COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2012AP2521

Cir. Ct. Nos. 2010CV2601
2011CV706

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

TINA L. PREISLER AND FREDERICK W. PREISLER,

PLAINTIFFS-CO-APPELLANTS,

V.

KUETTEL'S SEPTIC SERVICE, LLC, 4-DK FARM, DUKE KUETTEL, CHERYL KUETTEL, DALE KUETTEL AND DOUG KUETTEL,

DEFENDANTS-APPELLANTS,

GENERAL CASUALTY INSURANCE COMPANY, REGENT INSURANCE COMPANY, HASTINGS MUTUAL INSURANCE COMPANY AND SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS.

FREDERICK W. PREISLER AND TINA L. PREISLER,

PLAINTIFFS-APPELLANTS,

V.

CHARTIS SPECIALTY INSURANCE COMPANY F/K/A AMERICAN

INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

DEFENDANT,

RURAL MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

PHIL'S PUMPING AND FAB, INC.,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. This is an insurance coverage dispute concerning a pollution exclusion commonly found in commercial general liability (CGL) insurance policies. Tina and Frederick Preisler filed suit against Kuettel's Septic Service, LLC; 4 D-K Farm; Duke, Cheryl, Dale, and Doug Kuettel; and Phil's Pumping and Fab, Inc., alleging the defendants had contaminated their well water by over-spraying septage—a combination of water, urine, feces, and chemicals—and maintaining leaky storage tanks. Several insurers who provided liability coverage for the various defendants were also added to the suit: General Casualty Insurance Company, Regent Insurance Company, Hastings Mutual Insurance

Company, Secura Insurance, and Rural Mutual Insurance Company.[1] The Insurers asserted a pollution exclusion found in their policies barred coverage, and the circuit court agreed.

¶2 The primary issue on appeal is whether septage is a "pollutant" within the meaning of the pollution exclusions. We hold septage is unambiguously a pollutant. It is a contaminant, an irritant, and a waste substance. We reject the Preislers' and the Kuettels' arguments to the contrary and affirm.

BACKGROUND

¶3 The Preislers operate a dairy farm in Outagamie County. Among other things, they raise cattle. A well drilled in 1972 supplied water for household and farm needs until 2008.

¶4 The Kuettel family lives on a farm directly across County Road T from the Preislers' farm. The Kuettel family runs 4 D-K Farm, a farming operation, and Kuettel's Septic, a septic pumping service, from that location. Kuettel's Septic hauls, stores, and disposes of its customers' septage, which comes from tanks, grease traps, floor pits, and car washes. The septage is stored in large tanks, both above and below ground level. It is disposed of either by taking it to a treatment facility or spreading or injecting it on farmland. Kuettel's Septic hired Phil's Pumping and Fab, Inc., to occasionally dispose of septage.

[1] For ease of reading, we will subsequently refer to Fred and Tina Preisler as "the Preislers." We will refer to Kuettel's Septic, 4 D-K Farm, the individual Kuettels, and Phil's Pumping collectively as "the Kuettels." Finally, we will refer to the insurance companies collectively as "the Insurers."

¶5 At some point, Fred Preisler and Duke Kuettel discussed spreading septage on Preisler's farm as fertilizer.[2] Kuettel's Septic received permission from the Wisconsin Department of Natural Resources (DNR) to apply septage at a rate not to exceed 13,000 gallons per acre per week, with a total of 39,000 gallons per acre permitted annually. The Kuettels then applied the septage to the Preislers' farm for several years.

¶6 The Preislers began experiencing problems in the summer of 2008. A large algae bloom appeared in their pool, which had been filled with well water. The Preislers' cattle, which drank well water, began to die at an uncharacteristic rate. Testing in August 2008 showed the well water had an elevated nitrate level. Septage contains high levels of nitrogen, which is converted to nitrates in the soil. The cattle deaths abated in 2008, after the Preislers dug a new well.

