COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2006

Cornelia G. Clark
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. 2005AP654 Cir. Ct. No. 2003CV248

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

DAVID SCHULTZ AND VICKI SCHULTZ,

PLAINTIFFS-APPELLANTS,

GARST SEED COMPANY AND OLD REPUBLIC INSURANCE COMPANY,

SUBROGATED PARTIES,

V.

ASTRAZENECA INSURANCE COMPANY, LTD., F/K/A ZENECA INSURANCE COMPANY, LTD.,

DEFENDANT-RESPONDENT,

CASE CORPORATION AND OLD REPUBLIC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 BROWN, J. David Schultz was injured while on the job for his employer, Garst Seed Company. He and his wife, Vicki, claimed that Brian Schumacher, a sales representative for Garst Seed, was negligent in causing the accident. They primarily argue that AstraZeneca Insurance Company, Ltd., Garst Seed's liability insurer, covers Schumacher's negligence because Schumacher was in a joint venture with Garst Seed at the time and the policy lists joint venturers as other insureds. The trial court concluded that the undisputed facts showed no joint venture under the common law, and we agree. In so doing, we reject the Schultzes' contention that the policy redefined "joint venture" out of the common law. We reject the Schultzes' alternative arguments as well and affirm.

¶2 Schultz works for the Garst Seed Company as a district sales manager. His primary responsibility involves helping Garst Seed sales representatives increase their sales of the Garst Seed brand. Part of this job involves helping the sales representatives plant seed test plots. These plots, which are strategically located in areas where the public is likely to see the growing seeds, serve as demonstration plots for advertising and promotional purposes. Garst Seed plants hundreds of test plots around the country. They attract the interest of farmers by familiarizing them with the Garst Seed brand and allowing them to compare the growth of Garst seeds with other seed varieties.

¶3 Schumacher, owner of Schumacher Sales, is a sales representative for Garst Seed. A sales representative buys the Garst seed at wholesale prices and then sells it to other farmers at a price of his or her choosing. The sales

representative gets to keep any profit he or she makes from these sales. Schumacher enters into annual agreements with Garst Seed. One such agreement between Garst Seed and Schumacher Sales went into effect in late 1999. As part of this agreement, Schumacher agreed to use his best efforts to sell Garst Seed products and to cooperate with its promotional programs. The agreement characterized Schumacher's relationship to Garst Seed as an independent contractor arrangement.

¶4 On May 6, 2000, Schumacher and Schultz embarked on planting a test plot on land leased by Schumacher's brother, who had agreed to permit the test plot on his land in return for the resulting soybean crop. A representative from another seed company with whom Schumacher had a sales agreement also participated in the planting. All three men brought seed varieties to plant. Schumacher had obtained a grain drill and tractor from his brother. Schumacher operated the tractor, which pulled the grain drill along to plant each row. During the planting, Schultz and the other individual stood on a platform on the back of the grain drill, stirring the seed to make sure that it continued feeding properly through the seed hoppers. At the end of each row, Schumacher would stop the tractor. Schultz would start a generator and vacuum out the remaining seed from the hoppers, which were then refilled with different seed before Schumacher turned the tractor around to plant the next row.

¶5 The men made three passes down the field without incident. At the end of the fourth pass, however, the tractor moved while Schultz was reaching for the generator and was not hanging onto the back of the drill. Schultz, who was unprepared for the motion, fell off of the grain drill and struck his head and his ribs, sustaining serious and permanent injuries.

¶6 In addition to the grain drill manufacturer, which is not a party to this appeal, the Schultzes filed claims against two Garst Seed liability insurers, Old Republic Insurance Company and AstraZeneca, alleging that their policies covered injuries caused by Schumacher's negligent operation of the farm machinery. Old Republic claimed that its policy limits had already been exhausted. AstraZeneca, however, provided excess coverage for Garst Seed.

¶7 The Schultzes advanced three different theories of liability with respect to the AstraZeneca policy, which covers personal injury liability incurred by an insured. They first pointed out that the policy listed as insureds joint ventures in which Garst Seed or its parent corporation engaged. Their second theory was based on a drop-down provision in the AstraZeneca policy, which insured certain qualifying organizations covered by the Old Republic policy. The Schultzes' final alternative theory was that Schumacher was insured as an employee of Garst Seed.

