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DISTRICT II

December 29, 2021

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Waukesha County
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New STS Technical Solutions, Inc.
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STS Aviation Group, LLC
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STS Holdings, LLC
2000 NE Jensen Beach Blvd.
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1549

Busse/SJI Corporation v. Tactical Workforce Solutions, Inc.
(L.C. #2018CV1603)

Before Gundrum, P.J., Reilly and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Tactical Workforce Solutions, Inc., d/b/a STS Technical Services (hereafter STS) appeals from a circuit court order granting summary judgment to its insurer, Certain Underwriters at

Lloyd's, London (hereafter Underwriters). The circuit court concluded that Underwriters did not owe coverage to STS for Busse/SJI Corporation's claim that STS negligently designed and engineered equipment for Busse. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

STS is an engineering services firm. In 2012, Busse hired STS's predecessor to participate in the re-design of the main components of the LLP, one of Busse's line of palletizers. In 2013, STS took over the Busse project. In September 2018, Busse sued STS, its related companies, and Underwriters, STS's insurer, for breach of contract and negligence relating to the allegedly defective design and engineering of the LLP components. The Underwriters policy at issue ran from December 30, 2017 to December 30, 2018, and, subject to policy provisions, insured STS for claims first made and reported to Underwriters during this policy period and for wrongful acts occurring between January 27, 2015, the policy's retroactive date, and December 30, 2018, the policy's end date.

Underwriters sought summary judgment on coverage on two grounds: (1) STS did not commit a wrongful act after the retroactive date (January 27, 2015);² and (2) STS knew of an alleged wrongful act with respect to its professional services prior to December 30, 2017, the

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² The circuit court rejected this ground for summary judgment because the record showed the existence of material factual disputes relating to this ground. Because we affirm the circuit court's grant of summary judgment on other grounds, we do not address this ground further.

policy's inception date, such that Section IV, K. (hereafter Exclusion K) precluded coverage.

Section IV, K. states:

IV. EXCLUSIONS

This insurance does not apply to CLAIMS, CLAIM EXPENSES, or DAMAGES based upon or arising out of the actual or alleged liability of the Insured:

* * *

K. an actual or alleged WRONGFUL ACT with respect to PROFESSIONAL SERVICES which occurred prior to the inception date of the policy known to any INSURED's principal, partner, director, officer, agent or employee with responsibility for environmental affairs, legal affairs, or risk management and which could reasonably be expected to give rise to a CLAIM.

The policy defines "wrongful act" as "any act, error or omission committed by YOU in the performance of YOUR PROFESSIONAL SERVICES that results in Damages...."

In granting summary judgment, the circuit court concluded that Exclusion K barred coverage for Busse's claims because prior to the policy's December 30, 2017 inception date, STS's representatives knew of alleged wrongful acts with respect to its professional services involving the LLP components "which could reasonably be expected to give rise to a claim."

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

Insurance policies can exclude matters from coverage. *See Estate of Logan v. Northwestern Nat'l Cas. Co.*, 144 Wis. 2d 318, 347-48, 424 N.W.2d 179 (1988) (insurers may exclude from coverage losses that already occurred). Whether claims are excluded by an insurance policy presents a question of law we decide independently. *See Wosinski v. Advance Cast Stone Co.*, 2017 WI App 51, ¶¶108-09, 377 Wis. 2d 596, 901 N.W.2d 797.

The summary judgment record shows the following. Aware of Busse's issues with the LLP components, STS's Paul Gilbert³ sent an email on November 10, 2017, to Jorja Raymond, legal/human resources administrator, stating:

I just finished meeting with STS's President as well as our in-house council [sic] regarding the current situation. At this point, STS legal has requested a formal letter from Busse stating what documents you are looking for along with what will be discussed during our meeting. Please also include what aspect/part of the palletizer is causing the issues.

In response to this email, Gilbert received a November 10, 2017 letter from Tierney Grutza, vice-president human resources/in-house counsel at Arrowhead Systems, Inc.,⁴ setting out the list of documents Busse wanted to see and its specific areas of concern with the LLP components. Grutza's November 10 letter asked STS to provide the following documents for review:

³ By 2017, Gilbert was Director of Client Solutions and worked on addressing client questions and concerns.