¶7 The Preislers filed suit against Kuettel's Septic in 2010, later adding 4 D-K Farm, the Kuettel family, and Phil's Pumping. They alleged the Kuettels were negligent in spreading and storing septage, which caused a private nuisance and constituted a trespass on their land. They also alleged the Kuettels were strictly liable for engaging in an abnormally dangerous activity, and asserted Kuettel's Septic and Duke Kuettel violated WIS. STAT. § 100.18 by promising compliance with DNR regulations, but failing to follow through, and falsifying DNR reports.[3]

[2] The date of this event is disputed. The Preislers contend Duke Kuettel approached them about disposing of septage by spreading in 2002, while the Kuettels do not believe they began spreading until 2005. The date the spreading commenced is not a material fact.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶8 The Preislers eventually added numerous insurers to the suit. Hastings provided CGL coverage to Kuettel's Septic between July 13, 1999 and July 13, 2005, after which Regent provided coverage.[4] Hastings also provided CGL coverage to 4 D-K Farm until April 5, 2007, after which Secura provided coverage. In addition, Secura provided homeowner's insurance to the individual Kuettel defendants.[5] Finally, Rural provided CGL coverage to Phil's Pumping between 2002 and 2013.

¶9 Each policy included a similarly worded exclusion for pollution. All the policies involved in this appeal exclude damage caused by the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants.[6] The policies also similarly define a pollutant. Each policy defines a

[4] In addition to the six commercial policies, Hastings also issued seven separate automobile policies to Kuettel's Septic between July 13, 1999 and July 13, 2006. The Preislers and the Kuettels do not claim coverage under these policies.

[5] The homeowner's policies are not at issue in this appeal. As the circuit court observed, the policies do not have pollution exclusions. Rather, the court determined a different exclusion barred coverage. Neither the Preislers nor the Kuettels challenge this determination. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992) (arguments not specifically raised on appeal will not be considered or decided).

[6] The policies sometimes use different language to describe the causation component. For example, Hastings' policies bar coverage for damages "resulting from" or "which would not have occurred in whole or part but for" pollution. Rural's and Regent's policies sometimes use the phrase "arising out of" to describe causation. Although the Preislers and the Kuettels dispute the application of causation principles in general, no party argues these linguistic differences are material.

We also observe that this case involves two different types of pollution exclusions: the so-called "absolute" pollution exclusion and the broader total pollution exclusion. *See* 9 STEVEN PLITT, DANIEL MALDONADO, & JOSHUA D. ROGERS, COUCH ON INSURANCE § 127:3 (3d ed. 2008). Some exclusions are limited geographically or in other ways, such as by requiring that the pollutant be processed or handled in some way by an insured. No one argues these additional requirements have not been met, or otherwise discusses these limitations. Accordingly, we will not address them. *See* ***Graf***, 166 Wis. 2d at 451 (arguments not specifically raised on appeal will not be considered or decided).

pollutant as any solid, liquid, gaseous, or thermal irritant or contaminant.[7] The policies then give examples of pollutants; all identify smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.[8] Each policy states, "Waste includes materials to be recycled, reconditioned, or reclaimed."

¶10 The Insurers filed motions for summary and declaratory judgment, arguing their policies did not provide coverage for the Preislers' claims. The circuit court agreed. Relying on ***Hirschhorn v. Auto-Owners Insurance Co.***, 2012 WI 20, 338 Wis. 2d 761, 809 N.W.2d 529, *reconsideration denied*, 2012 WI 45, 340 Wis. 2d 546, 811 N.W.2d 821, the court determined that septage—consisting largely of feces and urine—was unambiguously "waste" and therefore a pollutant. The court also concluded the Preislers' losses resulted from the "discharge, release, escape, seepage, migration or dispersal" of the septage.[9]

¶11 The court then addressed the Preislers' argument that the damages were caused by nitrates, not septage. It noted that, under all formulations of the pollution exclusion's causation component, "there is a causal connection between

[7] The Hastings' policy issued to Kuettel's Septic in 2000 does not, as far as we can tell, define "pollutants," or provide examples of pollutants. However, no party argues the term in the 2000 policy should be given a different meaning in light of this omission.

[8] A pollutant under Secura's policy to 4 D-K Farm also includes toxic substances, petroleum substances or derivatives, fertilizers, fungicides, herbicides, and insecticides.

A pollutant under Hastings' policy to 4 D-K Farm also includes a radioactive irritant or contaminant. That policy also specifies that carbon monoxide is not a pollutant.

[9] The Preislers do not challenge this conclusion on appeal. The court made numerous other determinations regarding other policy provisions that the Preislers and the Kuettels do not appeal, and that we need not address. *See* ***Graf***, 166 Wis. 2d at 451 (arguments not specifically raised on appeal will not be considered or decided).

the spreading of septage and the contamination of [the Preislers' well] by nitrates originating in the septage." The Preislers and the Kuettels appeal.

