COURT OF APPEALS
DECISION
DATED AND RELEASED

June 1, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 94-1184

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

GENERAL CASUALTY INSURANCE COMPANY,

Plaintiff,

v.

FEULING CONCRETE CONSTRUCTION, INC.,

Defendant-Appellant,

POTRATZ CONCRETE PUMPING, INC., and XYZ INSURANCE COMPANY,

Defendants,

AMERICAN FAMILY INSURANCE COMPANY,

Intervenor-Defendant-Respondent.

APPEAL from a judgment of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

EICH, C.J. Feuling Concrete Construction, Inc., was sued for damages resulting from its alleged negligence in constructing a building foundation. It appeals from a summary judgment dismissing its insurer, American Family Insurance Company, from the action.

The issue is whether one of several exclusions in the American Family policy applies so as to defeat coverage for Feuling's alleged negligence. We conclude that a provision excluding coverage for damage to Feuling's "product" applies and we therefore affirm the judgment.

The underlying facts are not in dispute. Sugden Builders, Inc., the general contractor for the construction of a private residence in Lodi, subcontracted with Feuling for construction of the basement and foundation walls for the home. After the foundation walls had been poured and the backfilling completed, the walls began to bulge and crack and eventually collapsed. Sugden settled with the homeowners, and its insurer, General Casualty Insurance Company, having taken an assignment of the homeowners' and Sugden's claims, sued Feuling. General Casualty claimed that the cracking and collapse of the walls was caused by the low strength of the concrete and that Feuling (and the company Feuling hired, Potratz Concrete Pumping, Inc., who poured the walls) failed to exercise ordinary care in "curing" the cement after it was poured.[1] As a result, the basement and foundation had to be replaced at considerable expense, and General Casualty sought to recover the replacement costs as well as other damages, including compensation for the delay in completing the home for the purchaser.

American Family, Feuling's insurer, intervened in the action to contest coverage and filed a motion for summary judgment, claiming that various exclusions in its policy excluded coverage. The trial court, without explaining its decision other than to state that it was "adopt[ing] the arguments [in] American Family's brief," granted the motion and dismissed American Family from the case.

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[1] Specifically, the complaint alleged that the low strength of the concrete was caused by pouring the cement in below-freezing weather without maintaining it at an adequate temperature to allow for proper hydration.

Where, as here, the facts are undisputed and the issue involves the construction and application of a contract, the question is solely one of law, which we review de novo, owing no deference to the trial court's decision. ***Just v. Land Reclamation, Ltd.***, 155 Wis.2d 737, 744, 456 N.W.2d 570, 572 (1990); ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Under the general coverage provisions of its policy, American Family agreed to "pay those sums that the insured [Feuling] becomes legally obligated to pay as damages because of `bodily injury' or `property damage' to which this insurance applies." Feuling argued in the trial court that coverage attached under those provisions because the claimed exclusions did not apply. Feuling also argued that coverage attached under the personal-injury liability provisions of the policy. The trial court ruled that two exclusions in the property-damage portion of the policy applied and dismissed the action. It did not address Feuling's argument that coverage was available under the personal-injury provisions.

The property-damage exclusions on which the trial court based its decision provide as follows:

This insurance does not apply to:

....

j. "Property damage" to:

....

> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Feuling argues first that exclusion j(5) does not apply because, by its terms, reasonably interpreted, it applies only to damage to real property that occurs while the insured or its subcontractors "*are performing* some operation on the property," and because the foundation collapse did not occur until several months after Feuling had left the job site, Feuling was not *performing* any operations on the project at the time of the loss. Thus, says Feuling, the exclusion is inapplicable or, at best, ambiguous, in which case rules of insurance contract construction require the exclusion to be interpreted against American Family. "When ambiguous language appears in an insurance contract, we must construe the ambiguity in favor of the insured and against the insurance company that drafted the ambiguous language. This court has consistently stated that this is especially true of exclusionary clauses." ***Just***, 155 Wis.2d at 746, 456 N.W.2d at 573 (citations omitted).

We agree that the language is ambiguous. In ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis.2d 375, 383, 480 N.W.2d 1, 4 (1992), the supreme court stated, "`An ambiguity exists when the policy is reasonably susceptible to more than one construction from the viewpoint of a reasonable person of ordinary intelligence in the position of the insured.'" (Quoted sources omitted.)

In our opinion, exclusion j(5) is reasonably susceptible of two constructions under the rule. First, as Feuling argues, the "are performing" language suggests contemporaneity: that the exclusion applies only to property damage that occurs while the work is being undertaken. However, the exclusion goes on to state that "if the `property damage' *arises out of those operations* ...." (Emphasis added.) We believe reasonable people could construe that phrase to *not* require that the property damage occur while the work is going on. Construing such language against American Family, as we must under the above rules, we conclude that the exclusion does not defeat coverage.

Feuling next argues that the trial court erred in ruling that paragraph j(6) of the property-damage coverage exclusions applies to defeat coverage. As noted, paragraph j(6) excludes coverage for property damage to "[t]hat particular part of any property that must be restored, repaired or replaced because `your work' was incorrectly performed on it." The policy then states, "Paragraph (6) of this exclusion does not apply to `property damage' included in the `products-completed operations hazard.'"

