COURT OF APPEALS
DECISION
DATED AND RELEASED

October 31, 1995

No. 95-1433

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

SEANN R. COOPER,

Plaintiff-Appellant,

v.

CAPITOL INDEMNITY CORPORATION,

Defendant-Respondent,

KYLE SCHOLZ,

Defendant.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

PER CURIAM. Seann Cooper appeals a summary judgment dismissing his personal injury action against Capitol Indemnity Corporation. He argues that the trial court: (1) erroneously modified its scheduling order and (2) erroneously interpreted the insurance policy exclusion. We affirm the judgment.

On November 24, 1993, Cooper filed an amended complaint alleging that without provocation or consent, Kyle Scholz assaulted and battered him while Cooper was a patron at "P.R.'s Place." Cooper contends that Scholz approached him and a fight erupted, lacerating Cooper's finger. The parties were separated by acquaintances. Approximately ten seconds to one minute later, Scholz again approached Cooper, knocked him to the floor and beat him. Cooper sustained a broken jaw. Cooper contends that the bouncer and bartender merely watched the incidents and took no action to protect Cooper.

Cooper seeks damages as a result of his injuries suffered in the second altercation. The complaint alleges that Scholz intentionally caused Cooper's resulting injuries and that Scholz's conduct was outrageous, wanton, reckless and in total disregard to Scholz's rights and safety. Cooper further alleges that P.R's Place was insured for liability by Capitol Indemnity Corporation; that P.R's Place failed to exercise ordinary care to adequately protect its patron, Cooper, and that as a result of P.R.'s Place's negligence, Cooper was injured.

At the time of the incident, Capitol Indemnity insured P.R.'s Place for liability. The policy contained the following terms:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> ....

The policy contained an endorsement that read:

> THIS ENDORSEMENT CHANGES THE POLICY PLEASE READ IT CAREFULLY.
> EXCLUSION—ASSAULT OR BATTERY
>
> ....
>
> (This insurance does not apply to "bodily injury" or "property damage" or "personal injury" arising out of Assault and/or Battery.)

Definition: Assault: An apparently violent attempt or a willful offer with force or violence to do hurt to another without the actual doing of the hurt threatened.
Battery: The act of battering or beating.
Assault & Battery: Shall be deemed to include the forcible ejection or exclusion or attempt thereof of any person or persons from the premises by the Named Insured, their employees or agents.

On January 24, 1994, the trial court issued a scheduling order that all dispositive motions be filed by April 11, 1994. Trial was set for June 21, but reset three times and finally set for May 16, 1995. On December 30, 1994, Capitol Indemnity filed a motion to amend the scheduling order to permit it to renew its summary judgment motion.

Capitol Indemnity's summary judgment motion was based upon its policy exclusion and ***Berg v. Schultz,*** 190 Wis.2d 171, 526 N.W.2d 781 (Ct. App. 1994), released December 13, 1994, and ordered published January 31, 1995. At the February 6 motion hearing, neither trial counsel nor the trial court was aware that publication had been ordered. As a result, the trial court denied Capitol Indemnity's motions. As a sanction for citing an unpublished court of appeals decision, *see* § 809.23(3), STATS., the trial court ordered that Capitol Indemnity would not be permitted to renew any motion for dismissal on the grounds of coverage until trial.

On April 11, Capitol Indemnity renewed its motion to amend the scheduling order and for summary judgment of dismissal, based upon ***Berg.*** Because the trial court learned that ***Berg*** had been ordered published, it granted both motions and entered judgment accordingly. The trial court concluded that as a matter of law, Capitol Indemnity's policy excluded coverage because Cooper's injuries were the result of an assault and battery.

We review summary judgments de novo. When reviewing summary judgment, we apply the methodology set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). Summary judgment is appropriate when material facts are undisputed and the moving party is

entitled to judgment as a matter of law. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

Cooper argues that the trial court erroneously exercised its discretion when it permitted Capitol Indemnity to bring its untimely motion to amend the scheduling order. We disagree. The trial court may modify the scheduling order upon timely motion of any party or on its own motion. Section 802.10(3), STATS. It is discretionary for the trial court to entertain motions outside the time parameters set forth in pretrial orders. ***Denil v. Integrity Mut. Ins. Co.,*** 135 Wis.2d 373, 378, 401 N.W.2d 13, 15 (Ct. App. 1986). A discretionary decision will be sustained if the trial court has examined the relevant facts, applied the proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis.2d 296, 305-06, 470 N.W.2d 873, 876 (1991).

The record reveals a proper use of discretion. The trial court has the authority to manage its own calendars because the responsibility for court calendars is specifically placed upon the trial court by statute. Section 802.10, STATS. Pretrial orders are devices to facilitate pretrial matters that may arise in any given case. They are not inflexible tools without exceptions but rather devices to be used to expedite litigation and control the docket.

The trial court has the power to modify its order setting motion dates. Section 802.10(3)(b), STATS. Here, the court reasonably exercised its discretion in reviewing its earlier order and modifying the dates for pretrial proceedings in view of the erroneous information it had been provided at the February 6 hearing, which was that the ***Berg*** case had not yet been ordered published when in fact it had. Having subsequently learned that ***Berg*** could be dispositive and thus eliminating the need for trial, the trial court properly entertained the summary judgment motion.

Next, Cooper argues that the trial court misinterpreted the insurance policy exclusion for assault and battery. Cooper argues that the policy exclusion is ambiguous, that the reasonable insured would not have notice of the exclusion and that the assault and battery exclusion does not exclude injuries resulting from the insured's negligence. We disagree.

We conclude that the policy exclusion is not ambiguous. The interpretation of an unambiguous contract is a question of law. ***Schlosser v. Allis-Chalmers Corp.,*** 86 Wis.2d 226, 243-44, 271 N.W.2d 879, 887 (1978). A contract is ambiguous when it is susceptible to more than one reasonable interpretation. ***Wilke v. First Fed. S&L Assoc.,*** 108 Wis.2d 650, 654, 323 N.W.2d 179, 181 (Ct. App. 1982). The identical policy language withstood a challenge based upon ambiguity in ***Berg,*** 190 Wis.2d 174-75, 180, 526 N.W.2d at 782, 784. ("The insurance policy stated in unambiguous terms that there was no coverage for bodily injury 'arising out of' an assault or battery.") We further conclude that the reasonable insured would have notice of the exclusion. The exclusion is labeled, part of it is in capital letters, and important terms are underlined.

Finally, we conclude that the battery exclusion excludes the injuries under the undisputed facts of this case. Like the plaintiff in ***Berg***, Cooper claimed that P.R.'s Place breached its duty to protect its patrons from injuries caused by other patrons and therefore its negligence caused the injuries. ***Berg*** rejects this theory. Because Cooper's allegations are indistinguishable from ***Berg,*** the trial court correctly determined that ***Berg*** controls.

By the Court.—Judgment affirmed.

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