DISCUSSION

¶12 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. ***Id.*** (citing WIS. STAT. § 802.08(2)). Here, the parties do not dispute the salient facts. Accordingly, we must determine whether, upon these facts, the relevant policies' pollution exclusions bar coverage for the Preislers' claims. The interpretation of an insurance policy is a question of law. ***Hirschhorn***, 338 Wis. 2d 761, ¶21.

¶13 Our primary task when interpreting an insurance policy is to determine and give effect to the intent of the contracting parties. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. We construe insurance policies as they would be understood by a reasonable person in the position of the insured. ***Id.*** However, we will not interpret a policy to provide coverage for risks the insurer did not contemplate or underwrite and for which it has not received a premium. ***Id.***

¶14 In determining whether an insurer is obligated to provide coverage, we follow a well-established procedure. "First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage." ***Id.***, ¶24. If it does not, the analysis ends there. ***Id.*** If, however, the claim triggers the initial grant of coverage, we next examine the policy's exclusions to see whether any of them preclude coverage. ***Id.*** Then, we

analyze any exceptions to the exclusions to determine whether coverage has been reinstated. ***Id.***

¶15 The principal dispute in this case focuses on whether septage is a "pollutant" that triggers the pollution exclusions in the Insurers' policies. With one narrow exception—which we shall address later—no one argues the Preislers' claims fall outside the policies' initial grants of coverage. We therefore assume, without deciding, that the policies affirmatively grant coverage for the Preislers' claims, and proceed directly to whether the pollution exclusions apply.

¶16 A pollution exclusion bars coverage for damages caused in various ways by a pollutant. After Congress passed environmental legislation like the Comprehensive Environmental Response, Compensation, and Liability Act, the insurance industry designed the exclusion in an effort to avoid liability for gradual, long-term pollution and the resulting cleanup costs. 9 STEVEN PLITT, DANIEL MALDONADO, & JOSHUA D. ROGERS, COUCH ON INSURANCE § 127:3 (3d ed. 2008). Although the insurance industry was eventually successful in excluding coverage for most industrial pollution, the exclusion's reach remains a subject of much litigation. ***Id.*** In this case, the circuit court concluded it bars coverage for damages caused by the over-application of septage.

¶17 Our supreme court has not confined the pollution exclusion to its traditional environmental context. *See* ***Peace ex rel. Lerner v. Northwestern Nat'l Ins. Co.***, 228 Wis. 2d 106, 139-40, 596 N.W.2d 429 (1999). The pollution exclusion is intended to have broad application. ***Donaldson***, 211 Wis. 2d at 231. In ***Peace***, 228 Wis. 2d at 125, our supreme court concluded that lead paint dust, fumes, and chips are irritants and contaminants, and therefore pollutants. Bat guano and fragrance additives in fabric softener can also be pollutants. *See*

Hirschhorn, 338 Wis. 2d 761, ¶37 (bat guano); ***United States Fire Ins. Co. v. Ace Baking Co.***, 164 Wis. 2d 499, 501, 476 N.W.2d 280 (Ct. App. 1991) (fragrance additive). Our courts have reached these conclusions by a straightforward application of the policy terms, and we do the same.

¶18 A pollutant under all the relevant policies is defined as any solid, liquid, gaseous, or thermal irritant or contaminant. The policies do not define "irritant" or "contaminant," so these words must be given their common, ordinary meaning. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶17, 264 Wis. 2d 617, 665 N.W.2d 857. A "contaminant" is something that makes something else "impure or unclean by contact or mixture." ***Peace***, 228 Wis. 2d at 122; *see also* ***Langone v. American Family Mut. Ins. Co.***, 2007 WI App 121, ¶13, 300 Wis. 2d 742, 731 N.W.2d 334. An "irritant" is "the source of irritation, especially physical irritation." ***Peace***, 228 Wis. 2d at 122. "Irritation," in turn, means a "condition of inflammation, soreness, or irritability of a bodily organ." ***Id.***

¶19 Applying these definitions, we conclude septage is plainly a contaminant and irritant. Septage is generally defined as "excrement and other waste material contained in or removed from a septic tank." THE NEW OXFORD AMERICAN DICTIONARY 1554 (2001). The septage in this case was composed of waste materials stored in septic tanks, grease traps, floor pits, and catch basins. These materials are widely considered undesirable precisely because they cause impurity and uncleanliness. *See* ***Peace***, 228 Wis. 2d at 122. The storage, transport, and disposal of these materials are carefully regulated by the DNR because of the threat to the public health and potential for contamination. *See generally* WIS. ADMIN. CODE § NR 113 (January 2012) (recognizing deleterious health and environmental effects of septage).

