COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 02-2062
02-2984

Cir. Ct. No. 01-CV-55

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

JAMES R. SCHOFIELD,

PLAINTIFF-APPELLANT,

V.

RAYMOND E. SMITH AND SOCIETY INSURANCE, A MUTUAL COMPANY,

DEFENDANTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Clark County: DUANE H. POLIVKA, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 ROGGENSACK, J. James Schofield was injured when Raymond Smith's gun discharged as he was unloading it in anticipation of placing it in Schofield's van. Schofield and Smith appeal summary judgment granted to American Family Mutual Insurance on its denial of coverage under Smith's auto liability policies and to Society Insurance on its denial of coverage under Smith's businessowners policy. We conclude that the act of loading a gun into a vehicle includes the preparatory act of removing ammunition from it, and as such, it constitutes a "use" of a vehicle. Therefore, there is potential coverage for Smith's injuries under the auto policies. However, because we conclude that Smith was not engaged in the "conduct of a business" when he joined Schofield in deer hunting, the businessowners policy does not provide coverage for Schofield's injuries. Accordingly, we reverse the circuit court's summary judgment in regard to American Family and affirm in regard to Society Insurance.

BACKGROUND

¶2 Raymond Smith and his wife, Emily Smith, are the sole proprietors of the Glass House Tavern where James Schofield was a frequent customer. Schofield spent three hours most evenings at the bar, talking to other patrons and occasionally buying a round of drinks. During one of his trips to the bar, Schofield invited Smith to go deer hunting with him, and Smith accepted the invitation. Smith met Schofield at his property where he entered Schofield's van that was parked in a field to wait for deer. Approximately an hour later, deer were spotted; the hunters exited the van; and Schofield shot a deer. Smith and Schofield returned to the van to unload their guns prior to placing them in the van and returning to get the deer. Regarding the accident, Smith explained, "I had the van door open and it was snowing out so I was trying to catch the bullets in my

hand out of the bottom clip. I opened the bottom clip and it swung down and in the process the gun discharged." Schofield was shot in the right shoulder.

¶3 In his complaint against Smith, Schofield alleged that he was injured as a result of a deer hunting accident caused by Smith's negligence. The amended complaint alleged that Smith's negligence "arose out of the conduct of [Smith's] business, The Glass House." Smith tendered his defense to Society under a businessowners policy that insured the Glass House Tavern. The policy defines the insured as "you and your spouse … but only with respect to the conduct of a business of which you are the sole owner." Society intervened as an additional defendant; moved to bifurcate the issue of liability from the issue of coverage; and moved for summary judgment, declaring that the policy did not provide coverage.

¶4 Smith's affidavit in opposition to summary judgment alleged that his tavern business was a "hospitality" business where his "goodwill" activities went beyond the premises for a valued customer. Smith stated that Schofield was a valued customer and as such, Smith treated him with "expressed and recognized goodwill and friendship." Therefore, when Schofield requested that Smith join him deer hunting, Smith agreed for the sole reason that the activity would promote and protect his tavern business. In short, Smith's deer hunting was a "goodwill" activity with Schofield, a friend and valued customer, that he claims constituted part of the conduct of his business.[1]

[1] Although Society submitted a statement by Smith that would contradict these assertions, because we are reviewing summary judgment, we accept Smith's statements set forth above for purposes of this decision.

¶5 Smith also had two automobile liability policies issued by American Family that provided coverage for bodily injury due to the use of an automobile. Therefore, Schofield moved to join American Family as a defendant, alleging that the policies provided coverage to Smith because Schofield's injury arose out of the use of a vehicle. Smith tendered his defense to American Family, and American Family moved for summary judgment, contending that the policies did not provide coverage.

¶6 Schofield's and Smith's deposition testimony asserted the following undisputed facts. Both Schofield and Smith exited the van with the intent to shoot the deer. Schofield shot a deer. The hunters returned to the van with the intent to unload their guns and place them back in the van prior to bringing in the deer Schofield shot. The accident occurred while Smith was in the process of unloading ammunition from his gun in anticipation of placing it in the van.

