

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2006

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. 2005AP2610

Cir. Ct. No. 2004CV370

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SHARON L. BERGSTROM,

PLAINTIFF-APPELLANT,

V.

CHARLES BAKER,

DEFENDANT-RESPONDENT,

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from a judgment of the circuit court for Douglas County:
MICHAEL T. LUCCI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Sharon Bergstrom appeals a declaratory judgment denying insurance coverage for injuries she sustained while a resident of the Baker

House. She argues that her injuries are covered under a Prudential homeowners policy issued to Charles Baker, the owner of the house, and that Prudential's summary judgment motion was not timely filed. Because the "business pursuits" exception in Baker's policy excludes coverage for Bergstrom's injuries, and because Prudential's motion was in fact timely filed, we affirm the judgment.

BACKGROUND

¶2 For purposes of summary judgment, we accept the following facts as true. Charles Baker operates an assisted living home called the Baker House. The House is his home, and he uses it to provide assisted living services to one or two residents at a time. Assisted living services at the Baker House include around-the-clock care, meals, laundry, and transportation. For his services, Baker is paid approximately \$1,800 per month per resident, of which about \$1,250 is for assisted living services and the remainder is for rent.

¶3 Sharon Bergstrom became a resident at the Baker House on June 1, 2004. On July 13, 2004, she was injured while watching President George W. Bush's airplane from the backyard of the Baker House.¹ While she was looking up, Baker's dog wrapped its leash around her legs, causing her to fall. At the time, Baker was covered by a homeowners insurance policy issued by Prudential.

¶4 Bergstrom filed suit, alleging two claims against Baker. Prudential moved to intervene, and its motion was granted.² After discovery, Prudential

¹ President Bush apparently made a campaign stop in Duluth that day.

² No order granting Prudential's motion is in the record; however, Prudential appears on the caption of the February 25, 2005 hearing and was treated as an intervening party from that point forward.

moved for summary judgment, arguing that the “business pursuits” exclusion in its policy excluded coverage for Bergstrom’s injuries. Prudential’s motion was served on the parties on July 15, 2005, the last day permitted under the court’s scheduling order, and its notice of motion was sent to the parties about a week later. The circuit court granted Prudential’s motion and entered a declaratory judgment of no coverage for Bergstrom’s injuries.

STANDARD OF REVIEW

¶5 This court reviews a circuit court’s grant of summary judgment independently of the circuit court, benefiting from its analysis. *Vandenberg v. Continental Ins. Co.*, 2001 WI 85, ¶6, 244 Wis. 2d 802, 628 N.W.2d 876. Summary judgment is proper when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2)³; *Vandenberg*, 244 Wis. 2d 802, ¶6. The meaning of statutes and insurance contracts is a question of law, which we review without deference to the circuit court but benefiting from its analysis. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65; *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999).

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

I. Coverage

¶6 An insurance policy is to be construed as it would be understood by a reasonable person in the position of the insured. *Bertler v. Employers Ins. of Wausau*, 86 Wis. 2d 13, 17-18, 271 N.W.2d 603 (1978). When ambiguities in the contract exist, the contract is construed against the insurer. However, when no ambiguity exists, the contract will not be construed to bind an insurer to a risk it did not contemplate and for which it did not receive a premium. *Id.*

¶7 Here, Prudential’s policy excludes coverage for injuries arising out of **business** pursuits of any **insured** including duties that are normally, periodically or even seldom associated with the **insured’s** profession, trade or occupation, or full or part-time activity conducted for economic gain[.] (Emphasis in original.)

“Business” is defined in the policy as:

a. any full or part-time activity of any kind engaged in for economic gain or the use of any part of any premises for such purposes. The providing of home day care services to other than an **insured** or relative of an **insured**, for economic gain or other compensation is also a **business**. ...
or

b. any property rented or held for rental by an **insured**. Rental of **your residence premises** is not considered a **business** when:

....

(2) a portion is rented to not more than two roomers, roommates or boarders[.] (Emphasis in original.)

¶8 Bergstrom concedes that Baker’s operation of the Baker House was an “activity ... engaged in for economic gain” and that her injuries “arise out of”

his operation of the House. She contends that even so, the exclusion does not apply to her because (1) Baker's activities were a permissible rental under the policy; and (2) Baker's activities are "usual to non-business pursuits" as defined in *See Vandenberg*, 244 Wis. 2d 802.

¶9 Bergstrom's first contention is based on the definition of "business" in the policy. That definition allowed Baker to rent "to not more than two roomers, roommates or boarders" and still be covered under the policy. She argues that she was no more than a boarder at the Baker House.

¶10 A boarder is a person "provided with regular meals or regular meals and lodging." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 244 (unabr. 1993).⁴ Baker testified that the Baker House provided significantly more than "regular meals and lodging." According to Baker, he provided services twenty-four hours a day, seven days a week. Those services included laundry and transportation as well as room and board. In addition, about \$1,250 of the total \$1,800 paid each month on Bergstrom's behalf was payment for services other than rent. Bergstrom does not point to any evidence in the record disputing Baker's characterization of the services he performed.⁵ Based on Baker's unrefuted testimony, we conclude that a reasonable person could not interpret the policy to mean that Baker House residents were merely boarders.

⁴ No definition of "boarder" appears in the policy. We therefore rely on the dictionary definition to determine the word's common and ordinary meaning. *See State v. Denis L.R.*, 2005 WI 110, ¶40, 283 Wis. 2d 358, 699 N.W.2d 154.

⁵ In her brief to the circuit court, Bergstrom argued that her deposition testimony created a dispute over whether she was a boarder. In her deposition, she testified that she was not aware of any services Baker provided other than room and board. She does not renew that argument on appeal, and it is therefore deemed abandoned. *See Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 307, 306 N.W.2d 292 (Ct. App. 1981).

¶11 Second, Bergstrom argues that her injuries did not arise out of Baker's business pursuits because they were "usual to non-business pursuits" as defined in *Vandenberg*. She argues that activities "usual to non-business pursuits" can never arise out of business pursuits.

¶12 This argument is directly contrary to *Vandenberg*. *Vandenberg* dealt with the scope of certain policy language that "restore[d] coverage to some activities that *admittedly arise out of the insured's business pursuits.*" *Vandenberg*, 244 Wis. 2d 802, ¶33 (emphasis added; quotation omitted). The activities there were excluded by the business pursuits exclusion. However, the policy contained an exception to the exclusion that restored coverage to activities "usual to non-business pursuits." That exception is not present in Baker's Prudential policy, making whether Bergstrom's injuries were "usual to non-business pursuits" irrelevant. We therefore conclude Bergstrom's injuries are subject to the "business pursuits" exclusion in Baker's policy.

II. The timing of Prudential's motion

¶13 Bergstrom also argues that Prudential's summary judgment motion was not timely filed. She relies on WIS. STAT. § 802.01(2)(a):

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

¶14 Bergstrom argues that only a notice of motion satisfies the writing requirement, and that Prudential's motion was not timely because its notice of motion was filed after the court's deadline for dispositive motions had passed. Bergstrom misreads the statute.

¶15 Nothing in WIS. STAT. § 802.01(2)(a) provides that a notice is the exclusive method for fulfilling the writing requirement. The rule that the writing requirement “is fulfilled” by a proper notice merely allows the parties to use either a motion or a proper notice of motion as their written pleading. Prudential’s July 15 motion was a motion as defined in § 802.01(2)(a). Prudential therefore served its motion in compliance with the court’s scheduling order.

By the Court.—Judgment affirmed.

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

