COURT OF APPEALS
DECISION
DATED AND RELEASED

July 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 95-0985

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

SUZANNE SCHUCK,

Plaintiff,

v.

THE AETNA CASUALTY & SURETY COMPANY,

Defendant-Respondent,

MED CENTERS HEALTH CARE, INC.,

Subrogated Defendant,

ROBERT LEBEN,

Defendant-Third Party Plaintiff-Appellant,

CITY OF MILWAUKEE DEPARTMENT OF BUILDING INSPECTION and CITY OF MILWAUKEE,

Defendants-Third Party Plaintiffs,

v.

THOMAS JACQUES, JOHN TEECE and TODD THIRY,

Third Party Defendants.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL J. SKWIERAWSKI, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Robert Leben appeals from a summary judgment order dismissing claims against Aetna Casualty and Surety Company. The issue before this court is whether Aetna had a duty to defend Leben against claims arising from a personal injury action against Leben and Aetna brought by Suzanne Schuck. The trial court concluded that Aetna had no duty to defend Leben and granted Aetna's motion for summary judgment. Because the language of the policies unambiguously excludes coverage for Schuck's action, Aetna had no duty to defend Leben; thus, we conclude that the trial court properly granted summary judgment and affirm.

I. BACKGROUND.

The following facts were presented in the summary judgment materials. On August 2, 1992, Schuck fell off the roof of a student rooming house in Milwaukee during a party at which she had consumed alcoholic beverages. Leben was the owner of the property, which was located at 937 North 14th Street, and leased to eight Marquette University students. At the time of the incident, Aetna had issued two insurance policies to Leben covering his Cedarburg residence, approximately twenty-five miles north of Milwaukee. The first was a primary homeowners policy with a personal liability coverage limit of $100,000, and the second was a $1,000,000 excess personal liability policy. Schuck sued Leben for negligence, joining Aetna in the action. The trial court dismissed all claims and cross-claims against Aetna and found that Aetna had no duty to defend Leben. Leben argues on appeal that "the primary and excess policies issued by Aetna are vague and ambiguous with respect to their exclusionary language, and should provide coverage for the claims in plaintiff's complaint and amended complaints, or, at a minimum, provide a defense for those claims as they are presented by the plaintiff."

II. ANALYSIS.

Whether either of the policies requires Aetna to defend Leben is a matter of contract interpretation and, therefore, a question of law that we review *de novo*. ***Williams v. State Farm Fire & Casualty Co***., 180 Wis.2d 221, 226, 509 N.W.2d 294, 296 (Ct. App. 1993). When interpreting insurance policies, the general rule is that any ambiguity is resolved in favor of the insured, but "when the terms of a policy are plain on their face, the policy should not be rewritten by construction to bind the insurer to a risk it was unwilling to cover, and for which it was not paid." ***Jones v. Sears Roebuck & Co***., 80 Wis.2d 321, 329, 259 N.W.2d 70, 73 (1977) (quoting ***Garriguenc v. Love***, 67 Wis.2d 130, 135, 226 N.W.2d 414, 417 (1975)).

Leben first argues that his primary homeowners policy imposes a duty on Aetna to defend him against the suit brought by Schuck. The policy contains the following definitions:

> 3. **"business"** includes trade, profession, or occupation
>
> ....
>
> 5. **"insured location"** means:
> a. the **residence premises**;
> b. the part of any other premises, other structures, and grounds, used by you as a residence and which is shown in the Declarations or which is acquired by you during the policy period for your use as a residence ....
>
> ....
>
> 9. **"residence premises"** means the one or two family dwelling, other structures, and grounds or that part of any other building where you reside and which is shown as the "residence premises" in the Declarations.

The policy contains the following exclusions:

1. **Coverage E - Personal Liability and Coverage F - Medical Payments to Others** do not apply to **bodily injury** or **property damage**:

....

b. arising out of **business** pursuits of any **insured** or the rental or holding for rental of any part of any premises by any **insured**.

This exclusion does not apply to:

....

(3) the rental or holding for rental of an **insured location**.

....

d. arising out of any premises owned or rented to any **insured** or rented to others by any **insured** which is not an **insured location**.

2. **Coverage E - Personal Liability**, does not apply to:

....

j. **personal injury**

....

(2) which is caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of any **insured**;

The policy identified Leben's Cedarburg property as the "residence premises." It identified no other property as "other insured locations."