¶7 In response to the pending summary judgment motions, the court first granted Society summary judgment, concluding, "the hunting activity by Smith had nothing to do with the conduct of the tavern business." Accordingly, the court concluded that Smith was not an insured within the businessowners policy definition. Subsequently, the court granted American Family summary judgment, reasoning, "there is a difference between loading and unloading a vehicle and loading and unloading a gun while standing near a vehicle." Accordingly, the court concluded that Schofield's injuries were not "due to the use" of a vehicle. Smith appeals the circuit court's grant of summary judgment to

Society and Schofield appeals the court's grant of summary judgment to American Family.[2]

DISCUSSION

Standard of Review.

¶8 We review summary judgment decisions *de novo*, applying the same standards employed by the circuit court. ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 210, 588 N.W.2d 375, 376 (Ct. App. 1998). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***

¶9 The resolution of this case requires interpretation of insurance policies to determine if potential coverage exists, causing the insurers to be subject to a duty to defend. The interpretation of an insurance policy is also a question of law that we review *de novo*. ***Guenther***, 223 Wis. 2d at 210, 588 N.W.2d at 377.

[2] We consolidated these cases for purposes of appeal.

Auto Liability Policies.

¶10 Schofield argues that Smith's American Family automobile liability policies provide coverage for his injuries because the hunting accident arose out of the use of an automobile. The policies contain identical provisions that provide coverage for "**bodily injury** and **property damage** due to the **use** of a **car** or **utility trailer**." It is not contested that the term "car" as defined in the policy includes Schofield's van.[3] The relevant inquiry therefore is whether the discharge of Smith's gun while preparing to load it into the van constitutes a "use" of the vehicle under the policies.

¶11 American Family's coverage of injuries "due to the use" of the insured vehicle has been interpreted the same as policies providing coverage of injuries "arising out of the use" of an insured vehicle. ***Kemp v. Feltz***, 174 Wis. 2d

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[3] The policy provides in relevant part:

> **PART I—LIABILITY COVERAGE**
>
> **We** will pay compensatory damages an **insured person** is legally liable for because of **bodily injury** and **property damage** due to the **use** of a **car** or **utility trailer**.
>
> …
>
> **DEFINITIONS USED THOUGHOUT THIS POLICY**
>
> 3. **Car** means **your insured car**, a **private passenger car**, and a **utility car**.
>
> 10. **Utility Car** means:
>
> a. A **car** with a rated load capacity of 2,000 pounds or less, of the pickup, van, sedan delivery or panel truck type if not used in any business or occupation.

406, 411, 497 N.W.2d 751, 753 (Ct. App. 1993). The cases interpreting both policy phraseologies are therefore instructive. *See e.g.,* ***Allstate Ins. Co. v. Truck Ins. Exch.***, 63 Wis. 2d 148, 216 N.W.2d 205 (1974); ***Lawver v. Boling***, 71 Wis. 2d 408, 238 N.W.2d 514 (1976); ***Tomlin v. State Farm Mut. Auto. Liab. Ins. Co.***, 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

¶12 In ***Lawver***, the supreme court held that "the words 'arising out of' are very broad, general and comprehensive" and should be broadly construed in favor of coverage. ***Lawver***, 71 Wis. 2d at 415, 238 N.W.2d at 518; *see also* ***Tomlin***, 95 Wis. 2d at 225, 290 N.W.2d at 290-91. The ***Lawver*** court explained:

> They are commonly understood to mean originating from, growing out of, or flowing from, and require only that there be some causal relationship between the injury and the risk for which coverage is provided.… The issue is whether the vehicle's connection with the activities which gave rise to the injuries is sufficient to bring those general activities, and the negligence connected therewith, within the risk for which the parties to the contract reasonably contemplated there would be coverage.

Lawver, 71 Wis. 2d at 415-16, 238 N.W.2d at 518. The relevant test for coverage, therefore, is whether the "use" of the vehicle was sufficiently connected with the accident such that the risk was one for which the parties reasonably contemplated coverage. We resolve this question by determining whether the alleged "use" is one that is reasonably consistent with the inherent nature of the vehicle. ***Id.***

¶13 Wisconsin courts have consistently held that the use of a truck for hunting is reasonably consistent with the inherent nature of the vehicle. ***Thompson v. State Farm Mut. Auto Ins. Co.***, 161 Wis. 2d 450, 459, 468 N.W.2d 432, 435 (1991); ***Kemp***, 174 Wis. 2d at 412, 497 N.W.2d at 754. Additionally, in ***Allstate***, the Wisconsin Supreme Court held that a death resulting from the accidental discharge of a weapon as a passenger removed the weapon from a van

"arose out of the use" of the van. The court reasoned that the use of a van for hunting was reasonable and could be expected. ***Allstate***, 63 Wis. 2d at 158, 216 N.W.2d at 210. Therefore, using the van to transport rifles and ammunition to facilitate hunting was "a reasonable 'use' of this vehicle, and loading and unloading of such materials and equipment, which is a normal incident to such use, constitutes the 'use' of the vehicle." ***Id.*** The same reasoning applies here.