¶8 Both insurers moved for summary judgment. The circuit court found that Old Republic's policy limits had indeed been exhausted, precluding further liability. It also rejected all three of the Schultzes' arguments with respect to AstraZeneca's liability. With respect to the latter two theories, the court found a lack of record support for them. It also referred to the sales agreement, which characterized Schumacher as an independent contractor and not an employee. With respect to the joint venture theory of coverage, the court held that the relationship between Schumacher and Garst Seed did not meet the four-part common-law definition of a joint venture. Accordingly, the court denied the Schultzes' motion for declaratory judgment and granted summary judgment to AstraZeneca and Old Republic. The Schultzes appeal the summary judgment in favor of AstraZeneca.

¶9 The Schultzes first claim that the court erred when it treated the parties' motions as cross-motions for summary judgment, *see* ***James Cape & Sons Co. v. Mulcahy***, 2003 WI App 229, ¶13, 268 Wis. 2d 203, 672 N.W.2d 292 (where neither party argues that factual issues bar the other party's summary judgment motion, cross-motions for summary judgment operate as a stipulation as to the facts), *aff'd on other grounds*, 2005 WI 128, ___ Wis. 2d ___, 700 N.W.2d 243, because the Schultzes never moved for summary judgment. Rather, they sought declaratory relief. This argument truly elevates form over substance. Both declaratory judgment and summary judgment are proper vehicles to address questions of law involving insurance coverage. *See* ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665. We do not see how the procedural device the parties chose matters to the outcome. *See also* ***Reid v. Benz***, 2001 WI 106, ¶30, 245 Wis. 2d 658, 629 N.W.2d 262 (which device the parties used irrelevant to whether insured could recover attorney fees). In any event, we are left with only questions of law.

¶10 When we interpret the terms of an insurance policy, we aim to enforce the intent of the parties. ***State Farm Mut. Auto. Ins. Co. v. Langridge***, 2004 WI 113, ¶13, 275 Wis. 2d 35, 683 N.W.2d 75. We give the words in the policy their common and ordinary meaning so that our construction conforms to the understanding of a reasonable person in the position of the insured. ***Id.***, ¶14. We resolve ambiguities in favor of the insured, but where the plain meaning favors the insurer, we will resolve coverage against the insured. ***Id.***, ¶15.

¶11 We now consider the terms of the AstraZeneca policy. We first examine the availability of joint venture coverage. Neither party disputes that the policy lists joint ventures of the named insured and its subsidiaries as additional insureds, nor do they disagree that an insured's liability for negligence is covered.

They simply disagree whether a joint venture existed. The Schultzes claim that they are covered under what they call the definition of "joint venture" in the policy, relying on the following language: "The words '**Joint Venture**,' wherever used in this Policy, shall mean any joint venture, co-venture, joint lease, joint operating agreement or partnership and shall be deemed to include any companies which the **Named Insured** may term Related Companies and/or Associated Undertakings." They assert that this definition is broader than the common-law definition the circuit court applied.

¶12 We disagree. The policy does not "redefine" the term "joint venture." It merely clarifies that several undertakings the average person might know by other terms, for example, "co-venture" or "partnership," qualify as joint ventures. This understanding does not obviously differ from the common-law concept of joint venture, *see* ***Edlebeck v. Hooten***, 20 Wis. 2d 83, 88, 121 N.W.2d 240 (1963) (refers to people involved in a joint adventure as "coadventurers"), and the policy does not further define any of these terms in such a way as to distinguish them from common-law joint ventures.

¶13 In order for an undertaking to qualify as a common-law joint venture, four elements must be present: (1) each party must contribute money or services, even if not in equal proportion; (2) they must exercise joint proprietorship and mutual control over the subject matter of the undertaking; (3) they must agree to share profits; and (4) a contract, either express or implied, must exist and establish the relationship. ***Id.***; *see* ***Bach v. Liberty Mut. Fire Ins. Co.***, 36 Wis. 2d 72, 80, 82, 152 N.W.2d 911 (1967) (absence of the profit-sharing element precluded finding a joint venture). The parties' agreement must also establish a relationship whereby each co-venturer is both a principal and an agent of the others. ***Edlebeck***, 20 Wis. 2d at 88. The policy language in no way

distinguishes the four common-law elements or even refers to them. When an insurance policy is silent on the meaning of a term that has a technical meaning in law, we will apply the accepted legal meaning. *See* ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 366-67, 488 N.W.2d 82 (1992) (court applied legal meaning of "damages"). We conclude, as did the trial court, that the common-law elements apply.

