COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1569

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

NOR-LAKE, INC., A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT,

V.

AETNA CASUALTY AND SURETY CO., ROYAL INSURANCE COMPANY OF AMERICA AND AMERICAN & FOREIGN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for St. Croix County: ERIC J. WAHL, Judge. *Affirmed.*

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

¶1 CANE, C.J. Nor-Lake, Inc., appeals from that part of an order granting declaratory judgment in favor of Travelers Casualty and Surety Company

(f/k/a Aetna Casualty and Surety Company).[1] Nor-Lake argues that the circuit court erred by concluding that costs Nor-Lake incurred, at the direction of the Wisconsin Department of Natural Resources (DNR), to repair and restore third-party properties are not "damages" within the meaning of its Travelers-issued Comprehensive General Liability (CGL) policy. Because prior case law holds that remediation costs of third-party properties that arise at the direction of the DNR, as opposed to resulting from a third-party claim, do not constitute "damages" within the meaning of the CGL policy, we affirm the order.

BACKGROUND

¶2 Beginning in 1965, Nor-Lake, a refrigeration and laboratory equipment manufacturer, used paints and solvents containing volatile organic compounds at its Hudson facility. In 1984, Nor-Lake tested for and discovered groundwater contamination at that facility, as well as at five nearby residential wells. After notifying the DNR,[2] it participated in remediation that included installing monitoring wells and an aeration system, sampling wells and extracting groundwater.

¶3 From 1976 to 1987, Nor-Lake contracted with a disposal service to dispose of its trash at what is commonly known as the Junker landfill. After

[1] Nor-Lake explains that due to settlement agreements with the other named insurance companies, its claims against Travelers are all that remain on appeal.

[2] Nor-Lake notified the DNR, as was required by WIS. STAT. § 144.76(2) (1983-84). Subsection (2)(a) provided: "A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the department immediately of any discharge …." Section 144.76 was subsequently renumbered in part and repealed in part by 1995 Act 227 §§ 700 to 711, eff. January 1, 1997.

groundwater contamination was discovered resulting from the Junker site, Nor-Lake participated in remediation to minimize potential liability. For the purposes of this appeal, it is undisputed that neither the DNR nor the third-party property owners initiated suit against Nor-Lake.[3]

¶4 Travelers issued Nor-Lake a CGL policy for the time periods in question. Nor-Lake filed a declaratory judgment action to obtain insurance benefits for any remediation costs it incurred at the behest of the DNR. The circuit court granted summary judgment in favor of the insurers based on our supreme court's decision in ***City of Edgerton v. General Cas. Co.***, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). Nor-Lake appealed.

¶5 In that appeal, Nor-Lake argued that ***Edgerton*** was not dispositive of all pollution coverage claims as a matter of law. Upon review of ***Edgerton***, this court recognized that it did not involve remediation of neighboring properties, but rather, precluded insurance coverage for remediation due only to contamination of the property the insured owned or occupied. We therefore concluded that although the circuit court properly determined that ***Edgerton*** precluded coverage for remediation expenses at Nor-Lake's facility, ***Edgerton*** did not, as a matter of law, preclude coverage for remediation expenses arising from injury to neighboring wells or landfills not owned or occupied by the insured. *See* ***Nor-Lake, Inc. v. Aetna Cas. & Surety Co. et al.***, No. 95-2012, unpublished slip op. at 9 (Wis. Ct. App. April 16, 1996). That judgment was consequently affirmed in

[3] Travelers' brief notes that Nor-Lake's third amended complaint sought a declaration that its insurers were obligated to defend and indemnify it in connection with three underlying private-party lawsuits. The effect of these third-party lawsuits is not, however, at issue before this court.

part, reversed in part and remanded for resolution of Nor-Lake's liability for damages to third-party property.

¶6 Petitions for review and cross-review were filed with our supreme court. The supreme court held the petitions in abeyance pending its decisions in ***General Cas. Co. v. Hills***, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), and ***WPS Corp. v. Heritage Mut. Ins. Co.***, 209 Wis. 2d 160, 561 N.W.2d 726 (1997). After deciding ***Hills*** and ***WPS***, the supreme court denied all petitions.

