COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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. 2008AP2037 **Cir. Ct. No. 2005CV2997**

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

ALAN R. SZUTA AND SELIMA SZUTA,

PLAINTIFFS,

V.

KELBE BROS. EQUIPMENT CO., INC. AND SENTRY INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

ACUITY, A MUTUAL INSURANCE COMPANY,

SUBROGATED PARTY-DEFENDANT,

LBX COMPANY, LLC AND MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA,

DEFENDANTS-THIRD-PARTY
DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,

WESTCHESTER FIRE INSURANCE COMPANY,

DEFENDANT-THIRD-PARTY
DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

EVANSTON INSURANCE COMPANY AND LANDMARK AMERICAN INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

HENDRIX MANUFACTURING COMPANY, INC. AND RSUI INDEMNITY COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. LBX Company, LLC and Mitsui Sumitomo Insurance Company of America (collectively, "LBX") appeal the order dismissing their claims against Evanston Insurance Company and Landmark American Insurance Company. We agree with the circuit court that the policy language is unambiguous. In the meaning of this policy, a safety device is not "provided" simply by giving notice of its availability. We affirm.

¶2 We take the undisputed facts from the parties' declaratory judgment and summary judgment filings. In May 2004, E & W Excavating employee Alan Szuta was seriously and permanently injured when a hydraulic "quick coupler"

failed and the excavator bucket detached from the excavator and fell on him. E & W had purchased the excavator in October 2000 from Kelbe Bros. Equipment Company, who bought it earlier that year from Con-Equipment. Con-Equipment bought the excavator from LBX in 1998. Hendrix Manufacturing Equipment Company manufactured the quick coupler.[1] Evanston and Landmark were Hendrix's primary and excess insurers, respectively.

¶3 Hendrix began manufacturing this particular quick coupler in 1989. This first-generation coupler did not have a factory-installed safety-lock pin to secure the attaching implement to the excavator. Complaints about the device arose and multiple personal injury claims followed. In July 2001, Hendrix began to offer a free mechanical lock pin retrofit kit for these first-generation couplers.[2] Hendrix notified its dealers about the safety upgrade via a mass mailing and through its field sales representatives. The notice stated in relevant part:

> **ATTENTION: HENDRIX QUICK COUPLER DEALERS**
>
> It has become apparent to Hendrix Manufacturing Company, Inc. that some operators of the Hendrix Hydraulic Quick Coupler are not testing to ensure proper mating of the coupler to the attachment. Therefore, Hendrix Manufacturing Company recommends and will make available to your customers a mechanical lock kit and instructions for the installation of the kit. Installation and any necessary modifications will be the responsibility of the individual machine owner.
>
> This mechanical lock kit will be made available to your customers free of charge until September 15, 2001. After that time, the mechanical lock kit will be available for a

[1] Hendrix filed for bankruptcy in 2004.

[2] In the fall of 2002, Hendrix introduced its second-generation quick couplers which had factory-installed safety-lock pins, eliminating the need for end users to add the safety device.

> fee. To obtain the mechanical lock kit, have your customer fill out the attached form….

¶4 Due to Hendrix's claims experience, its products liability carrier cancelled coverage for the policy year ending December 31, 2001. Hendrix secured coverage through another carrier for the policy year ending February 28, 2003, but it totally excluded coverage of all first-generation quick couplers. The next policy year, Hendrix was able to purchase slightly broader coverage, but it still excluded all couplers without a mechanical pin. When another claim involving a first-generation coupler came in before the February 28, 2004 renewal deadline, that insurer refused to renew coverage for all first-generation quick couplers, even if retrofitted. Hendrix's insurance agent set about trying to find a carrier willing to provide coverage for those couplers for which mechanical lock kits had been ordered.