¶14 Looking at the record, we discern that the undertaking between Garst Seed and Schumacher or Schumacher Sales fails with respect to at least the latter three of these criteria. If we consider just the test planting, it is clear that the profit-sharing element is wholly lacking. Neither party would make any profit off of the demonstration plot because Schumacher's brother was entitled to the whole crop. Even if we look to the broader relationship of the parties, we do not discern any profit-sharing arrangement. Profit sharing implies more than just an economically symbiotic relationship: it contemplates that the parties to the venture will *divide* certain receipts. Here, we have a mere wholesaler-retailer relationship in which each party derives its profits from a separate source. Garst Seed makes a profit when Schumacher pays for Garst Seed's products. Obviously, Schumacher's payment of Garst Seed's purchase price does not generate a profit for *both* parties. Schumacher makes a profit only when he *subsequently* sells the same products above his cost. Because Schumacher gets to keep the *entire* excess, no splitting of profits occurs at this juncture either.

¶15 Garst Seed and Schumacher Sales also did not share mutual control over any undertaking. This element requires that each party to the undertaking has an "equal voice in the manner of its performance and control over the agencies used therein." ***Bowers v. Treuthardt***, 5 Wis. 2d 271, 281, 92 N.W.2d 878 (1958) (citation omitted). Here, both parties brought seed and participated in the planting,

with Schumacher operating the tractor and Schultz the grain drill. Thus, the participation in the actual planting seems to have been mutual and pretty much equal. That said, because the planting itself was not a for-profit transaction, we must also assess this element in terms of the parties' broader relationship. Here, the record does not support the existence of mutual and equal control by both parties. It does not reveal that Garst Seed set Schumacher Sales' resale prices or had a say in the terms of Schumacher's resale transactions or whom he chose as customers. Similarly, there is no evidence that Schumacher had any authority with respect to Garst Seed's marketing or setting of wholesale prices. Indeed, his contract obligates him to cooperate with Garst Seed's promotional efforts, which implies that Garst Seed sets its promotion policies without Schumacher's input.

¶16 Finally, we do not discern the existence of any express or implied contract between Schumacher Sales and Garst Seed to act as both principal and agent for one another. The express contract between the two only evidences an independent contractor relationship, and a relationship that is merely beneficial to both parties will not suffice for an implied contract. Nearly everyone who enters a business relationship does so with the expectation that the relationship will be economically beneficial, yet not all business relationships are joint ventures. Thus, the business relationship between Garst Seed and Schumacher does not qualify as a joint venture covered by the AstraZeneca policy.

¶17 The Schultzes assert that even if the Garst Seed-Schumacher relationship is not a joint venture, it is a "catchall" organization insurable pursuant to the terms of the Old Republic policy, for which AstraZeneca provides drop-down coverage. The Old Republic policy states, in pertinent part, "Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority

interest, will qualify as a Named Insured if there is no other similar insurance available to that organization." The Schultzes conclude that such an organization exists here because "[t]he Garst Seed test seed plot did not plant itself. It did not occur by random events." The mere fact that someone must have planted the field, however, does not establish that a newly created organization—and not Garst Seed and Schumacher Sales through their common efforts—must have done so. We agree with the circuit court that the record does not establish the existence of any new organization. Moreover, even if we were to assume that Garst Seed and Schumacher formed some phantom organization, coverage depends on the extent of Garst Seed's ownership or interest in the organization. The record is silent on that issue as well.

¶18 Finally, we agree with the circuit court that the record does not establish that Schumacher was a servant for Garst Seed. Indeed, the sales agreement between Garst Seed and Schumacher Sales designates the latter as an independent contractor. Moreover, the deposition testimony of Garst's regional manager states that Garst Seed sales representatives are not regular employees of the company. Schumacher expressed the same understanding in his own deposition testimony. We do not accept the Schultzes' suggestion that Schumacher's contractual obligation to cooperate with Garst Seed's promotional efforts evidences a "contract of service" or that Schumacher was an individual "supplied to" Garst Seed as a servant. They do not cite any other basis for their theory that Schumacher was covered as an employee.

¶19 We affirm. The facts of record do not establish the existence of any insured organization or the existence of an employer-employee relationship between Garst Seed and Schumacher. Moreover, their business relationship does not meet the requirements for a joint venture. They do not divide profits between

them, and there is no evidence that each acts as an agent for the other. Moreover, with the exception of the actual planting of the test fields, which was only one small element of the parties' overall wholesaler-retailer relationship, each party acted without the other's input or authorization in the operations of their respective businesses. To expand the common-law concept any further would risk turning every contractual relationship into a joint venture. This we will not do.

By the Court.—Judgment and order affirmed.

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