¶14 It is not disputed that the parties' hunting activities included the use of the van. Prior to shooting the deer, Smith and Schofield sat in the van to keep warm, talk and watch for deer. Consistent with ***Allstate***, Smith's loading of hunting materials and equipment, including his gun into the van, constitutes a use of the vehicle. *See* ***id.*** American Family argues that ***Allstate*** is distinguishable because unlike the hunter in ***Allstate***, Smith was not actually placing his gun into Schofield's van when it discharged. American Family maintains that, "the only connection to the van was the fact that Smith was fortuitously standing near it to eject his rifle's ammunition." In response, Schofield argues that loading a gun into a van includes the preparatory act of "ejecting the shells from the gun." Therefore, the discharge of the gun that caused Schofield's injuries arose out of the use of a vehicle. We agree with Schofield.

¶15 It is well established that "use" of a vehicle includes unloading and loading articles into it, absent specific provisions in the policy excluding such activities. ***Id.*** ("[L]oading and unloading … constitutes the 'use' of the vehicle in spite of the absence of any specific 'loading and unloading' clause from the policy."). The acts of loading or unloading involve a given range of activities that may include preparatory acts. *See* ***Komorowski v. Kozicki***, 45 Wis. 2d 95, 105, 172 N.W.2d 329, 333-34 (1969). Additionally, the supreme court has held that to find coverage based on loading or unloading an automobile, a person must be

actively engaged in loading or unloading and the negligent act must be a part of the loading or unloading activity. *See* ***Amery Motor Co. v. Corey***, 46 Wis. 2d 291, 297, 174 N.W.2d 540, 543 (1970).

¶16 According to Smith, "at the time of [the] incident … [he was] attempting to unload [his] gun and then put the gun back in the van." WISCONSIN STAT. § 167.31(2)(b) (2001-02) provides that "no person may place, possess or transport a firearm … in or on a vehicle, unless the firearm is unloaded." The statue defines "unloaded" to mean "[h]aving no shell or cartridge in the chamber of a firearm or in the magazine attached to a firearm." Section 167.31(1). Therefore, Smith's act of ejecting ammunition from his gun was a necessary precursor to loading his gun into the vehicle. The undisputed evidence demonstrates that Smith was actively engaged in the process of loading the van and that his act of removing the ammunition from his gun was part of the loading process. And finally, the weapon discharged while Smith was engaged in the loading activity. Accordingly, we conclude that Schofield's injuries occurred during the loading of the van and therefore, arose out the "use" of the van. We therefore reverse the circuit court's summary judgment as to potential coverage under the American Family policies.

Businessowners Policy.

¶17 Smith argues that his businessowners liability policy from Society provides coverage because the hunting accident occurred with respect to the conduct of his business. Society contends Smith was not an "insured" while deer hunting. The policy states in relevant part:

> **A. COVERAGES**
>
> **1. Business Liability.**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies.
>
> …
>
> **C. WHO IS AN INSURED**
>
> **1** If you are designated in the Declarations as:
>
> **a.** An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

Smith is designated on the declaration page and is the sole owner of the tavern. Therefore, the inquiry relevant to whether Smith's alleged negligence is covered under the policy is whether deer hunting is an activity "with respect to the conduct of a business."

¶18 Smith argues that the policy language "conduct of a business" is unambiguous and applies to *any* activity that is performed for the purpose of the business. Smith focuses on his alleged purpose for going deer hunting, rather than on the act of deer hunting, itself. He cites ***Rayburn v. MSI Insurance Co.***, 2001 WI App 9, ¶17, 240 Wis. 2d 745, 624 N.W.2d 878, for the proposition that "a sole proprietor may have a business purpose in providing the services of the business without compensation—for example, to build goodwill and thereby gain new customers." He asserts that he went deer hunting with Schofield for the sole purpose of promoting his business and building goodwill or, "to keep a customer happy." Therefore, he maintains that because his purpose for deer hunting was related to his business, *i.e.*, building goodwill, the hunting accident occurred with respect to the conduct of his business.