Leben claims that the exclusions are vague and ambiguous as to the "business" and "rental or holding for rental" language. He contends that the policy could be read to cover an incident of general negligence such as the one brought in this suit even though the injury-premises is not specifically identified in the policy. Aetna, on the other hand, argues that Leben's connection with the property and the incident clearly falls under the "business pursuit" exclusion. Hence, it had no duty to defend.

An activity falls under the "business pursuit" exclusion if it satisfies two elements: continuity and profit motive. ***Williams***, 180 Wis.2d at 228, 509 N.W.2d at 297. Continuity requires a showing of a customary engagement or a stated occupation. ***Id***. Profit motive requires that the activity "must be shown to be such activity as a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements." ***Id***. (quoting ***Bertler v. Employers Ins. of Wausau***, 86 Wis.2d 13, 21, 271 N.W.2d 603, 607 (1978)). In ***Williams***, we determined that a joint venturer's investment in Texas property satisfied both elements and was, therefore, to be considered a "business pursuit." ***Id***. at 229, 509 N.W.2d at 297.

Leben's involvement with the property where the injury occurred was clearly part of a "business pursuit." Leben acquired the 14th Street premises on December 5, 1973, along with several other parcels of real estate in Milwaukee. On August 25, 1992, Leben sold ten parcels, including the 14th Street premises. The 14th Street parcel was licensed by the City of Milwaukee as a "Rooming House, Type I." Leben never resided at this or any other Milwaukee property. The property was consistently engaged for rental business which is evident from Leben's reporting it as a source of rental income subject to depreciation deductions on federal Schedule E forms.

Leben further argues that, even if the "business pursuit" and rental exclusions apply, they do not extend to activities which are "ordinarily incident to non-business pursuits." He contends that one of these activities is the proper maintenance of the property; however, that is clearly part of Leben's landlord duties and connected to his rental business. His other contention is that the serving of alcohol to minors is an activity "incident to non-business pursuit." Leben's second amended complaint bases this cause of action on § 125.07(1)(a)3, STATS., which imposed a forfeiture upon Leben as the owner of

the rental property for serving alcoholic beverages to minors. However, both the business pursuit and rental exclusions apply to prevent coverage or a duty to defend.[1]

Leben argues that he reasonably believed that he was covered, but a plain reading of his primary homeowners policy indicates that his claim falls under the "business pursuit" exclusion. The policy also explicitly and unambiguously excludes coverage of any "bodily injury" "arising out of any premises ... rented to others by any insured which is not an insured location." It is undisputed that 937 North 14th Street was not an insured location. By no logical legerdemain can Leben stretch Aetna's duty of defense and coverage from his residence in Cedarburg to his multi-unit rooming house business in Milwaukee.

Finally, Leben argues that if the primary homeowners policy does not cover the incident, the excess personal liability policy does. Once again, it is necessary to look at the language of the policy. The excess policy contains the following definitions:

> 3. **"Business"** includes any full or part-time trade, profession or occupation, including farming.
>
> ....
>
> 12. **"Primary insurance"** or **"primary insurance policy"** means the types of insurance policies shown on the Declarations that pay a loss before this policy pays. It includes renewal and replacement policies.

The policy contains the following exclusion:

[1] Leben's appellate brief devotes less than one page to this argument, and contains no citation to authority. RULE 809.19(1)(e), STATS. Respondent's brief also cites to no authority on this issue.

> 8. any **personal injury** or **property damage** arising out of **business** pursuits of any **insured** or the rental of any part of any premises by any **insured**.

As the above analysis indicates, coverage under this policy is similarly not available because of the "business pursuit" and rental exclusions. The excess policy, however, contains an exception to the exclusion for the following:

> h. the regular rental or holding for rental of any one to two-family dwelling of yours for the exclusive use as a residence, insured by your **primary insurance policy**.

Leben claims that 937 North 14th Street falls under this savings clause. Leben's position is untenable considering the unambiguous language of the provision. The 14th Street premises was not a "one to two-family dwelling," but rather a "Rooming House, Type I" as defined by City of Milwaukee ordinances. The 14th Street premises was a student boarding house and not "for the exclusive use as a residence." And finally, Leben's primary policy did not cover 937 North 14th Street as an "insured location." We, therefore, conclude that the savings clause does not affect the "business pursuit" and rental exclusions.

Because of the unambiguous language of the policies, Aetna was not required to defend Leben in this suit. Accordingly, the order of the trial court is affirmed.

By the Court.—Order affirmed.

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