¶20 The supreme court's recent decision in ***Hirschhorn*** provides ample support for our conclusion that septage is a pollutant. In that case, a vacation home became uninhabitable because bat guano—bat feces and urine—had accumulated in the walls and ceilings. ***Hirschhorn***, 338 Wis. 2d 761, ¶8. The homeowner's insurer denied coverage, citing a pollution exclusion nearly identical to the ones in this case. *See* ***id.***, ¶27. Our supreme court concluded bat guano is unambiguously a pollutant because it is both a contaminant and an irritant. ***Id.***, ¶33.

¶21 The ***Hirschhorn*** exclusion, like the exclusions in this case, listed examples of pollutants, including "waste." ***Id.***, ¶34. Waste can be defined as excrement, or "the undigested residue of food eliminated from the body." ***Id.*** "Feces and urine are commonly understood to be waste." ***Id.***; *see also* ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 213, 588 N.W.2d 375 (Ct. App. 1998) (combination of fecal matter, mud, and sludge suspended in water that flooded homeowner's basement could be considered a pollutant); WIS. ADMIN. CODE § NR 113.03(55) (defining septage as waste water). Even the Preislers' expert defined septage as "waste content from a septic tank." Thus, the term "waste" unambiguously includes septage.

¶22 The exclusion's clarification that "[w]aste includes materials to be recycled, reconditioned, or reclaimed" provides further support for our holding. As the Preislers and the Kuettels point out, septage has beneficial uses, including as fertilizer. However, the clarification unambiguously states that substances should not be excluded from the definition of "waste" simply because they have some potential beneficial use. Because "waste" denotes a condition of being useless, it makes sense that insurers wished "to clarify that, for purposes of the pollution exclusion clause, 'waste' may include materials to be used again."

Hirschhorn, 338 Wis. 2d 761, ¶36. The policies' explication of the term "waste" fits septage perfectly.

¶23 ***Ace Baking***, 164 Wis. 2d at 501, is fully consistent with this analysis. There, a generally harmless fragrance additive in fabric softener, linalool, caused Ace Baking's ice cream cones stored in the same warehouse to taste like soap. ***Id.*** We held that, under the circumstances of the case, Ace Baking's insurer was not obligated to provide coverage. ***Id.*** at 505. We were careful to note that it is "a rare substance indeed that is *always* a pollutant; the most noxious of materials have their appropriate and non-polluting uses." ***Id.*** However, "although linalool is a valued ingredient for some uses, it fouled Ace Baking's products" and was therefore a pollutant. ***Id.*** The upshot of ***Ace Baking*** is that a substance with a beneficial use can nonetheless be classified as a pollutant.

¶24 The Kuettels rely heavily on the fact that unlike the property owner in ***Hirschhorn***, the Preislers consented and intended to have septage sprayed on their land. Emphasizing that the bat guano in ***Hirschhorn*** was unwanted, they assert a "pollutant" can only be something an owner did not want on his or her property. This argument finds no support in the policies' definitions of "pollutant," which do not speak in terms of intent. As we have indicated, the definitions look to whether damage has been caused by an irritant or contaminant in any of the designated states of matter. "Absent a finding of ambiguity, we will not apply rules of construction to rewrite an insurance policy to bind an insurer to a risk it did not contemplate and for which it did not receive a premium." ***Hirschhorn***, 338 Wis. 2d 761, ¶24.