¶7 On remand to the circuit court, Nor-Lake's insurers sought declaratory judgment under WIS. STAT. § 806.04 to determine the extent of insurance coverage, if any, for Nor-Lake's remediation expenses. The circuit court, based on this court's decisions in two cases released after the remand, granted declaratory judgment in favor of the insurers. This appeal followed.[4]

ANALYSIS

¶8 This case involves the interpretation of an insurance contract, a question of law that this court determines de novo. *See* ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 635-36, 586 N.W.2d 863 (1998). The interpretation of an insurance contract is controlled by principles of contract construction. *See* ***Hills***, 209 Wis. 2d at 175. "The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties." ***Id***. To that end, "the language of an insurance policy should be interpreted to

[4] On July 8, 1999, this court granted Nor-Lake's petition for leave to appeal the interlocutory declaratory judgment.

mean what a reasonable person in the position of the insured would have understood the words to mean." ***Id***.

¶9 Here, the CGL policy at issue promised to pay on behalf of Nor-Lake "all sums which the insured shall become legally obligated to pay as damages because of … property damage." In ***Edgerton***, which involved identical policy language, our supreme court held that, "'damages' as used in … insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature. The term 'damages' does not encompass the cost of complying with an injunctive decree." ***Edgerton***, 184 Wis. 2d at 783. The ***Edgerton*** court noted that remediation and response costs assigned under CERCLA[5] and equivalent state statutes are, "by definition, considered to be equitable relief." ***Id***. at 784. The court further noted:

> [A]s an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of injunctive action, while providing for remediation and cleanup of the affected site. This type of relief is distinct from that which is substitutionary—monetary compensation provided to make up for a claimed loss.

Id. at 785. The ***Edgerton*** court consequently concluded that remediation and response costs did not constitute "damages" as that term was used in the CGL policy. As this court recognized in Nor-Lake's earlier appeal, ***Edgerton*** did not address a CGL policy's coverage where remediation of third-party properties was concerned. This specific issue was, however, addressed in two subsequent

[5] The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was designed to provide for the cleanup of hazardous waste. CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 and is codified at 42 U.S.C. §§ 9601-9675.

groundwater pollution cases: ***Amcast Industrial Corp. v. Affiliated FM Ins. Co.***, 221 Wis. 2d 145, 584 N.W.2d 218 (Ct. App. 1998) and ***Hydrite Chemical Co. v. Aetna Cas. & Surety Co.***, 220 Wis. 2d 26, 582 N.W.2d 423 (Ct. App. 1998).

¶10 In ***Amcast***, an aluminum die casting facility sought coverage under a CGL policy for costs associated with a DNR consent order requiring it to "investigate and remediate … contamination in the sediments, water and soil ... which emanated from the Amcast facility and coverage for remediation costs after its identification as a 'potentially responsible party' for contamination at a landfill." ***Amcast***, 221 Wis. 2d at 150-51. As in the instant case, the circuit court determined that ***Edgerton*** controlled and negated the coverage sought. *See* ***id***. at 150.

¶11 Amcast appealed the circuit court's decision and, consistent with Nor-Lake's argument in the present case, argued that ***Edgerton*** had no applicability to harmed property that was neither owned nor occupied by Amcast. *See* ***id***. This court concluded, however, that it was not ownership of the property that was dispositive; but rather, "the type of relief sought and the posture of the party seeking relief." ***Id***. at 160-61. The ***Amcast*** court concluded that regardless of the harmed property's ownership, where there is no third-party claim, remediation costs do not constitute "damages," as that term is defined by a CGL policy. *See* ***id***. at 161-62.

¶12 Similarly, in ***Hydrite***, the insured, seeking coverage under a CGL policy for remediation costs of third-party property, attempted to distinguish ***Edgerton*** based on the harmed property's ownership. *See* ***Hydrite***, 220 Wis. 2d at 38. The ***Hydrite*** court concluded that such a distinction was of marginal significance and focused on the fact that Hydrite's remediation costs were in

response to a governmental directive as opposed to a demand for compensatory, monetary relief from a non-government third party. *See* ***id***. at 40. Because Hydrite's remediation costs were not the result of any third-party claim, the court concluded that ***Edgerton*** precluded coverage for the remediation costs associated with even third-party property. *See* ***id***.

