

NOTICE  
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2016 IL App (5th) 140499-U

NO. 5-14-0499

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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WEST BEND MUTUAL INSURANCE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 10-MR-56
	)	
RANDOLPH COUNTY FAIR,	)	
	)	
Defendant	)	
	)	Honorable
(Raymond W. Hubert, Intervening	)	Richard A. Brown,
Defendant-Appellant).	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justices Goldenhersh and Cates concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Due to ambiguity in the insurance policy, the policy is be construed strictly against the insurer who drafted the policy and liberally in favor of coverage for the insured.
- ¶ 2 The defendant-intervenor, Raymond Hubert, appeals the circuit court's order finding he was actively participating in a sports event at the time he was injured, and as such, his claim for injuries was excluded from the plaintiff's, West Bend Mutual Insurance's (West Bend), policy coverage. For the reasons which follow, we reverse.

¶ 3 The facts necessary to the disposition of this appeal are as follows. Randolph County Fair, Inc. (Randolph County),<sup>1</sup> a non-for-profit corporation, was engaged in the business of planning and hosting events in Randolph County, Illinois. One event in particular was a "mud bog" racing event where volunteers would dig a trench, fill the trench with water, and schedule pickup trucks and other four-wheel-drive vehicles to race through the mud pit. The driver who traveled the fastest or farthest through the mud bog was determined as the winner.

¶ 4 On July 16, 2009, during and immediately prior to the injury, Hubert was assisting in pulling vehicles out of the mud by attaching and detaching a cable to a tractor located on the event track. At approximately 7 p.m., Hubert was detaching a cable from a vehicle when the cable struck his legs, causing him to fall to the ground and allegedly suffer injuries.

¶ 5 On May 7, 2010, following this incident, Hubert filed a two-count complaint against Randolph County, alleging negligence and premise liability pertaining to his injuries, and seeking \$50,000 in damages. Shortly thereafter, Randolph County sought coverage, including defense, under its commercial general liability policy with West Bend.

¶ 6 On or about June 17, 2010, West Bend filed a complaint for declaratory judgment seeking declarations that it was not required to provide coverage, including defense and

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<sup>1</sup>Randolph County Fair, Inc., although a co-party before the circuit court, is not a party to this appeal.

indemnity, to Randolph County, pursuant to the insurance policy's exclusions. In support, West Bend argued that the mud bog racing event was a "sports or athletic contest or exhibition" and that any claimed injuries or damages sustained by Hubert, a "participant" of the event, were excluded from coverage under the insurance policy's exclusionary clause, stated herein:

"With respect to [any and all operations], this insurance does not apply to 'bodily injury' to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor."

¶ 7 On June 18, 2010, Randolph County filed a lawsuit against West Bend seeking declaratory judgment for coverage under the commercial general liability policy for Hubert's sustained injuries.

¶ 8 On July 7, 2010, Hubert filed a petition to intervene as a necessary party to the initiated action between Randolph County and West Bend, wherein West Bend sought to limit Randolph County's coverage regarding Hubert's alleged injuries. On July 7, 2010, the circuit court granted Hubert's motion and he was added as a defendant.

¶ 9 On August 16, 2010, Hubert sought summary judgment, arguing the phrases "participating in" and "sports or athletic contest or exhibition" were ambiguous within the insurance policy and should be construed in favor of Hubert and against the insurer, West Bend, as there was no genuine issue of material fact as to all claims in the action.

¶ 10 On September 9, 2010, West Bend filed a motion for summary judgment, claiming it had no duty to defend Randolph County due to the insurance policy's exclusionary clause. West Bend asserted that the exclusionary endorsement at issue did not contain

overly technical words or phrases, and that the plain and ordinary meanings of the phrases "participating in" and "sports or athletic contest or exhibition" included the mud bog event. West Bend asserted that every dictionary definition of the term "to take part" in something was to "participate" in it. Likewise, West Bend argued that the plain and ordinary meaning, as provided by the standard dictionary definition, of the phrase "sports or athletic contest or exhibition" would include the mud bog racing event.

¶ 11 On March 8, 2011, the circuit court heard proceedings regarding whether or not "participating in" and "any sports or athletic contest or exhibition" were ambiguous as stated within the insurance policy. On March 10, 2011, the court denied both Hubert's August 16, 2010, and West Bend's September 9, 2010, motions for summary judgment.

¶ 12 On February 14, 2012, West Bend requested that the circuit court grant a stay pertaining to the action filed by Hubert against Randolph County, cause No. 10-L-11, pending resolution of any potential appeal in the underlying case. On February 16, 2012, the court granted West Bend's motion for stay pending resolution of any potential appeal.

¶ 13 On September 19, 2014, the circuit court held a bench trial. At this time, Hubert argued that three groups of individuals were involved in a mud bog event—participants, those individuals who competed in the event to win a financial prize; volunteers, those who worked the event; and the spectators. West Bend argued that Hubert was essential to the continuation of the race by the nature of his actions and was clearly participating in the sporting event. Moreover, West Bend relied on the standard dictionary definitions for both phrases in question, arguing that Hubert was clearly a participant, as he took part by actively assisting in the mud bog racing event, which constituted a sports event.

¶ 14 On September 23, 2014, the circuit court ruled that the mud bog event held by Randolph County on July 16, 2009, was a sports contest and that Hubert was an active participant in the event. The court rationalized that without "Hubert's role in fastening a cable to the truck stuck in the mud pit so that it could be pulled off the race course, the racing event would stop as the raceway would be blocked. His actions show that he was participating in a sports event at the time he was injured and his claim is excluded from plaintiff's insurance coverage." On October 3, 2014, Hubert filed a timely notice of appeal.

