

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 6, 2005**

Cornelia G. Clark  
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. 2005AP970**

**Cir. Ct. No. 2004CV229**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**MT. HARDCRABBLE, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**T.H.E. INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Barron County:  
JAMES C. BABLER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mt. Hardscrabble, Inc., appeals an order dismissing its declaratory judgment action against T.H.E. Insurance Company. Mt. Hardscrabble contends the circuit court erred when it concluded there was no coverage under the T.H.E. policy. It argues the policy either unambiguously

provides coverage for its loss or the policy is ambiguous and must be construed in favor of coverage. We conclude the policy is unambiguous and does not provide coverage. Therefore, we affirm the order.

## BACKGROUND

¶2 Mt. Hardscrabble operated a ski hill, chalet and banquet hall.<sup>1</sup> On June 23, 2003, lightning struck a radio tower at the top of the ski hill. The lightning strike caused a fire in an outdoor electrical service panel located between the banquet hall and the pump house at the bottom of the hill. The fire destroyed the pump house and its contents, which were used to make snow on areas of the hill that had little or no snow.<sup>2</sup> Mt. Hardscrabble ceased operations after the June 23, 2003 incident.

¶3 At the time of the fire, Mt. Hardscrabble was insured by a T.H.E. commercial insurance policy. In accordance with that policy, T.H.E. compensated Mt. Hardscrabble for the physical damage to the electrical panel. Mt. Hardscrabble also made a claim under the loss of business income coverage of the policy due to the snowmaking equipment's destruction. T.H.E. denied coverage for that claim.

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<sup>1</sup> Mt. Hardscrabble asserts in its brief that it ran a "restaurant-bar." The T.H.E. insurance policy at issue in this appeal covered a building described as a "banquethall/restaurant/bar." For simplicity, we refer to this building as the banquet hall throughout this opinion.

<sup>2</sup> Mt. Hardscrabble submitted no affidavits or other evidence to support its claimed loss to the pump house and its contents. Indeed, the record is largely devoid of facts. However, because we conclude as a matter of law that the T.H.E. policy does not provide coverage, we need not resolve the factual disputes between the parties. The background section of this opinion contains the facts as alleged by Mt. Hardscrabble.

¶4 On May 26, 2004, Mt. Hardscrabble commenced this action. It sought, among other things, a declaration that the T.H.E. policy provided coverage for its loss of business income as a result of the lightning strike. The circuit court concluded Mt. Hardscrabble's loss did not occur to a described premises as defined by the policy, nor did the snowmaking equipment qualify under the "Alteration and New Building" section of the policy. Accordingly, it found there was no coverage under the T.H.E. policy and dismissed Mt. Hardscrabble's complaint.

#### STANDARD OF REVIEW

¶5 The sole issue on appeal involves the interpretation of an insurance policy, a question of law that we review independently. *Folkman v. Quamme*, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. We construe insurance policies to give effect to the intent of the parties as expressed in the language of the policy. *Id.*, ¶16. In doing so, we give the words in the policy their common and ordinary meaning, as a reasonable person in the position of the insured would understand them. *Id.*, ¶17.

¶6 "Where the language of the policy is plain and unambiguous, we enforce it as written ...." *Danbeck v. American Fam. Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. Policy language is ambiguous if, when read in context, it is reasonably or fairly susceptible to more than one interpretation. *Garriguenc v. Love*, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975). We construe ambiguous language in favor of coverage. *Danbeck*, 245 Wis. 2d 186, ¶10.

## DISCUSSION

¶7 The lost business income portion of the T.H.E. policy provides, in relevant part:

We will pay for the actual loss of Business Income you sustain due to the necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by *direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.* (Emphasis added.)

The parties agree that the only “described premises” to which business income loss coverage applies is the banquet hall.

¶8 However, Mt. Hardscrabble contends the “Additional Coverages” section of the policy provides coverage. Specifically, Mt. Hardscrabble relies on the italicized language below:

### c. Alterations And New Buildings

We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss to:

(1) New buildings or structures, whether complete or under construction;

(2) Alterations or additions to existing buildings or structures; and

(3) *Machinery, equipment, supplies* or building materials *located on or within 100 feet of the described premises* and:

(a) *Used in the construction, alterations or additions;* or

(b) Incidental to the occupancy of new buildings. (Emphasis added.)

Mt. Hardscrabble contends the damaged snowmaking equipment was located within 100 feet of the banquet hall. It also argues the equipment was used in “alterations” and “additions” because it was used to add snow to the ski hill. Therefore, it concludes, the plain language of (3)(a) provides coverage.

¶9 Mt. Hardscrabble’s interpretation of the policy language is flawed in two respects. First, Mt. Hardscrabble ignores the introductory language: “We will pay for the actual loss of Business Income you sustain due to direct physical loss or damage *at the described premises* ....” (Emphasis added.) Mt. Hardscrabble concedes that the only “described premises” is the banquet hall. The snowmaking equipment was located in the pump house, not the banquet hall.

¶10 Second, Mt. Hardscrabble misconstrues “[u]sed in the construction, alterations or additions” as that language is used in (3)(a). Mt. Hardscrabble contends coverage is triggered by damage to equipment used for any alterations or additions to the ski hill. However, (3)(a) refers to equipment used in *the* alterations or additions, not *any* alterations or additions. The “Alterations and New Buildings” section consists of a single sentence. When that sentence is read as a whole, the only reasonable interpretation is that (3)(a) refers back to the “construction,” “alterations” and “additions” mentioned in (1) and (2). Thus, coverage is triggered by damage to alterations and additions to existing buildings or structures or to machinery used to make those alterations and additions. Because Mt. Hardscrabble’s snowmaking equipment was not used to add to or alter any existing building or structure, the policy does not provide coverage for its loss.

¶11 Alternatively, Mt. Hardscrabble argues that, even if the plain language of the policy does not provide coverage, it has offered a reasonable

interpretation of the policy language. Therefore, it contends, the policy is ambiguous and must be construed in favor of coverage. However, we have concluded that there is only one reasonable interpretation of the policy language. Accordingly, the policy is unambiguous and does not provide coverage for Mt. Hardscrabble's loss.

*By the Court.*—Order affirmed.

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

