpose to serve the employer to permit the inference that the events giving rise to the injury fell within the scope of employment. *See* ***Finsland***, 57 Wis.2d at 276, 204 N.W.2d at 6.

Next, we address Daniel's arguments. Daniel contends that the exclusionary language, "only with respect to their duties as officers and directors" is ambiguous, because the term "duties" is subject to more than one reasonable interpretation. We disagree. Because the policy does not define the term, resort may be had to ordinary and common usage. Duty is "obligatory tasks ... conduct, service or functions ...." WEBSTER'S THIRD NEW INT'L DICTIONARY 705 (Unabr. 3d ed. 1976). That the scope of one's duty may be fact sensitive depending on the circumstances of one's employment does not render the term ambiguous.

Next, Daniel argues that ***Grotelueschen*** gave approval to the dual purpose doctrine, that "[a]n act can further part personal and part business purposes and still occur in the ordinary course of the partnership." ***Id***. at 454,

171 Wis.2d 437, 492 N.W.2d at 137. He argues that if the work of the employee creates the necessity for travel, he is in the course of his employment, even though he at the same time is serving some purpose of his own, citing ***Wolfe v. Harms,*** 413 S.W.2d 204, 216 (Mo. 1967). Here, the facts fail to raise the issue whether the ski trip to Utah was occasioned by his employment. By Daniel's own admission "[t]he object was for us to ski." Consequently, this argument fails.

Daniel also argues that as a owner of a small company, although he is an officer, he acts like a partner or sole proprietor and therefore, under ***Groteluesche***n, the dual purpose doctrine should apply. We conclude that the facts of this case do not support the disregard of the corporate status of Benson Builders, and consequently reject this argument.

Next, Daniel argues that attending a builder's convention and discussions with an architect and other business associates are duties and functions of a corporate officer, and building good will is a valid business pursuit, and it is irrelevant where the discussions take place. The facts of record, however, demonstrate that the accident did not occur at the builder's convention or even in Las Vegas, but rather during a subsequent vacation trip to Utah. There is no suggestion that the accident was related to a business discussion, but occurred while skiing in icy conditions near a steep slope. Because this conduct is too attenuated from the duty of an officer or director, this argument also fails.

Next, Daniel argues that the policy's failure to define its exclusionary language creates an illusory contract. We disagree. "[A]ny interpretation, which allows one party to a contract to determine without limitation and in a subjective manner the meaning of an ambiguous term, comes dangerously close to an illusory or aleatory contract if it does not in fact reach it." ***Gerruth Realty Co. v. Pire***, 17 Wis.2d 89, 92, 115 N.W.2d 557, 559 (1962) (citation omitted). Because we conclude that the definition of who is an insured is not ambiguous, we conclude that the contract is not illusory.[2]

[2] Daniel also argues that coverage under the Twin City commercial policy and the Fidelity policy is not mutually exclusive. Because this argument is not dispositive, we do not address it. ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).

By the Court.—Judgment affirmed.

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