The initial language of the exclusion plainly applies, for the damage in this case involves Feuling's allegedly negligent ("incorrectly performed") work on the house foundation. Feuling contends, however, that the latter paragraph--the "exclusion-to-the-exclusion"--applies to negate the exclusion itself. The phrase "products-completed operations hazard" is defined elsewhere in the policy as including "all `bodily injury' and `property damage' occurring away from premises you own or rent and arising out of `your product' or `your work' ...." Feuling reads the exclusion-to-the-exclusion as applying to work performed by a subcontractor--which, as indicated above, the concrete pouring was--thus negating the exclusion itself.

American Family does not respond to the argument, and we have often stated, "`Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.'" ***State ex rel. Sahagian v. Young***, 141 Wis.2d 495, 500, 415 N.W.2d 568, 570 (Ct. App. 1987) (quoted sources omitted). We thus conclude that exclusion j(6) is also inapplicable.

Feuling also argues that the trial court incorrectly ruled that another policy exclusion--exclusion k--applies to its work on the project. Exclusion k excludes coverage for property damage to "`your product' arising out of it or any part of it." It is a clause common to commercial general liability policies, and it has been before the courts, in various forms, in several cases.

In ***Sola Basic Indus., Inc. v. United States Fidelity & Guar. Co.***, 90 Wis.2d 641, 653, 280 N.W.2d 211, 217 (1979), for example, the supreme court considered a similar exclusion.[2] The court stated that one of the "principles ... derived from the[] cases" involving the product-damage exclusion is that the exclusion "eliminate[s] coverage for injury to or destruction of the product furnished or work completed by the insured ...." If, however, "the defect in the product furnished or the work completed ... causes damage to other tangible property, there is coverage for such damage ...." ***Id***.[3] It is a distinction between

[2] The policy in ***Sola Basic*** excluded coverage for property damage to "`the ... Insured's products arising out of such products or any part of such products ....'" ***Sola Basic Indus., Inc. v. United States Fidelity & Guar. Co.***, 90 Wis.2d 641, 646, 280 N.W.2d 211, 213 (1979).

[3] The court noted that the term "property damage" does not necessarily require actual physical damage to property but would include diminution in the property's value or loss of its use. ***Sola Basic***, 90 Wis.2d at 653-54, 280 N.W.2d at 217.

"an accident of faulty workmanship" and "faulty workmanship which causes an accident." ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 265, 371 N.W.2d 392, 395 (Ct. App. 1985). The latter is the type of risk insured against; the former is a "business risk" to which the exclusion applies to defeat coverage.

> "The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The [underlying] coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."

Id. at 264-65, 371 N.W.2d at 394 (quoting ***Weedo v. Stone-E-Brick, Inc.***, 405 A.2d 788, 791 (N.J. 1979)).

In this case General Casualty claims that Feuling was negligent in pouring and curing the basement walls of the home. Thus, Feuling is being proceeded against because its own "product," the poured concrete, failed. The failure complained of is that of "the product furnished or work completed by [Feuling]." ***Sola Basic***, 90 Wis.2d at 653, 280 N.W.2d at 217. We conclude that the trial court correctly ruled that exclusion k of the American Family policy applies.

Feuling disagrees, pointing to the language of the exclusion covering damage to "your product" and to the definition of that phrase elsewhere in the policy as "any goods or products, *other than real property* ...."

(Emphasis added.) Then, citing generally to a legal encyclopedia,[4] Feuling contends that because the foundation walls and footings are "permanent, fixed and immovable and attached to the land," they "clearly constitute real property" and, as a result, the exclusion does not apply.

American Family agrees that the foundation walls are *now* part of the building, but maintains that at the time they were provided by Feuling, they were not. We agree. Feuling was not selling real property. The "goods" provided by Feuling constituted only the wet concrete used in the foundation, together with accompanying construction services. Feuling claims, however, that if we are to so decide, we must also conclude that the general contractor would be covered by the exclusion for any and all negligence in construction of the home because it "also contracted to supply personal property in the form of building materials, as opposed to real property in the form of a house." The answer to that argument is that this is not such a case. If Feuling had been the general contractor, providing an entire home as a completed project, a different result may indeed be proper. That question is not before us in this case, however.

We thus conclude that exclusion k in the property-damage section of the policy applies to exclude coverage for the acts complained of in General Casualty's complaint.

Finally, Feuling argues that coverage exists under the personal-injury provisions of the policy. As indicated, the trial court did not reach this question.

The policy defines "personal injury" as

> [a]n injury, other than "bodily injury", arising out of one or more of the following offenses:
>
> ....

[4] 63A AM. JUR. 2D *Property* §§ 13-16 (1984).

> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner ....

In so arguing, Feuling refers us to ***City of Edgerton v. General Casualty Co.***, 172 Wis.2d 518, 548-50, 493 N.W.2d 768, 780-81 (Ct. App. 1992), *rev'd in part on other grounds*, 184 Wis.2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 115 S. Ct. 1360 (1995), as interpreting "nearly identical policy language" to cover groundwater contamination as an "invasion" of the property owner's right of occupancy. Because General Casualty's complaint in this case includes a claim for damages for the delay in completion of the home, Feuling argues that the claim constitutes one for wrongful "eviction" from the home or, at the least, an invasion of "the right of private occupancy" of the premises. Thus, Feuling argues that the claim is covered under the personal-injury provisions.

City of Edgerton, of course, provides no authority for the proposition that the type of construction defect alleged in this case would constitute a similar "invasion," and Feuling has offered no other authority in support of the proposition it advances. We reject the argument.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.