¶5 Hendrix's agent contacted a wholesale broker specializing in hard-to-place risks. The broker in turn contacted at least seventeen different carriers, including Evanston. Evanston's casualty underwriter testified at deposition that an important part of ultimately deciding to underwrite the risk was that, to be covered, end users of first-generation couplers had to have sent in the request form to obtain a mechanical lock kit. The Evanston underwriter summarized Evanston's proposed coverage in a memorandum to the underwriting file. The memo stated that Hendrix designed a retrofit mechanism "which was made available to all operations which had purchased their couplers." The memo also stated that Hendrix maintained a list of all "affected couplers" and that Evanston "anticipates excluding any couplers which have not been provided with the locking retrofit." Evanston wrote a CGL policy insuring Hendrix, effective

February 28, 2004 through April 1, 2005. Hendrix's agent proposed the language ultimately used in the exclusion endorsement:

> **EXCLUSION—DESIGNATED PRODUCTS**
>
> ….
>
> **Designated Product(s):**
>
> All first[-]generation couplers manufactured or distributed by the Insured that have not been provided with a mechanical lock retrofit kit. A list of Serial numbers of the insured couplers is contained in the underwriting file, subject to periodic updates.

Hendrix provided the underwriters with a list of serial numbers of those quick couplers for which retrofit kits had been requested and sent.

¶6 The E & W excavator was not retrofitted at the time of Szuta's 2004 accident.[3] Szuta filed suit against Kelbe, who sold the Hendrix quick coupler to E & W. Kelbe sought contribution from LBX, and Szuta also later named LBX as a defendant. LBX, in turn, impleaded Hendrix and Evanston for contribution and indemnification. Evanston moved for a declaratory judgment seeking a declaration that its policy owed no coverage. It argued that no form ever was submitted to Hendrix requesting a mechanical lock retrofit kit and the serial number of the Hendrix coupler did not appear on the list of serial numbers of the insured couplers. LBX responded that the kit was "provided" within the meaning of the exclusion when Hendrix's informational material made the kit available. The circuit court agreed that the exclusion language was ambiguous and denied the motion.

[3] Kelbe installed a Hendrix coupler on the excavator in 1999 before selling the excavator to E & W in 2000. In 2002, Kelbe notified E & W that a safety-lock pin "has been made available by Hendrix," and enclosed a copy of the Hendrix notice.

¶7 LBX then added Landmark, Hendrix's excess insurer, as a third-party defendant, and moved in limine to bar Evanston from relying on the designated product exclusion. After more discovery into the underwriting history of the Landmark and Evanston policies, Landmark moved for summary judgment. Evanston joined the motion. The circuit court granted the motions. LBX appeals.

¶8 We review an order for summary judgment independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We affirm a grant of summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).[4] A motion for summary judgment may be used to address issues of insurance policy coverage. ***Kendziora v. Church Mut. Ins. Co.***, 2003 WI App 83, ¶6, 263 Wis. 2d 274, 661 N.W.2d 456. Summary judgment and the construction of an insurance contract both present a question of law that we review de novo. ***Commercial Union Midwest Ins. Co. v. Vorbeck***, 2004 WI App 11, ¶7, 269 Wis. 2d 204, 674 N.W.2d 665 (Ct. App. 2003).

¶9 As noted, the designated products exclusion endorsement excluded:

> All first[-]generation couplers manufactured or distributed by the Insured that have not been provided with a mechanical lock retrofit kit. A list of Serial numbers of the insured couplers is contained in the underwriting file, subject to periodic updates.

LBX contends that the language must be construed against Evanston, first, because the listing of insured couplers cannot be proved and, second, because the

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

first sentence is ambiguous as to what "provided" means. LBX contends "provided" reasonably could be understood to mean "made available," according to a secondary dictionary definition, such that Hendrix "provided" the retrofit kit by mailing notice of its availability. The insurers argue that "provided" means "actually supplied." Like Evanston and Landmark, we view LBX's second argument as dispositive, and so address it first.