¶19 Society responds that the policy language is unambiguous, however, it applies only to the type of activities that comprise the business's activities and are also performed in furtherance of the business. Society asserts, "[a] person's internal intentions when he goes hunting do not control whether the activity is within the conduct of his tavern business." Because the parties argue for different constructions of the policy language, as an initial matter, we must determine whether the language is ambiguous under the circumstances presented here.

¶20 We construe the language of an insurance policy using rules of construction similar to those applied to other contracts. ***Vogel v. Russo,*** 2000 WI 85, ¶14, 236 Wis. 2d 504, 613 N.W.2d 177. If words or phrases in a policy are susceptible to more than one reasonable construction, they are ambiguous, ***Smith v. Atlantic Mutual Insurance Co.***, 155 Wis. 2d 808, 811, 456 N.W.2d 597, 598-99 (1990), and we will construe the policy as it would be interpreted by a reasonable insured. ***Holsum Foods v. Home Ins. Co.***, 162 Wis. 2d 563, 568-69, 469 N.W.2d 918, 920 (Ct. App. 1991). However, if the policy is not ambiguous, we will not rewrite it by construction to impose liability for a risk the insurer did not contemplate and for which it has not been paid. ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶10, 245 Wis. 2d 134, 628 N.W.2d 916.

¶21 We have previously interpreted the policy language "conduct of a business" in ***Society Insurance v. Linehan***, 2000 WI App 163, 238 Wis. 2d 359, 616 N.W.2d 918. In ***Linehan***, the business owner was a sole proprietor of a tavern. He owned a dog that served as the tavern's mascot and provided some security against burglary. The owner was sued when an employee let the dog out of the tavern and the dog attacked a child. The owner argued that he was an insured for the purpose of an employee's negligently letting the dog out because the phrase "conduct of a business" focused on his activities and the activities of his

employees, not the activity of the dog. We agreed. We concluded that "conduct of a business" must be interpreted based on the actions of the insured, and those actions are characterized either as "personal or business." ***Id.***, ¶¶ 13-14. In order for the business owner to be an insured under the policy's requirements, the activity that resulted in the injury must be a business activity, not a personal activity. ***Id.***, ¶15. Because the parties did not dispute that the owner's act of keeping the dog was a business activity, we concluded that the injury occurred with respect to the "conduct of the business." ***Id.***

¶22 In ***Rayburn,*** we explained ***Linehan*** and concluded that an insured is engaged in the conduct of his business when the activity is a business activity and is also performed for the purpose of the insured business. ***Rayburn***, 240 Wis. 2d 745, ¶16. In ***Rayburn***, the business owner was the sole proprietor of a construction business that built homes. We addressed whether the insured's activity of helping his father build a shed on the father's property constituted the conduct of the son's business. We concluded that although the activity was one engaged in by the business owner in his construction business, he was not acting "with respect to the conduct of his business" when he built the shed because "he did not do so for the purpose of his business; he did so for the personal reason of helping his father." ***Id.*** ***Rayburn*** instructs, therefore, that even when the activity is one normally performed in the business, in order to be engaged in "the conduct of a business," the activity also must be performed in furtherance of the business, not as a favor to a family member or friend.

¶23 Although we concluded in ***Linehan*** and again in ***Rayburn*** that the phrase "conduct of a business" was not ambiguous, we determine whether an ambiguity is present based on the context of the issues and facts before us. ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659. The same

phrase may be ambiguous in one case but not in another. ***Id.*** This case, unlike ***Linehan*** or ***Rayburn***, is concerned with an activity that is indisputably not part of the usual course of serving drinks and food at the Glass House Tavern. Instead, Smith argues he engaged in deer hunting to promote his business. The parties' dispute therefore centers on whether an insured's activity must be an activity performed in the usual course of the insured's business *and* performed in furtherance of the business to constitute "conduct of the business."

¶24 We agree with Smith that the sole proprietor of a tavern may have a business purpose in engaging in an activity to build goodwill, gain new customers or keep existing customers. However, the policy language states he is only an insured "with respect to conduct of a business." We have previously held that for coverage, the insured's activity that caused the injury must be one that he does in conducting his business. ***Linehan***, 238 Wis. 2d 359, ¶12. For example, a house builder "conducts his business" when he is engaged in an activity done during the course of his construction business; a tavern owner "conducts his business" when he is operating his tavern.