¶25 For the sake of argument, even if we were to interpret a "pollutant" as including only undesired substances, it is apparent the Preislers did not consent to have septage applied in such quantities that it contaminated their well. Substances that cause damage in unintended settings are often deemed pollutants. *See* ***Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co.***, 2004 WI App 29, ¶16, 269 Wis. 2d 775, 676 N.W.2d 528 (bacteria that rendered food products unfit for consumption deemed a contaminant); ***Ace Baking***, 164 Wis. 2d at 505 (ingredient in fabric softener that fouled other products in same warehouse a "pollutant" in relation to those products). The basic premise of the Preislers' suit is that they suffered damages caused by excess septage; in essence, the Preislers allege they got more than they bargained for. They can hardly be heard to take the contrary position on appeal.

¶26 The Preislers and the Kuettels assert that the circuit court interpreted the policies contrary to the Kuettels' reasonable expectations. This is essentially an argument that the pollution exclusion is ambiguous. *See* ***Langone***, 300 Wis. 2d 742, ¶21. Insurance policy language is ambiguous if it is susceptible to more than one reasonable interpretation. ***Folkman***, 264 Wis. 2d 617, ¶13. If there is no ambiguity in the policy language, it is enforced as written, without resort to rules of construction or applicable principles of case law. ***Id.*** Any ambiguities will be construed in favor of the insured. ***Id.***

¶27 We have already concluded that septage is unambiguously a pollutant, and could reject the Preislers' and the Kuettels' reasonable expectations argument on this basis alone. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court need not address other issues when one is dispositive of the appeal). However, because the reasonable expectations

argument is central to the Preislers' and the Kuettels' position on appeal, we pause briefly to address it.

¶28 Because application of the reasonable expectations test can yield different conclusions, it is important to consider the facts of each case. *See* ***Langone***, 300 Wis. 2d 742, ¶24. In ***Langone***, the issue was whether damages caused by an accumulation of carbon monoxide from a malfunctioning boiler were the result of a pollutant. ***Id.***, ¶¶1-3. In concluding they were not, the court was persuaded by the fact that carbon monoxide, which is always present in smaller concentrations, becomes dangerous only at high levels or by prolonged exposure. ***Id.***, ¶26. A reasonable insured—in ***Langone***, the landlord—would not characterize an "extraordinary concentration of carbon monoxide" as a pollutant. ***Id.***

¶29 The foundation for ***Langone***'s holding had been laid a decade earlier in ***Donaldson***. ***Donaldson***, like ***Langone***, was a "sick building" case, in which a buildup of exhaled carbon dioxide caused by inadequate ventilation sickened office workers. ***Donaldson***, 211 Wis. 2d at 227. The court was not persuaded that exhaled carbon dioxide was unambiguously a pollutant. ***Id.*** at 231-32. Instead, it determined the pollution exclusion "does not plainly and clearly alert a reasonable insured that coverage is denied for personal injury claims that have their genesis in activities as fundamental as human respiration." ***Id.*** at 232.

¶30 ***Langone*** and ***Donaldson*** are examples of the rule that the pollution exclusion will not preclude coverage for damages that result from an "everyday activit[y] 'gone slightly, but not surprisingly, awry.'" ***Donaldson***, 211 Wis. 2d at 233 (quoting ***Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.***, 976 F.2d 1037, 1044 (7th Cir. 1992)). As the ***Pipefitters*** court put it, "There is nothing

that unusual about paint peeling off of a wall, asbestos particles escaping during the installation or removal of insulation, or paint drifting off the mark during a spraypainting job." ***Pipefitters***, 976 F.2d at 1044. While our supreme court has rejected at least one of the ***Pipefitters*** court's examples of an everyday, ordinary activity, *see* ***Peace***, 228 Wis. 2d 106 (lead paint), the list is nonetheless illustrative of the sort of ho-hum events that help shape the insured's reasonable expectations. The pollution exclusion is ambiguous when the insured could reasonably expect coverage on the facts of the case. ***Donaldson***, 211 Wis. 2d at 233.

¶31 The rationale for excluding everyday activities is to constrain the pollution exclusion's reach, which, without reasonable restrictions, would be "virtually boundless." ***Id.*** at 232-33. Nearly any substance, including water, can be a pollutant under the right circumstances. ***Id.*** at 232, 237. As the ***Donaldson*** court observed, without some limiting principle, the clause would bar coverage for virtually any injury, such as those "suffered by one who slips and falls on the spilled contents of a bottle of Drano" or "an allergic reaction to chlorine in a public pool." ***Id.*** at 232.

¶32 However, this is not a case in which the pollution exclusion threatens to swallow the reasonable expectations of the insured. An insured may not expect a basic function like human respiration to be classified as pollution, *see* ***Donaldson***, 211 Wis. 2d at 232-33, but disposing of septage—a mixture of water, urine, fecal material, and household chemicals—on another's property is a different matter. Certainly reasonable insureds involved in hauling and disposing of septage should be presumed to know the dangers of the substances they carry. These activities are highly regulated, require careful planning, and carry the potential for significant liability. *See* ***Peace***, 228 Wis. 2d at 137-38 (lead paint chips, flakes, and dust widely, if not universally, understood to be toxic and

capable of producing lead poisoning), 150 (Bradley, J., concurring) (Lead has been long recognized as harmful, and is heavily restricted by the modern regulatory state.). A reasonable insured would not view spreading or injecting septage on farmland as an ordinary, wholly unremarkable event. *See* ***Donaldson***, 211 Wis. 2d at 233; *but see* ***Guenther***, 223 Wis. 2d at 215-16 (pollution exclusion not intended to preclude coverage for ordinary events like sewer backups).[10]

¶33 In considering the reasonable expectations of the insured, the nature of the substance involved is also important. *See* ***Langone***, 300 Wis. 2d 742, ¶17. The gases at issue in ***Donaldson*** and ***Langone*** are "universally present and generally harmless in all but the most unusual circumstances." ***Hirschhorn***, 338 Wis. 2d 761, ¶37 (citing ***Donaldson***, 211 Wis. 2d at 234). "Like carbon dioxide, carbon monoxide is colorless, odorless, and present in the air around us." ***Langone***, 300 Wis. 2d 742, ¶19. While the individual substances comprising septage are common, we are not persuaded septage is the type of omnipresent substance envisioned by ***Donaldson*** and ***Langone***, and in any event it certainly is not generally harmless. Rather, like bat guano, it is "a unique and largely undesirable substance that is commonly understood to be harmful." *See* ***Hirschhorn***, 338 Wis. 2d 761, ¶37.

¶34 Having failed to persuade us that a reasonable insured would not view septage as "waste" or a "pollutant," the Preislers and the Kuettels try a different tack. In an attempt to fit this case within ***Donaldson*** and ***Langone***, they

[10] As authority for this conclusion, the court in ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 588 N.W.2d 375 (Ct. App. 1998), relied on the Court of Appeals' decision in ***Peace v. Northwestern National Insurance Co.***, 215 Wis. 2d 165, 172-73, 573 N.W.2d 197 (Ct. App. 1997), which was reversed by the supreme court on appeal.

argue the damage was really caused by the nitrogen in the septage, which undergoes oxidization in the soil and becomes nitrate. Quoting ***Donaldson***, 211 Wis. 2d at 234, they argue that nitrogen and nitrate are "'universally present and generally harmless in all but the most unusual instances,' and the nitrogen cycle that produces nitrates … 'is a necessary and natural part of life.'"

¶35 We need not go too far down this path, for the Preislers and the Kuettels ignore key language in the pollution exclusion. Each exclusion bars coverage for damages caused by a "pollutant." Although the policies use various phrases to describe the causation component—"arising out of" and "resulting from," for example—there is no dispute that, but for the septage, the Preislers' well water would not have been contaminated. Thus, even if the individual contaminating agent meets the ***Donaldson*** criteria, it is traceable back to a substance that we have concluded is unambiguously a pollutant. *See* ***Trumpeter Devs., LLC v. Pierce Cnty.***, 2004 WI App 107, ¶9, 272 Wis. 2d 829, 681 N.W.2d 269 ("[A]ll that is necessary is some causal relationship between the injury and the event not covered.").

¶36 As a result, no reasonable insured, on these facts, would conclude the policies provide coverage. As in ***Peace***, the key terms are unambiguous. *See* ***Peace***, 228 Wis. 2d at 136. "Pollutants" has a specific meaning that "cannot be undone by different notions of 'pollution' outside the policy, unrelated to the policy language, unless such a 'reading' produced absurd results." ***Id.*** The policies' example of "waste" as an excluded pollutant should have been a clear indicator to the Kuettels that there would be no coverage for claims involving

septage. We do not look to the expectations of the insured in the face of a clear and unambiguous exclusion.[11] ***Langone***, 300 Wis. 2d 742, ¶10.