¶13 Here, as in ***Amcast*** and ***Hydrite***, Nor-Lake's remediation costs did not result from a third-party claim, but rather at the behest of the DNR. Consequently, under the holdings in ***Amcast*** and ***Hydrite***, Nor-Lake's remediation costs do not constitute "damages" as that term is defined under Travelers' CGL policy. Nor-Lake, nevertheless, contends that ***Amcast*** and ***Hydrite*** conflict with our supreme court's decisions in ***Hills*** and ***WPS***. Nor-Lake argues that ***Hills*** and ***WPS*** support its contention that remediation expenses of third-party properties are "damages" within the context of a CGL policy.

¶14 Unlike ***Amcast*** and ***Hydrite***, however, both ***Hills*** and ***WPS*** involved third-party claims. In ***Hills***, Donald Hills, the owner of Don's Standard, contracted with Arrowhead Refining Company to pick up waste from Don's Standard. *See* ***Hills***, 209 Wis. 2d at 171. Arrowhead transported and deposited the waste at its waste oil recycling business in Minnesota. *See* ***id***. The EPA later determined that Arrowhead's recycling activities had contaminated the Minnesota site. *See* ***id***. at 172. Thereafter, the United States filed suit in district court against Arrowhead and fourteen additional defendants, seeking declaratory relief and recovery of response costs. Arrowhead and other defendants then filed a third-party complaint against Hills and other parties seeking recovery for response costs associated with the site. Hills' insurer, General Casualty, sought a judgment

declaring that it had no duty to defend or indemnify Hills in the third-party action.[6] *See* ***id***. at 172-73. In a subsequent summary judgment motion, General Casualty argued that the third-party action sought recovery for response costs and, based on ***Edgerton***, was therefore not a suit seeking "damages." *See* ***id***. at 174.

¶15 The ***Hills*** court concluded that "in order to determine whether an action seeks 'damages,' we must consider the nature of the relief being sought—whether it is remedial, substitutionary relief that is intended to compensate for past wrongs, or preventive and focusing on future conduct." ***Id***. at 180. The court distinguished ***Hills*** from ***Edgerton***, noting that unlike ***Edgerton***, "neither the EPA nor DNR have requested or directed Hills to develop a remediation plan or incur remediation and response costs under CERCLA or an equivalent state statute." ***Id***. The court further noted that the contaminated property in ***Hills*** did not fit within the owned-property exclusion contained in the insurance policies. *See* ***id***. The court concluded that Arrowhead did not want Hills to take, or refrain from taking any action, but rather, sought substitutionary, monetary relief to compensate for the losses it might incur. *See* ***id***. at 181. The court further recognized that "regardless of the nature of the underlying claim made by the United States against Arrowhead, the fundamental remedy Arrowhead seeks from Hills is

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[6] Although General Casualty claimed it had no duty to defend or indemnify Hills, the court considered only General Casualty's duty to defend, concluding that the duty to indemnify issue would have to await resolution of Arrowhead's claim against Hills. The court noted:

> Policies of liability insurance impose two duties on the insurer with respect to the insured – the duty to indemnify and the duty to defend. … The duty to defend is broader than the duty to indemnify, because the duty to defend is triggered by arguable, as opposed to actual, coverage.

General Cas. Co. v. Hills, 209 Wis. 2d 167, 176 n.11, 561 N.W.2d 718 (1997) (internal citations omitted). ***Hills***' argued applicability to Nor-Lake's claim for indemnification is questionable on this distinction alone.

compensatory damages for the past injuries he allegedly inflicted on the Arrowhead site." ***Id***. at 182. As the ***Hydrite*** court noted, "of relevance in ***Hills*** [is] not whether the sums the insured sought *from the insurer* would be considered damages; rather, the focus [is] on whether the remedy sought *from the insured* would be considered damages." ***Hydrite***, 220 Wis. 2d at 37. The ***Hills*** court ultimately determined, consistent with ***Edgerton***, that Arrowhead sought "damages" from Hills as that word was contemplated in the insurance policy. *See* ***id***.