¶25 We are not persuaded that an activity totally unrelated to the business, but engaged in to further the business, constitutes an activity "with respect to the conduct of a business." To impose liability under a business liability policy, an insured must have reasonably expected coverage for the conduct that caused the injury. *See* ***Rayburn***, 240 Wis. 2d 745, ¶14. We fail to see how an insured could reasonably believe that going deer hunting is conducting a tavern's business. As we stated in ***Rayburn***, a business owner "may have a business purpose in providing *the services of the business* without compensation … to build

goodwill." ***Id.***, ¶17 (emphasis added). But Smith was not providing the services of a tavern when he went deer hunting.[4] Accordingly, we conclude that the policy language is not ambiguous because a reasonable insured would understand that one is engaged in an activity with respect to the conduct of a business when the activity that causes the injury is one the owner performs in the usual course of his business *and* it is engaged in for a business purpose.

¶26 Smith does not dispute that deer hunting is not an activity in which he engages in the usual course of his tavern business. Because his sole argument for coverage rests on his assertion that he agreed to join Schofield for the purpose of building "business goodwill," which we conclude is not sufficient to trigger liability, Smith was not an insured within Society's policy definition when he was deer hunting. Accordingly, we affirm the circuit court's grant of summary judgment to Society.

CONCLUSION

¶27 We conclude that the act of loading a gun into a vehicle includes the preparatory act of removing ammunition from it, and as such, it constitutes a "use" of a vehicle. Therefore, there is potential coverage for Smith's injuries under the auto policies. However, because we conclude that Smith was not engaged in the "conduct of a business" when he joined Schofield in deer hunting, the businessowners policy does not provide coverage for Schofield's injuries.

[4] We note that to adopt the dissent's position would expand coverage of the policy essentially without limit because no matter the activity chosen, if the business owner claims to have engaged in it to further his business it would be covered. We conclude this is not a reasonable reading of a policy purchased to cover the conduct of a business.

Accordingly, we reverse the circuit court's summary judgment in regard to American Family and affirm in regard to Society Insurance.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

¶28 LUNDSTEN, J. (*concurring in part; dissenting in part*). I agree with the majority's decision regarding the automobile policy, but disagree with its analysis and conclusions regarding the business owner's policy. Accordingly, I concur in part and, respectfully, dissent in part.

¶29 As I understand the majority's decision, it is not enough that business owners or employees act with a reasonable purpose furthering the insured's business for such action to fall under the policy phrase "conduct of a business." Rather, the activity must also be one that is *commonly* performed in the course of the type of business at issue—in the words of the majority, an activity performed "in the usual course" of such a business. Majority at ¶25. I disagree. The majority's construction of "conduct of a business" would leave businesses unprotected from claims arising out of activities that fall outside "usual" activities for the type of business at issue, but are plainly business activities nonetheless. In my view, the phrase "conduct of a business" can reasonably be read to encompass unusual or typically non-business activities, so long as the activities are engaged in for a business purpose as judged by a reasonableness standard.

¶30 I begin with the majority's misplaced reliance on ***Society Insurance v. Linehan***, 2000 WI App 163, 238 Wis. 2d 359, 616 N.W.2d 918, and ***Rayburn v. MSI Insurance Co.***, 2001 WI App 9, 240 Wis. 2d 745, 624 N.W.2d 878. Neither case provides support for the narrow construction the majority gives the phrase "conduct of a business."

¶31 In ***Linehan***, the question before the court was whether a business policy provided coverage for an injury inflicted by a dog that was the mascot for the insured's business, a tavern. An employee released the dog from the tavern and the dog injured a two-year-old child. The tavern owner's policy covered the "insureds, but only with respect to the conduct of a business." ***Linehan***, 238 Wis. 2d 359, ¶7. The insurance company conceded that keeping the dog as a mascot and, presumably, releasing the dog from the tavern building from time to time was "conduct of a business." ***Id.***, ¶¶2, 15.[5] It was also undisputed that the conduct of the dog when injuring the child was not "conduct of a business."

