**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 15, 2008**

**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. 2005AP1966** **Cir. Ct. No. 2003CV1461**

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

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**STEVEN J. VERHAAGH, TODD R. VERHAAGH, AND GLENN R. VERHAAGH, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF SCOTT J. VERHAAGH, BERNARD J. VERHAAGH AND GLORIA J. VERHAAGH,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**EDWARD J. FARAH D/B/A FARAH'S FAUCET CORNER BAR A/K/A THE KORNER BAR, FARAH'S FAUCET CORNER BAR A/K/A THE KORNER BAR, APRIL Q. ECKES, MICHAEL T. SWILLE, AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND PENN AMERICA INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS,**

**ROBERT C. SMITS, PHILIP A. LASKOWSKI AND WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Steven VerHaagh[1] appeals a judgment declaring Penn America Insurance Company's commercial general liability policy ("CGL") provided no coverage for damages arising from a bar fight. VerHaagh argues: (1) the policy in its entirety is contextually ambiguous; (2) the declaration page is ambiguous and illusory; (3) the endorsement page is ambiguous and illusory; and (4) the assault and battery exclusion is ambiguous. We disagree and affirm.

¶2 VerHaagh sought damages resulting from a physical altercation between Scott VerHaagh and two other patrons at The Korner Bar in DePere, which resulted in Scott sustaining a fatal injury. Various defendants were named in a wrongful death suit, including the two patrons involved in the altercation, the bartender, and Edward Farah as the owner of The Korner Bar. Penn America issued a CGL policy to "Edward Farah dba Korner Bar." Farah tendered to Penn America a copy of the complaint, after which Penn America filed a motion to intervene, bifurcate and stay liability proceedings pending resolution of coverage issues. Penn America subsequently filed a motion for summary judgment, requesting dismissal on the grounds the policy contained an assault and battery exclusion, which precluded a duty to defend or indemnify any defendants in the action. The circuit court granted summary judgment dismissing Penn America and VerHaagh now appeals.

[1] Appellants are collectively referred to as "Steven VerHaagh" or "VerHaagh."

¶3 We review summary judgment decisions de novo and follow the same methodology as the trial court. *See* ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). When we construe insurance policy provisions, our goal is to give effect to the intent of the parties as expressed in the language of the policy. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. The first issue in construing an insurance policy is to determine whether an ambiguity exists regarding the disputed coverage issue. "Insurance policy language is ambiguous if it is susceptible to more than one reasonable interpretation." ***Id.***, ¶13 (citation omitted). If there is no ambiguity, we apply the language as written, without resort to rules of construction or applicable principles of case law. ***Id.***

¶4 A provision that is unambiguous in itself may be ambiguous in the context of the entire policy. ***Id.***, ¶19. The test for contextual ambiguity is the same as that for determining whether a particular clause is ambiguous: is the language of the particular provision, "when read in the context of the policy's other language, reasonably or fairly susceptible to more than one construction?" ***Id.***, ¶29. "This standard is measured by the objective understanding of the reasonable insured." ***Id.*** To determine whether there is contextual ambiguity, we inquire whether the organization, labeling, explanation, inconsistency, omission, and text of other relevant portions in the policy create an objectively reasonable alternative meaning and, thereby, disrupt an insurer's otherwise clear policy language. ***Id.***, ¶¶19, 30.

¶5 We turn first to whether the assault and battery exclusion is susceptible to more than one reasonable interpretation. The circuit court concluded the policy language in the assault and battery exclusion was unambiguous. The assault and battery exclusion provides:

**ASSAULT AND BATTERY EXCLUSION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY
COVERAGE B - PERSONAL AND ADVERTISING INJURY LIABILITY
COVERAGE C - MEDICAL PAYMENTS
COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART

> In consideration of the premium charged it is hereby understood and agreed that this policy will not provide coverage, meaning indemnification or defense costs for damages alleged or claimed for:
>
> "Bodily Injury", "Property Damage", "Personal and Advertising Injury", "Medical Payments or any other damages resulting from assault and battery or physical altercations that occur in, on, near or away from the insured's premises;
>
> 1) Whether or not caused by, at the instigation of, or with the direct or indirect involvement of the insured, the insured's employees, patrons or other persons in, on, near or away from insured's premises, or
>
> 2) Whether or not caused by or arising out of the insured's failure to properly supervise or keep the insured's premises in a safe condition, or
>
> 3) Whether or not caused by or arising out of any insured's act or omission in connection with the prevention or suppression of the assault and battery or physical altercation, including, but not limited to, negligent hiring, training and/or supervision.
>
> 4) Whether or not caused by or arising out of negligent, reckless, or wanton conduct by the insured, the insured's employees, patrons or other persons.