¶10 When determining insurance coverage, we apply the same rules that are applied to contracts generally. ***Kendziora***, 263 Wis. 2d 274, ¶6. We construe the policy language to give effect to the intent of the parties as expressed therein. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. Our first task is to determine whether the language is ambiguous. ***Id.***, ¶13. We give words in the policy their common and ordinary meaning, that is, what a reasonable person in the insured's position would have understood them to mean. ***Id.***, ¶17 (citations omitted). To make that determination, we may consider the purpose or subject matter of the insurance, the situation of the parties, and the circumstances surrounding the making of the contract. ***Frost ex rel. Anderson v. Whitbeck***, 2002 WI 129, ¶22, 257 Wis. 2d 80, 654 N.W.2d 225.

¶11 We construe ambiguous terms in favor of coverage. ***Id.***, ¶19. We also generally construe against the insurer provisions that tend to limit coverage. ***Bartel v. Carey***, 127 Wis. 2d 310, 314-15, 379 N.W.2d 864 (Ct. App. 1985). Where the policy language is plain and unambiguous, we enforce it as written to avoid rewriting the contract by construction and imposing obligations the parties did not undertake. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150.

¶12 For several reasons, we reject LBX's argument that "provided" is ambiguous. First, "the mere fact that a word has more than one meaning does not necessarily make that word 'ambiguous' if only one meaning comports with the parties' objectively reasonable expectations." ***United States Fire Ins. Co. v. Ace Baking Co.***, 164 Wis. 2d 499, 503, 476 N.W.2d 280 (Ct. App. 1991). Rather, a word or phrase is ambiguous when it is so imprecise and elastic as to lack any certain interpretation or is susceptible of more than one *reasonable* construction. ***Frost ex rel. Anderson***, 257 Wis. 2d 80, ¶18.

¶13 It is undisputed that multiple claims forced Hendrix to scramble to find and maintain insurance coverage—after notifying its end users in 2001 that safety upgrades were available at no cost. Nothing in the language of the exclusion supports an interpretation that Evanston agreed to provide or that Hendrix believed it was purchasing coverage based simply on notice to the purchaser or end user of a safety enhancement—notice which may or may not have been received, let alone acted upon. The exclusion makes no mention of notice whatsoever, much less notice of availability of the retrofit kit. Rather, it clearly excludes couplers that have not been provided with a kit. LBX's argument that "provided" reasonably could be understood to mean "made available pursuant to notice, even if not acted upon" yields a strained result and requires a wholesale rewriting of the clause.

¶14 Second, the clause under consideration here is an exclusion clause, not a coverage clause, putting a reasonable insured on notice that it limits coverage rather than confers it. *See* ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 263, 371 N.W.2d 392 (Ct. App. 1985). Third, there would have been no need to maintain a list of covered couplers if the mass mailing itself conferred coverage on every coupler. In this situation, therefore, construing "provided" to mean "made

available" is unreasonable, if not absurd. Insurance policies should not be interpreted so as to lead to an absurd result or to bind an insurer to a risk it did not contemplate. ***Thompson v. Threshermen's Mut. Ins. Co.***, 172 Wis. 2d 275, 282, 493 N.W.2d 734 (Ct. App. 1992).

¶15 LBX's other argument involves the second sentence of the designated products exclusion: "A list of serial numbers of the insured couplers is contained in the underwriting file, subject to periodic updates." LBX devotes the bulk of its brief arguing that an insurer is not entitled to summary judgment when it "loses a crucial part of its policy."

¶16 This argument goes nowhere. Evanston acknowledged that in 2004 it was unable to locate its entire underwriting file, but was able to reconstruct the file from other sources. It attached to an affidavit in support of summary judgment a list of serial numbers of insured couplers. The serial number of E & W's Hendrix quick coupler is not on the list. Moreover, it is undisputed that it was not retrofitted with the safety latch. Nothing in the summary judgment papers suggests that E & W even returned the form requesting the retrofit kit. LBX's argument that some hypothetical lost document might show that this coupler was an insured coupler is untenably thin. We also reject its claim that there is no way to definitively say whether the "missing" list contains excluded or insured couplers. The sentence plainly says that the underwriting file contains "[a] list of serial numbers of the *insured* couplers." (Emphasis added.) On this summary judgment record, the policy could not have insured the coupler at issue.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.