¶32 The dispute in ***Linehan*** was whether the word "conduct" within the phrase "conduct of a business" applied to the insured's conduct (keeping the dog) or the dog's conduct (injuring the child). *See* ***id.***, ¶¶9-10, 13, 15. We rejected the insurance company's argument that, for the incident to be covered, the dog "must have been furthering the conduct of the business when it attacked [the child]." ***Id.***, ¶9. We concluded that the term "conduct" unambiguously referred to the conduct of the insured tavern owner, not his dog. Since the insurance company conceded the insured's conduct with respect to the dog was covered, there was coverage under the policy. ***Id.***, ¶15.

¶33 Because there was no dispute in ***Linehan*** regarding which activities were or were not "conduct of a business," we had no occasion to address what *types* of activities constitute "conduct of a business." *See* ***id.***, ¶¶ 9-10, 13. I do

[5] ***Linehan*** refers to the insurance company as having conceded that keeping the dog "served a business purpose." ***Society Ins. v. Linehan***, 2000 WI App 163, ¶2, 238 Wis. 2d 359, 616 N.W.2d 918. It is clear from the context, however, that the insurance company was conceding that keeping the dog as a mascot was "conduct of a business" within the meaning of the policy.

not dispute the majority's assertion that in order to be "conduct of a business" the activity resulting "in the injury must be a business activity, not a personal activity." Majority at ¶21. However, ***Linehan*** does not shed light on what is "business" and what is "personal."[6]

¶34 The majority's reliance on ***Linehan*** is ironic. Keeping a potentially dangerous animal as a mascot is, I dare say, an unusual business activity, at least compared with engaging in social events with the business purpose of promoting good will and customer loyalty. If the facts of ***Linehan*** came before a court in the future, and the insurance company disputes whether keeping a dog as a mascot is "conduct of a business," the majority opinion in this case will provide strong support for the proposition that keeping as a mascot an animal that is capable of harming a child is an unusual business activity that does not constitute "conduct of a business."

¶35 The majority accurately describes ***Rayburn***, but that decision also lends no support to the majority's decision. In ***Rayburn***, the insured was a building contractor engaged in helping his father build a shed. During construction, a neighbor assisting in the project was injured. ***Rayburn***, 240 Wis. 2d 745, ¶2. The neighbor sued, and the issue we faced was coverage under the building contractor's business insurance policy. The question was whether an

[6] In ***Rayburn***, we attributed to ***Linehan*** reasoning not contained in that decision. In ***Rayburn*** we stated: "[Our] construction of the phrase [conduct of a business] is consistent with the distinction we made in ***Linehan*** between business and personal activities and with our focus there on the purpose of owning the dog. In ***Linehan***, the keeping of the dog, we concluded, constituted the conduct of the business because keeping the dog had a business purpose, not a personal purpose." ***Rayburn v. MSI Ins. Co.***, 2001 WI App 9, ¶15, 240 Wis. 2d 745, 624 N.W.2d 878. However, as explained above, in ***Linehan*** we did not discuss whether keeping the dog had a business or personal purpose because the business purpose was conceded by the insurance company.

activity that is typical of the insured's business activity must have a business *purpose* to qualify as "conduct of a business." ***Id.***, ¶¶13-16. We answered in the affirmative, stating:

> We conclude the language [conduct of a business] is not ambiguous on this point, because a reasonable person would understand that one is not engaged in the conduct of a business when the activity is not performed for the purpose of the business, even if the activity is one the insured ordinarily engages in as the sole owner of the business.

Id., ¶14.

¶36 Just as in ***Linehan***, we had no reason in ***Rayburn*** to address whether the *type* of activity at issue needed to be a type the owner normally performed in his business. We had no reason to address this topic because it was undisputed that the activity (building a shed) was one generally engaged in by the insured building contractor when conducting his business. ***Rayburn***, 240 Wis. 2d 745, ¶¶13-14.