¶16 Similarly, in ***WPS***, WPS agreed to install gas service to a building owned by the Tomahawk School District and hired Helmreich Utility Construction, an independent contractor, to actually install the service. *See* ***WPS***, 209 Wis. 2d at 164. While installing the service, Helmreich cut an underground pipe, contaminating the surrounding soil with fuel oil. *See* ***id***. The DNR subsequently sent letters to Tomahawk and WPS, ordering them to investigate and remediate the property. *See* ***id***. WPS thereafter commenced a direct action against Helmreich's insurer, based upon a CGL policy it had issued to Helmreich. *See* ***id***. The insurer moved for summary judgment, claiming, in relevant part, that reimbursement for investigation and remediation costs did not constitute "damages" under the policy. *See* ***id***. at 164-65. The ***WPS*** court, consistent with its decision in ***Hills***, noted that "where parties other than the EPA or DNR seek recovery from an insurer for damages its insured allegedly inflicted through contamination on property that does not fit within an owned-property exclusion, the suit seeks 'damages' under an insurance policy." ***Id***. at 165. Therefore, ***Amcast*** and ***Hydrite*** are not contrary to our supreme court's decisions in either ***Hills*** or ***WPS***. Where, as here, there is no third-party claim, ***Amcast*** and ***Hydrite***

preclude coverage to Nor-Lake for the costs it incurs remediating neighboring properties.

¶17 Nor-Lake argues persuasively that the supreme court's discussion of damages in ***Hills*** and ***WPS*** should nevertheless apply to an insured's remediation costs of third-party property. However, even though we may disagree with the holdings in ***Amcast*** and ***Hydrite***, under ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), we may not overrule or modify a prior court of appeals published decision.

¶18 We must nevertheless point out that although Nor-Lake's remediation costs for neighboring properties arose at the direction of the DNR, "[i]t has long been the law of this state that the cost of repairing and restoring damaged property and water to its original condition is a proper measure of compensatory damages." ***Hills***, 209 Wis. 2d at 181. That Nor-Lake's costs arose from a DNR directive rather than a third-party claim is arguably immaterial, as the fact remains that Nor-Lake incurred costs restoring third-party properties harmed by Nor-Lake's alleged negligence. The ***Hills*** court, discussing the expectations of a reasonable insured, recognized that a CGL policy is designed to protect an insured against liability for negligent acts resulting in damage to third parties. *See* ***id***. at 183-84.

¶19 Further, as the ***Hydrite*** court recognized, "whether a remedy sought constitutes damages does not depend upon the form of the action, but upon the nature of the remedy sought." ***Id***. at 36 (citing ***Hills***, 209 Wis. 2d at 178.) The ***Hills*** court allowed coverage where Arrowhead sought substitutionary, monetary relief to compensate for past wrongs, rather than relief designed to prevent future harm. *See* ***id***. Here, Nor-Lake seeks indemnification for costs it incurred restoring

the third-party properties. If, for example, Nor-Lake had repaired the third-party property at the third party's demand, without a lawsuit, there appears to be no question that the repair costs would constitute damages within the meaning of the CGL policy. It is not unusual for insurance companies, in the absence of a lawsuit, to pay "damages" incurred because of their insured's action. It should not make any difference if the repairs to the third-party property are made at the direction of the DNR. Relief for such costs is compensatory, rather than equitable in nature, regardless of whether or not such costs result by virtue of DNR directive or third-party claim.

¶20 Again, however, we must follow the holdings in ***Amcast*** and ***Hydrite***. Therefore, under these holdings, coverage under the Travelers-issued CGL policy is precluded for the costs Nor-Lake incurs remediating third-party property. Because coverage is precluded, Nor-Lake's contention that a factual question remains regarding the costs it incurred remediating third-party property necessarily fails. We therefore affirm the order.

By the Court.—Order affirmed.

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