⁴ Even though Grutza was associated with Arrowhead Systems, no party argues that Grutza's November 10 letter was anything other than a document relating to the Busse-STS dispute.

- Agreed upon Terms and Conditions
- The proposal for the Scope of Work and/or services provided
- The design criteria, specifications, and requirements that they were given or were developed as part of their Scope of Work
- Calculations demonstrating the design meets the criteria/specifications/requirements
- Documentation of Design Reviews
- Documentation illustrating Busse approval for said designs

The November 10 letter also identified “areas of specific concern with regard to the project” including specific failures of various LLP components arising from “inadequate design” and manufacturing along with maintenance issues. The letter stated that the above matters would be discussed at an upcoming meeting. In his deposition, STS’s in-house counsel, Jeffrey Devine,⁵ confirmed that he received and reviewed the November 10 letter shortly after Gilbert received it. While Devine testified that he treated the letter as a mere request for documents, he also admitted that he recognized that Busse was claiming that the LLP components were failing as described in the letter.

At a December 7, 2017 meeting attended by Gilbert, Devine, and others from STS and Grutza and others from Busse, Busse set out the problems with the LLP components. In his deposition, Devine acknowledged that he took from the December 7 meeting that Busse had problems with the LLP components.

⁵ Devine was in-house corporate legal counsel for STS Aviation Group, STS’s parent company. His duties included contract review, assisting in litigation, handling general legal questions, and legal risk management.

The circuit court undertook the following analysis of the summary judgment record:

In particular, what strikes me is that the first part of the November 10 letter would be a signal, a red flare, to any person in any type of business who's in an executive^[6] position. It doesn't necessarily have to be the president or the legal officer, but it really is a warning. They're not asking to look at the document so they can create a scrapbook. They're asking so they can review what really happened to decide, to assess blame.

In the second part of the letter where the letter references the specific deficiencies that had been occurring to the equipment, reading that, you tie that into the first section and that's a second red flare that says, this is a warning, if I'm smart we have to alert the team that we're going to be sued and we ought to be careful what we say to these people in any meeting.

I don't think you have to be a major player to risk liability and understand that. I'm satisfied that Devine and Gilbert both had notice of what the wrongful acts were. And I'm satisfied that a reasonable person in an executive position, not necessarily any kind of specialized one, would say this is a warning shot; we have to be prepared.

We agree with the circuit court's view of the summary judgment record. Devine's role at STS is undisputed in the record. As a person responsible for legal affairs and risk management, Devine fell squarely within those persons whose knowledge of an alleged wrongful act with respect to professional services could trigger Exclusion K. Devine's statement that because he is not an engineer, he could not have understood the import of Busse's November 10 request for documents and its list of concerns about the LLP components did not create a material issue of disputed fact sufficient to preclude summary judgment.

⁶ Although the circuit court spoke in terms of "executives," Section IV, K refers to the knowledge of any STS "principal, partner, director, officer, agent or employee with responsibility for environmental affairs, legal affairs, or risk management." As discussed elsewhere in this opinion, Jeffrey Devine qualifies as such an individual.

The record shows no genuine factual dispute that the November 10 letter and December 7 meeting establish that Devine and therefore STS had knowledge of alleged wrongful acts with respect to its professional services involving the LLP components which could reasonably be expected to give rise to a claim.⁷ Because STS had this knowledge before the policy's December 30, 2017 inception date, Exclusion K precluded coverage for Busse's claims.⁸

The circuit court's grant of summary judgment to Underwriters is affirmed.⁹

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

⁷ Having concluded that Devine's in-house counsel and risk management roles within the STS companies satisfy Exclusion K, we need not delve into whether Gilbert's role within STS made him a "principal, partner, director, officer, agent or employee with responsibility for environmental affairs, legal affairs, or risk management" as set forth in Exclusion K.

⁸ Because we affirm the circuit court's conclusion that STS knew of the alleged wrongful act which could reasonably be expected to give rise to a claim, we need not address choice of law arguments, i.e., whether the designation of New York law under Condition G of the policy conflicts with public policy and law in Wisconsin. We conclude that the result in this appeal would be the same in both jurisdictions: Exclusion K applies and deprives STS of coverage for Busse's claims.

⁹ We have considered all of the arguments in the briefs. To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals