COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1119

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

EARL CORWIN FERRY, JR., BY THE GUARDIAN OF HIS PERSON AND ESTATE, CAROL MARTINSON,

PLAINTIFF-APPELLANT,

V.

TIPTON IRON WORKS, INC., WAUSAU INSURANCE COMPANY, JOHN DOE, A FICTITIOUS NAME, DEF INSURANCE COMPANY, LEROY F. KNIPP, WEST PLAINS RESAW SYSTEMS, INC., RICHEY SALES COMPANY, INC., JKL INSURANCE COMPANY AND MNO INSURANCE COMPANY,

DEFENDANTS,

MID-CENTURY INSURANCE COMPANY,

DEFENDANT-
INTERVENING PLAINTIFF-RESPONDENT.

APPEAL from orders of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Earl Ferry, Jr., by his guardian Carol Martinson, sued Tipton Iron Works, Inc., to recover for injuries Ferry sustained while operating a saw that Tipton manufactured and sold to Ferry's employer. Mid-Century Insurance Company insured Tipton. Ferry appeals orders that granted summary judgment and dismissed Mid-Century from Ferry's action. Ferry argues that summary judgment was inappropriate because his complaint lists claims covered by the insurance contract. He contends that Mid-Century therefore has a duty to defend Tipton. We disagree and affirm the orders.

BACKGROUND

¶2 For purposes of summary judgment, the parties do not dispute the facts. Ferry alleges that he was seriously and permanently injured while operating a saw manufactured by Tipton, which Tipton had sold to and installed at Ferry's place of employment, Walters Brothers Lumber Manufacturing. He claims that he was "catastrophically injured when struck in the head by a wooden board, that was ejected from a saw"[1] that was "designed and/or manufactured and/or advertised and/or distributed and/or sold" by Tipton or others. Ferry sued Tipton, the other parties who may have been involved with the design, testing, manufacture, sale,

[1] Ferry suffered a depressed open skull fracture and traumatic brain injury from the saw. He submits that he will require life-long care and assistance in daily living. As a result of his incapacity, a guardian ad litem was appointed.

and installation of the saw for Walters Brothers, and their insurers. He claims that Tipton, and others not relevant to this appeal, were

> negligent in their duties, including but not limited to, being negligent in the design, production, manufacturing, testing, advertising, distributing, selling, and/or failure to provide required or adequate safety devices and warnings in regard to the subject saw and its component parts, to guard against the likelihood of injury to users. Further, said defendants were negligent in their duties, in failing to reasonably warn users relative to the uses of said saw, and the hazards and dangers associated therewith. Further, said defendants were negligent in failing to properly recall and/or refit said saw and/or its component parts, with proper and reasonable safety devices, and/or retrofit said saw and/or its component parts in a reasonably safe condition.

¶3 Mid-Century brought a motion for summary judgment arguing that its policy does not cover Ferry's claims. Mid-Century argued that it therefore had no duty to defend Tipton in this action. The circuit court granted the motion for summary judgment and dismissed Mid-Century from the action.

DISCUSSION

¶4 We apply the same standards as the circuit court when evaluating whether summary judgment was properly granted. WIS. STAT. § 802.08; ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999). The law of summary judgment is well established, and we will not repeat it here.

¶5 The interpretation of an insurance contract is a question of law we review de novo. ***Id.*** at 805. We interpret insurance contracts by the same rules of construction that apply to other contracts. ***Id.*** at 806. If the complaint states a cause of action that if proven may be covered by the insurance contract, the insurance company has a duty to defend its insured. ***Id.*** at 806-07. The court will

not rewrite the contract to "bind an insurer to a risk which the insurer did not contemplate and for which it has not been paid." ***Id.*** at 807. However, in interpreting the contract language, "[t]he test is not what the insurer intended the words to mean but what a reasonable person in the position of an insured would have understood the words to mean." ***Vidmar v. American Family Mut. Ins. Co.***, 104 Wis. 2d 360, 365, 312 N.W.2d 129 (1981).

¶6 The insurance contract in this case provides coverage for "bodily injury" caused by an "occurrence" that occurs in the "coverage territory" during the "policy period." However, the policy specifically excludes coverage for "'bodily injury' or 'property damage' included within the 'products-completed operations hazard.'" "Products-completed operations hazard" is defined as

> all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned.

The policy defines "your product" as "any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by (1) You …."

¶7 Ferry concedes that the products-completed operations hazard exclusion on its face may preclude coverage for his claims, but he urges the court to read the exclusion in concert with the rest of the policy. *See* ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 562, 278 N.W.2d 857 (1979). Ferry contends that the saw does not fit within the policy definitions of "your product" or "your work." He argues that the exclusion should be narrowly construed against the insurer. *See* ***Vidmar***, 104 Wis. 2d at 365.

¶8 Specifically, he contends that his complaint alleges that Tipton "designed, advertised and/or tested" a good or product that caused him injury. Ferry reasons that because the policy does not define "your product" or "your work" as those products that Tipton designed, advertised or tested, the products-completed operations hazard exclusion does not apply to that part of his claim. He also asserts that the complaint alleges Tipton's failure to affirmatively act to make the product safer to use. Specifically, he alleges that Tipton negligently failed to provide required or adequate safety devices, recall and/or retrofit the saw with proper and reasonable safety devices, guard against hazards or prevent Ferry's injuries from being enhanced. He again reasons that because the "your product" definition does not mention failures to affirmatively act to improve product safety, the policy exclusion does not apply to these allegations.

¶9 Mid-Century argues that the exclusion is unambiguous and broadly covers product liability claims on products Tipton manufactured. We agree. The same product that Ferry claims was designed, advertised or tested by Tipton was also manufactured, sold, handled and distributed by Tipton. Similarly, the same product on which he claims Tipton failed to provide safety enhancements was also manufactured, sold, handled and distributed by Tipton.

¶10 We conclude that the saw meets the definition of "your product" or "your work" as stated in the policy. We further conclude that the products-completed operations hazard exclusion applies to the products Tipton manufactured, regardless whether it also designed or failed to do something to the same product. Thus, the exclusion applies to all of Ferry's allegations and the circuit court properly granted summary judgment and ordered that Mid-Century had no duty to defend Tipton against the Ferry's claims.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.