¶ 15 The sole issue before this court is to determine whether the phrase "participating in" is ambiguous within West Bend's insurance policy. An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). On this issue, our review proceeds *de novo*. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 174 (2008). The primary objective of the court is to determine and give effect to the intent of the parties as expressed in the language of the policy. *Hobbs*, 214 Ill. 2d at 17. On review, the court is to assume that every provision in the contract serves a purpose. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). The policy is to be construed as a whole, taking into account the type of insurance provided, the nature of the risks involved, and the overall purpose served by the contract. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). An insurance policy's exclusions are to be read narrowly and

applied only where the terms are clear, definite, and specific. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393 (2005).

¶ 16 "If the policy language is unambiguous, the policy will be applied as written, unless it contravenes public policy." *Hobbs*, 214 Ill. 2d at 17. Conversely, if the language of the policy is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and liberally in favor of coverage for the insured. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.*, 223 Ill. 2d 407, 417 (2006); *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 293 (2001). "This is because the words used in the policy were chosen by the insurer." *Maka v. Illinois Farmers Insurance Co.*, 332 Ill. App. 3d 447, 451 (2002). Likewise, "provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer." *Koloms*, 177 Ill. 2d at 479.

¶ 17 The pertinent question in the underlying action is whether Hubert qualifies as a participant under the terms of the insurance policy. Under Illinois law, no case law defines "participant" for this court to follow. Under West Bend's commercial general liability coverage, an exclusion provision for athletic or sports participants provides as follows:

"[T]his insurance does not apply to 'bodily injury' to *any person* while practicing for or *participating in* any sports or athletic contest or exhibition that you sponsor." (Emphasis added.)

¶ 18 If an insurance policy does not define a particular term, a court should afford the term its plain and ordinary meaning. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 115 (1992). Dictionaries provide several definitions for the term "participate," including the following: to take part, to have a part or share in something, to be involved with others in doing something, to take part in an activity or event with others, to be active or involved in something, to share in something. See Merriam-Webster's Collegiate Dictionary (10th ed. 1993); Merriam-Webster's Collegiate Dictionary online; The American Heritage Dictionary of the English Language 2013 (3d ed. 1992). On appeal, West Bend relies heavily on the definition "to take part" in affording "participate" its plain and ordinary meaning.

¶ 19 Hubert argues that to follow West Bend's dictionary definition of "participate" would essentially include anyone on the fairgrounds, even spectators and ticket sellers, as these individuals are technically taking part in the event. West Bend argues that the plain and ordinary meaning of "participate" includes anyone actively taking part in the operation of the racing event, no matter their role. Therefore, West Bend contends that participating in the event cannot be limited to only those individuals racing and driving vehicles, because the policy exclusion is not limited only to drivers. As a result, under West Bend's interpretation, anyone taking part in the actual racing event, in any way, no matter what their role, not just the competitors, would be excluded from coverage.

¶ 20 Following a review, our court concludes that the insurance policy's language "participating in" is clearly ambiguous as it is reasonably susceptible to more than one meaning within the context in which it appears. First, Hubert's interpretation essentially

excludes from coverage all individuals on the fairgrounds, including ticket sellers and spectators; whereas, West Bend's interpretation includes all individuals physically taking part in the racing event. We find it important to note that the language following "participating in" is clearly limited to physical action in a sports or athletic event. Thus, it is not clear who constitutes a participant and how far the exclusion actually extends. Does the language pertain only to participants driving a vehicle or to all individuals within the mud pit and on the event track, such as Hubert, a volunteer? An ordinary interpretation of the policy's language implies that the policy's exclusion would pertain to those individuals actually driving the vehicles, given that the competitors clearly have increased risks associated with their actions for which they sign application forms and waivers and pay fees to participate. However, based on the language, we are unable to decipher who is in fact excluded from coverage, given that the phrase "participating in" is reasonably susceptible to more than one interpretation. In light of this uncertainty, we conclude that the circuit court did err in finding that the insurance policy contained "clear words" and was thus unambiguous.

¶ 21 Moreover, West Bend references Hubert's deposition testimony that he was in fact a participant; however, the record on appeal does not contain this transcript. Regardless, if taken as true, our court still finds that the language contained in the insurance policy is ambiguous, despite any such admission by Hubert. This is further bolstered by four individuals, including Randolph County Fair's president and three board members, who were at all times under the impression that volunteers, which included Hubert, were covered under any event hosted by Randolph County. We conclude that had West Bend



desired any and all individuals partaking in any sports event or athletic contest on the fairgrounds to be excluded under the policy, such a term could have easily been defined for clarification.

¶ 22 Consequently, it is apparent that neither party knows where the policy's coverage begins and where it ends. Thus, we find the phrase "participating in" is not sufficiently clear to avoid a finding that the term is ambiguous as it is currently written in the insurance policy. In Illinois, ambiguities and doubts in insurance policies are resolved in favor of the insured, especially those that appear in exclusionary clauses. *Outboard Marine Corp.*, 154 Ill. 2d at 121. Consequently, in this particular context, we construe the policy's language "participating in" in favor of Hubert, finding that a clear ambiguity exists. The order of the circuit court of Randolph County is hereby reversed. The action of Raymond Hubert v. Randolph County, cause No. 10-L-11, can hereby move forward.

¶ 23 Reversed.