¶37 To the extent ***Rayburn*** does apply here, it stands for the proposition that the insured's purpose matters. That is, although the insured in ***Rayburn*** was engaged in precisely the type of activity contemplated under the policy, the activity was not covered solely because the insured did not engage in it for a business purpose. Rather, his purpose was purely personal—he built the shed solely to help his father. ***Id.***, ¶16.[7]

[7] I readily admit that I was no more successful than the majority at finding helpful Wisconsin case law. In fact, my expanded search in other jurisdictions also failed to uncover a case resolving the question we face here. What I did discover was a line of cases addressing "business pursuits" exclusions to homeowners' policies. A standard provision in homeowners' policies excludes from coverage injuries caused by "business pursuits," with an exception to the (continued)

¶38 I conclude that the phrase "conduct of a business" is, at a minimum, ambiguous. Even assuming the majority's reading of the phrase is reasonable, the reading proposed by tavern owner Smith is also reasonable. When policy language is ambiguous because it is reasonably susceptible to more than one construction, the ambiguity is resolved in favor of coverage. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 221 Wis. 2d 800, 806, 586 N.W.2d 29 (Ct. App. 1998). The reasonable reading of the phrase "conduct of a business" that I would apply is that it covers social outings a business owner engages in that are reasonably calculated to promote his or her business.

¶39 The majority's holding is problematic because it excludes business activities when they are not the sort engaged in "in the usual course" of the type of business in question. As I understand this reasoning, it means that if a building materials supplier hosts a social event for his best customers, physical injury to customers during the event would never be covered by the supplier's business insurance because the supplier was not supplying building materials or otherwise

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exclusion for business pursuits that are "ordinarily incident to a non-business pursuit." Many of these cases called upon courts to determine what constitutes a "business pursuit" when the activity occurs in a non-business setting. Some of these courts conclude that a business purpose renders an otherwise social activity a business pursuit. *See, e.g.,* ***West Am. Ins. Co. v. California Mut. Ins. Co.***, 240 Cal. Rptr. 540 (Ct. App. 1987) (an employer who invited his employees to his home to drink, gamble, and relax was engaged in a business pursuit because the employer's motivation was to buoy employee relations); ***Curbee, Ltd. v. Rhubart***, 594 A.2d 733, 737 (Pa. Super. Ct. 1991) (appreciation luncheon held by business owner for employees is "unquestionably … a business pursuit"). Although in some of these cases, coverage under the homeowner's policy was ultimately found to exist because of the exception to the exclusion, *e.g.,* ***Curbee***, 594 A.2d at 736-37, the fact remains that social events with a business purpose were, in the first instance, held to be "business pursuits." *See also* ***Myrtil v. Hartford Fire Ins. Co.***, 510 F. Supp. 1198 (E.D. Pa. 1981) (party given by restaurant owner at rented home for employees and their guests and business-related persons and their guests was clearly engaged in a business pursuit; since exception for activities ordinarily incident to non-business pursuits is held to be ambiguous, the insured will be covered under her homeowner's policy as well as her business policy).

performing a "usual" task connected with supplying building materials. I fail to understand how the majority comes to the conclusion that reasonable business people would not think they are engaged in the "conduct of a business" when they finance and host a social event for their best customers. The very reasons such "social" events are held is to promote the sponsoring business, and the very reason some business people attend social events sponsored by others is, likewise, to promote their business. If business owners cannot be confident that their business insurance will cover such functions, they apparently must hope that their auto or homeowner policies will provide sufficient coverage, or else abandon participation in these functions.

¶40 It may be that the majority simply finds the particular social activity in this case (deer hunting at the invitation of a bar patron) too far removed from normal business-purpose socializing. But if that is the case, it is incumbent on the majority to avoid throwing the baby out with the bath water. I discern no viable definition of "conduct of a business" that both captures common and legitimate business social events, but plainly excludes what the majority apparently believes is too far removed from normal business-purpose socializing.

¶41 I emphasize my position that the subjective intention of a business owner does not dictate what is "conduct of a business." As explained in ***Rayburn***, "[w]e construe the words in an insurance contract as a reasonable person in the position of an insured would understand them." ***Rayburn***, 240 Wis. 2d 745, ¶8. If the asserted business purpose is not reasonable, a reasonable person in the position of the insured would not expect coverage under his or her business policy. Thus, a business owner might assert and subjectively believe that he took his UPS delivery person out for a steak dinner to promote the owner's hobby shop but, if no

reasonable business person would think such an activity, under the circumstances, would further a business purpose, there is no coverage.

¶42 Accordingly, I would deny summary judgment to the business insurance provider, Society Insurance. There is a factual dispute in this case as to whether tavern owner Raymond Smith's participation in the deer hunting outing was for the purpose of promoting his tavern business and whether he reasonably thought the activity would further his business interests.