

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2003

Cornelia G. Clark
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. 02-2005
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-391

**IN COURT OF APPEALS
DISTRICT III**

**COMSTOCK DAIRY ENTERPRISES, INC., D/B/A CRYSTAL
LAKE CHEESE FACTORY,**

PLAINTIFF-RESPONDENT,

v.

WESTERN NATIONAL MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Western National Mutual Insurance Company appeals a judgment entered on a jury verdict awarding Comstock Dairy Enterprises, Inc., \$80,000 for damage to a whey tank. Western contends that the trial court erred by finding the insurance policy ambiguous regarding the

definition of a covered “object.” It also challenges whether there was sufficient evidence to support the jury’s conclusion that the damage to the whey tank was caused by an accident. We agree with Western that the insurance policy is unambiguous and, as applied, precludes coverage. Thus, we need not reach the issue whether the evidence was sufficient to support the jury’s verdict. We reverse the judgment.

Background

¶2 Western, through its agent, Lowell Dague of Noah Insurance Group, issued two policies to Comstock. One was a “commercial lines” policy and one was a “boiler and machinery” policy. The commercial lines policy protects covered property from damage resulting from a covered cause of loss. It specifically excludes coverage for damage caused by routine wear and tear, rust, corrosion, or hidden or latent defects. Coverage under the commercial lines policy is not at issue in this appeal.

¶3 The boiler policy is a supplemental policy designed to provide coverage for specific property that might be left uncovered by exclusions in the commercial lines policy. The terms of this boiler policy are at issue and will be discussed more thoroughly below, but the policy also protects “covered property” from a “covered cause of loss.”

¶4 Comstock purchased a remanufactured, 6000-gallon whey tank in 1997. The tank had been constructed in the 1980s with one chamber but was refurbished so that it had two 3000-gallon compartments. The tank was put into service in June 1998, and Comstock soon discovered a leak in the right chamber.

¶5 In July 1999, a Comstock employee noticed that the tank was leaking whey onto the floor. When looking into the tank through a glass portal, the employee also noticed the wall separating the chambers and the tank floor were bulging. Further investigation revealed cracks near the bulges, as well as an eighteen-inch crack at the base of a wall. Comstock hired a company to repair the tank to restore it for use. The cracks were welded, and a reinforced steel plate was put over the bulging area. In October 1999, Comstock noticed more cracking in the tank, all of which Comstock repaired itself by welding. The tank was finally taken out of service and replaced in late 2001.

¶6 After the cracks were discovered in July 1999, Comstock notified its insurance agent, who notified Western. Western sent its boiler inspector to Comstock. Western then acknowledged receipt of the notice of loss and indicated it would investigate the claim. Meanwhile, Comstock solicited bids for a replacement tank and submitted them to Western. After Western received the bids, it concluded that the tank was not a covered object under the policy. Western informed Comstock that replacement of the tank would not be covered under the boiler policy. Comstock then commenced this action. Although the complaint initially alleged coverage under both the boiler policy and the commercial lines policy, the only issue on appeal is whether the tank was covered under the boiler policy.

¶7 Comstock sought summary judgment, claiming there should be coverage because (1) it told the agent it wanted full coverage, (2) the tank was listed on a Statement of Values sheet submitted to Western, and (3) Comstock's insurance agent thought the tank was covered. It did not, however, argue that the policy was ambiguous. The trial court nevertheless found the boiler policy ambiguous and ruled that for purposes of trial, the tank would be treated as a

covered object. The case proceeded to the jury on the issue of damages only, and the jury awarded \$80,000 to Comstock.¹

¶8 Western moved for judgment notwithstanding the verdict or to change answers on the special verdict because, it contended, there was insufficient evidence to support the claim that the damage was caused by an “accident” instead of excluded manners of loss. It also renewed its claim that the policy was unambiguous and excluded coverage. The trial court denied Western’s motions, replying that because Comstock had wanted full coverage and because the agent thought the tank was covered, the court’s determination of ambiguity was reinforced. Western appeals.