¶6 We conclude the assault and battery exclusion is not susceptible to more than one reasonable meaning and, in fact, VerHaagh does not suggest an alternative meaning. The provision is unambiguous on its face: there is no coverage for "bodily injury" damages "resulting from assault and battery or physical altercations that occur in, on, near or away from the insured's premises.

The exclusion focuses on the incident or injury that gives rise to the claim, not the plaintiff's theory of liability. Thus, if the damages incurred by a third party resulted from the underlying assault and battery, the exclusion applies. *See* ***Berg v. Schultz***, 190 Wis. 2d 170, 176, 526 N.W.2d 781 (Ct. App. 1994).

¶7 VerHaagh insists the assault and battery exclusion is illusory. According to VerHaagh, the policy builds up false expectations because "The policy purports to *cover* all liability, and then by exclusion *denies* potential liability, including negligence." Penn America responds that the policy does not bar coverage, but in fact provides coverage for third-party liability claims that do not arise out of assault and battery.[2] As examples, Penn America cites unsafe conditions on the premises, such as the tavern owner's failure to remove ice and snow from the walkway, or a customer who is injured as a result of an employee's negligent stacking of barstools. VerHaagh does not reply to this argument and therefore the issue is deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶8 VerHaagh also contends the policy is contextually ambiguous when read in its entirety because "As a tavern owner, Mr. Farah reasonably expected that the claimed exclusions would be clearly and expressly set forth on the Declarations Page." VerHaagh insists Penn America created an ambiguous and illusory policy by failing to set forth the assault and battery exclusion on the

[2] Penn America also argues that VerHaagh lacks standing to raise the issue because he is not the insured under the policy. VerHaagh does not reply to the standing issue. Counsel for Penn America's insured informed this court that his client was not participating in the appeal and would not be filing a brief. On September 4, 2007, we issued an order that this appeal would be taken under submission without briefs from the insured. However, we need not reach the standing issue because we conclude VerHaagh fails on the merits. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663 (1938).

declarations page, but rather "deviously placing" the exclusion eighty-nine pages into the policy.

¶9 We disagree. The first declarations page states in bold print and capital letters that forms and endorsements complete the policy. Moreover, the first declarations page states in bold print and capital letters, just below the list of coverages:

> **FORM(S) AND ENDORSEMENT(S) MADE A PART[ ]**
> **OF THIS POLICY AT THE TIME OF ISSUE**
>
> **SEE FORM S901**

¶10 The next page of the policy contains the endorsement page labeled "S901." On the endorsement page is a list of forms, including "S2005 (05/02)." The "Assault and Battery" exclusion form is labeled "S2005 (05/02)." The top of the form is plainly and conspicuously labeled in bold print and capital letters: "**ASSAULT AND BATTERY EXCLUSION**." We conclude the circuit court properly determined the policy was not contextually ambiguous.

¶11 VerHaagh also claims the endorsement page is ambiguous because it "does not supply any feasible information on any exclusions/endorsements to the Policy other than listing a section of letters and numbers without any other information…." However, we held in ***Ruenger v. Soodsma***, 2005 WI App 79, ¶22, 281 Wis. 2d 228, 695 N.W.2d 840, that providing the names of the endorsements and where they can be found in the policy is not required:

> We reject Ruenger's argument that the failure to identify the UIM endorsement by name next to its number and to specify where in the policy it can be found, together with length of the policy, create contextual ambiguity. A reasonable insured would understand that he or she had to look through the policy to find the pages that addressed each of the types of coverage listed on the … declarations page.

Moreover, in ***Berg***, the insurance policy included an "assault and battery" exclusion by endorsement. ***Berg***, 190 Wis. 2d at 174.

¶12 Although organizationally complex, the organization and other relevant provisions of the Penn America policy do not create an objectively reasonable alternative meaning so as to render it contextually ambiguous. There is nothing in the policy that contradicts the provisions in the assault and battery exclusion. Rather, the insured is reminded throughout the policy to read the entire policy. The policy also repeatedly provides that the general grant of coverage may be limited by the exclusions and other provisions within the policy and, further, that the policy is made up of forms and endorsements. These notifications are sufficient to alert a reasonable insured that the declarations are but one part of the whole policy. By reading the entire policy, a reasonable insured finds the endorsements, including the assault and battery exclusion, which is clearly labeled: "**ASSAULT AND BATTERY EXCLUSION**." The exclusion was properly applied by the circuit court in this case to preclude a duty to defend or indemnify.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).