Standard of Review

¶9 Western challenges the trial court’s grant of summary judgment, which determined there was coverage for the whey tank under the boiler policy. We review a summary judgment decision de novo, using the same methodology as the trial court. *Rural Mut. Ins. Co. v. Welsh*, 2001 WI App 183, ¶4, 247 Wis. 2d 417, 633 N.W.2d 633. The construction of language in an insurance policy involves questions of law we review de novo. *See Herwig v. Enerson & Eggen*, 98 Wis. 2d 38, 39, 295 N.W.2d 201 (Ct. App. 1980). If the language of an insurance policy is unambiguous, we will not rewrite the policy by construction. *Frost v. Whitbeck*, 2002 WI 129, ¶17, 257 Wis. 2d 80, 654 N.W.2d 225. If terms in an insurance policy are ambiguous, they should be construed against the

¹ The judgment was entered for \$108,386.12 for the verdict, costs, and interest.

insurance company that drafted the policy. *Id.* at ¶19. Whether ambiguity exists is also a question of law. *Id.* at ¶18.

Discussion

¶10 The primary dispute in this case centers around the phrase “Comprehensive Coverage Including Production Machines” appearing on the declarations page. Comstock contends the phrase leads a reasonable insured to believe it has comprehensive coverage for its production machines. It not only argues that the whey tank is a production machine but that because “production machines” is not a term defined in the policy, the policy is ambiguous. Thus, Comstock claims, we should construe the policy against Western and affirm coverage for the whey tank. We disagree.

¶11 The coverage provision of the policy states, in effect, that Western will pay for direct damage to any property that Comstock owns if the damage is caused by an “accident” to an “object” shown in the declarations.² “Object” is in

² The coverage section of the policy states:

We will pay for direct damage to Covered Property caused by a Covered Cause of Loss.

1. Covered Property.

Covered Property, as used in this Coverage Part, means any property that:

a. You own

....

2. Covered Cause of Loss

(continued)

quotation marks in the policy; thus, it has the meaning specified in the definitions section of the policy. The definition section says: “‘**Object**’ means the equipment shown in the Declarations. Full description of specific ‘object’ categories are found in the Object Definitions endorsement attached to this Coverage Form.” Thus far, then, the policy has directed the insured to the declarations page twice—once in the coverage section and once in the definitions section—in order to ascertain what equipment is listed as an “object” and, therefore, covered. It also refers the insured to an object definitions endorsement.

¶12 The declarations page is where the phrase “Comprehensive Coverage Including Production Machines” first appears.³ It is in the space entitled “Group Description or Description of ‘Object’” where, ostensibly, all covered equipment should be shown. This is where the trial court found ambiguity, stating:

There is no question that on the boiler and machinery coverage form declaration page, that it refers to comprehensive coverage, including production machines, and clearly a whey tank is a production machine

[T]here are repeated references in the coverage form to object and different definitions, but referring back to the declaration sheet ... the Court is left with one conclusion and that is that this policy has contradictory provisions which I believe render it ambiguous

A Covered Cause of Loss is an “accident” to an “object” shown in the Declarations. An “object” must be in use or connected ready for use at the location specified for it at the time of the “accident.”

If the definitions of “Covered Property” and “Covered Cause of Loss” are substituted into the main coverage clause, the result is the definition in the main text.

³ Recall, however, that while the declarations page is supposed to list equipment, the listing comes in the context of defining “object.”

¶13 Comstock argues that the equipment shown on the declarations page is its “Production Machines.” But this ignores the rest of the phrase—if all that is to be listed is the covered equipment it would not be necessary to write “Comprehensive Coverage Including.” Comstock also contends that the failure to define “Production Machines” anywhere in the policy results in an ambiguity. These arguments, however, presume that the policy stops at the declarations page and ignore the rest of the policy language.

¶14 While the insured is directed to the declarations page, Western has several options for completing the page. It could list all equipment to be covered, provide a group description as the page suggests, or incorporate another document by reference.⁴

¶15 The list option would be least likely to cause initial confusion and would be most consistent with the coverage and definition sections of the policy. In this case, Western never received a list of equipment to insure. Comstock counters that a list was indeed submitted. The list to which Comstock refers, however, is a statement of values and on its face applies only to the commercial lines policy.⁵ Moreover, the list was provided to indicate the value of property, not to describe “objects” to be covered. Indeed, several items on the list of values—such as the office and a storage building—are not items that a boiler policy is designed to protect. Comstock could not reasonably contend that these items fit any definition of “object” in the policy.

⁴ A fourth option is to specifically list whatever text might be contained in an incorporated document, but that could be cumbersome, particularly if the relevant text is lengthy.

⁵ Comstock claims the insurance agent assured it that only one list would be needed for both policies.

¶16 Because Western had no list of property it was to insure, it used an equipment group description, “Comprehensive Coverage Including Production Machines.” The definitions section, by referring the insured to the declarations page, also informed the insured that the full description of object categories—that is, groups—would be found in an endorsement. It is no coincidence that the policy contains an endorsement entitled “Object Definition No. 6—Comprehensive Coverage (Including Production Machines).” This endorsement defines the group of machinery by defining what is an “object” and what is not. Thus, Western insures all equipment, production machines, or objects that fulfill the definition of “object” set forth in the endorsement.

¶17 Because the endorsement title and the group definition on the declarations page are the same, there is the collateral effect of incorporating the endorsement by reference. This, too, is consistent with the definition section’s information to the insured that a complete description of object categories is contained in an object definition endorsement.

¶18 A general rule of contract construction is that the meaning of a particular provision is to be ascertained with reference to the contract as a whole. *Tempelis v. Aetna Cas. & Surety Co.*, 169 Wis. 2d 1, 9, 485 N.W.2d 217 (1992). Moreover, a policy and its endorsements are to be harmonized to the greatest extent possible. See *Vidmar v. American Fam. Mut. Ins. Co.*, 104 Wis. 2d 360, 366, 312 N.W.2d 129 (1981), *overruled on other grounds by Welch v. State Farm Mut. Auto. Ins. Co.*, 122 Wis. 2d 172, 361 N.W.2d 680 (1985). Comstock’s contention that it relied on the declarations page to determine its coverage ignores the endorsements that are also part of the policy.

¶19 We conclude that a reasonable insured would have known to consult the endorsements for a complete explanation of the terms on the declarations page. Not only did “Comprehensive Coverage Including Production Machines” signify a group description but it also served to definitely identify the proper endorsement for the insured to read. Any initial confusion would have been eliminated upon matching the endorsement title to the declarations page notation. Once the title and notation were matched, a reasonable insured would have known the coverage of its property under the boiler policy was subject to the definition of “object” contained in the endorsement.

¶20 In the endorsement an “object” is defined as any

1. Boiler, fired vessel, unfired vessel normally subject to vacuum or internal pressure other than the weight of its contents, refrigerating and air conditioning vessels, and any metal piping and its accessory equipment.
2. Mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power.
3. Any of the following vessels listed below are included within the provisions of this section when use with an “object”:
 - a. Condensate return tank;
 - b. Cushion or expansion tank used with a hot water heating boiler.^{6]}

⁶ When the policy was renewed, the endorsement had been updated to reflect a fourth category, and Western questioned one of Comstock’s witnesses regarding the endorsement with the fourth category not applicable at the time the whey tank was damaged. However, the first three categories of the new endorsement are identical to the three categories on the original endorsement.

¶21 Comstock’s president and chief executive officer, Anthony Curella, as well as its operations manager, Phillip Robertson, conceded that the whey tank did not meet the definitions of “object” contained in the endorsement.⁷ There is no testimony that the tank fits the definitions in the endorsement. Thus, as a matter of law, there would be insufficient evidence for the trial court to have ruled otherwise.

¶22 Additionally, a definition for “production machines” is not required. As used in the declarations page, it is part of a group description which is explained in the endorsement. As a freestanding part of the endorsement title, it is not a phrase upon which Comstock can rely. Insurance policies should not be construed based on titles or headings. *Ott v. All-Star Ins. Co.*, 99 Wis. 2d 635, 645, 299 N.W.2d 839 (1981) (supreme court reversed where trial and appellate courts interpreted policy based on its title).⁸

¶23 “A genuine ambiguity arises when the phrasing of a policy is so confusing that the average policyholder cannot make out the boundaries of coverage.” *Bulen v. West Bend Mut. Ins. Co.*, 125 Wis. 2d 259, 264, 371 N.W.2d 392 (Ct. App. 1985). We agree that use of the group description or incorporation of the endorsement by reference could have been clearer. The full endorsement title could have been listed, or Western could have written something directory, such as “objects as defined in production machine endorsement” or “see comprehensive coverage endorsement.” However, a declarations page is only a

⁷ The same concession is also made in Comstock’s appellate brief.

⁸ And, in any event, we are not convinced that the whey tank is a “Production Machine” as Comstock asserts.

summary of coverage, not a complete picture. *Sukala v. Heritage Mut. Ins. Co.*, 2000 WI App 266, ¶11, 240 Wis. 2d 65, 622 N.W.2d 457.⁹ It is not intended to replace a careful reading of the policy.

¶24 Moreover, just because a policy is complex, it is not necessarily ambiguous. See *Heater v. Fireman's Fund Ins. Co.*, 30 Wis. 2d 561, 565, 141 N.W.2d 178 (1966) (“We think it appropriate to note that the language of the disputed rider is unnecessarily cumbersome, complex, and hard to read. In spite of these shortcomings, it does not follow that the language used is ambiguous. After a disciplined and careful reading, the meaning is clear and not subject to different interpretations.”). Here, the policy was complex, but through a careful and disciplined reading, Comstock would have known the boundaries of its coverage. The definition of “object” was ascertainable and the whey tank failed to satisfy the definition.

¶25 Comstock advances two other arguments that it claims require we conclude Western owes it coverage. First, Comstock argues there is another ambiguity and points to policy language stating that an “object” “must be in use or connected ready for use” at the time of the accident for coverage to be effected. Paragraph E of the production machines endorsement states that Western

will consider that the—connected ready for use—requirement of the Coverage Form and its endorsements has been met by an “object” in this section if that “object” is:

1. Periodically filled, moved, emptied, and refilled in the course of its normal services; and

⁹ *Sukala v. Heritage Mut. Ins. Co.*, 2000 WI App 266, 240 Wis. 2d 65, 622 N.W.2d 457, has been implicitly overruled on other grounds by *Badger Mut. Ins. Co. v. Schmitz*, 2002 WI 98, 255 Wis. 2d 61, 647 N.W.2d 223.

2. Used for storage of gas or liquid.

¶26 Comstock argues that under this paragraph, the whey tank would be covered because it is connected and ready for use. This section, however, does not provide a definition of “object.” It defines “connected ready for use.” This provision would not apply until Comstock first showed that the tank was an “object.” It does not create an ambiguity over the meaning of “object.”

¶27 Second, Comstock argues a species of waiver.¹⁰ It claims that because it requested full coverage, produced a list of items it wanted insured, and because the agent believed the boiler policy covered the whey tank, Western is somehow precluded from denying coverage because of Comstock’s expectations.

¶28 An agent’s oral misrepresentation of unambiguous policy provisions as to coverage cannot modify the contract by estoppel or otherwise. *Albert v. Home Fire & Marine Ins. Co.*, 275 Wis. 280, 286-87, 81 N.W.2d 549 (1957). Moreover, “as a matter of law, an insured cannot have a reasonable expectation of coverage where an unambiguous policy excludes coverage.” *American States Ins. Co. v. Skrobis Paint. & Decor.*, 182 Wis. 2d 445, 451, 513 N.W.2d 695 (Ct. App. 1994). Because we have concluded that the policy is unambiguous, Comstock’s arguments regarding the agent’s representations are unavailing.

¶29 The policy unambiguously precludes coverage for the damage to the whey tank. Therefore, summary judgment finding coverage should not have been

¹⁰ “The general rule is well established that the doctrine of waiver or estoppel based upon the conduct or action of the insurer or its agent is not applicable to matters of coverage as distinguished from grounds for forfeiture.” *Shannon v. Shannon*, 150 Wis. 2d 434, 450-51, 442 N.W.2d 25 (1989).

granted and the case did not present a factual dispute. The case is remanded for entry of judgment in Western's favor and dismissal of the complaint.

By the Court.—Judgment reversed and cause remanded with directions.

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