¶37 The Preislers and the Kuettels also argue our interpretation leads to absurd and unreasonable results. *See* ***Nichols v. American Emp'rs Ins. Co.***, 140 Wis. 2d 743, 751, 412 N.W.2d 547 (Ct. App. 1987) (We strive to give insurance policies a reasonable interpretation, avoiding those that lead to absurd results.). They believe our decision draws an arbitrary line between chemical fertilizers and organic fertilizer like septage, supplying coverage for the former while excluding it for the latter. We are not persuaded. While the Kuettels are probably correct that a chemical fertilizer would not be classified as "waste," they cite no authority, nor provide any reasoning, for the proposition that chemical fertilizer is not otherwise a "pollutant." We do not decide hypothetical questions.

¶38 The Preislers and the Kuettels cite volumes of foreign authority in an effort to convince us that the pollution exclusion is ambiguous under the circumstances. There are numerous problems with these authorities on their merits; some are inconsistent with Wisconsin law, *see, e.g.*, ***United States Fid. & Guar. Co. v. Armstrong***, 479 So. 2d 1164, 1168 (Ala. 1985) (observing that, under Alabama law, pollution exclusion is intended to cover only industrial pollution, and to deny coverage under the facts of the case "would be to distort the plain

[11] The Preislers and the Kuettels have directed our attention to the recently decided ***Wilson Mutual Insurance Co. v. Falk***, Nos. 2013AP691, 2013AP776, unpublished slip op., 2013 WL 6480760, ¶14 (WI APP Dec. 11, 2013), in which this court determined that manure is not a pollutant according to the reasonable expectations of the insured farmer. We conclude that ***Falk*** is inapplicable. Here, the policy is unambiguous, and we need not consider the reasonable expectations of the insured. Moreover, the insureds in ***Falk*** and this case are not similarly situated. The reasonable expectations of a farmer may vary from the reasonable expectations of individuals involved in septage hauling and disposal.

purpose of the pollution exclusion"), and others reach conclusions at odds even within the jurisdiction, *compare* ***Florida Farm Bureau Ins. Co. v. Birge***, 659 So. 2d 310, 311 (Fla. Dist. Ct. App. 1994) (pollution exclusion ambiguous), *with* ***Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.***, 711 So. 2d 1135, 1138 (Fla. 1998) (pollution exclusion unambiguous). But more to the point, the pollution exclusion is not rendered ambiguous "merely because the parties disagree about its meaning, or because they can point to conflicting interpretations of the clause by different courts." ***Peace***, 228 Wis. 2d at 136 (citation omitted). "If the existence of differing court interpretations inevitably meant ambiguity, then only the first interpretation by a court would count." ***Id.*** This case is adequately resolved under existing Wisconsin law, and we have no need to look to the decisions of other jurisdictions.

¶39 Ordinarily, we would proceed to determine whether spraying or injecting septage on farmland constitutes the "discharge, dispersal, seepage, migration, release or escape of pollutants." *See* ***Donaldson***, 211 Wis. 2d at 228. However, neither the Preislers nor the Kuettels have challenged the circuit court's conclusion on this point, and there does not appear to be any dispute that this requirement has been satisfied. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442,

451, 480 N.W.2d 16 (1992) (arguments not specifically raised on appeal will not be considered or decided).[12]

¶40 As we alluded to earlier, Hastings presents an alternative argument for affirming the judgment in its favor. Hastings notes that it covered Kuettel's Septic only until 2005, and 4 D-K Farm until 2007. Its policies limited the initial grant of coverage to "bodily injury" or "property damage" occurring during the policy period. As a result, it contends any indemnification obligation ceased before the Preislers' damages occurred in 2008.

¶41 Secura also presents an alternative argument for affirming. It contends a limited liability endorsement to its policy with 4 D-K Farm limits coverage to damages that occur on 4 D-K Farm's facilities and farmland.[13] If so,

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[12] That the Preislers and the Kuettels do not raise this issue is quite curious, as ***Arnold v. Cincinnati Insurance Co.***, 2004 WI App 195, 276 Wis. 2d 762, 688 N.W.2d 708, which they do not cite, appears to at least arguably support their position on appeal. In ***Arnold***, we concluded that coverage for damage to a home caused by a stripping product used on the home's siding was not barred by a pollution exclusion in the homeowner's policy. ***Id.***, ¶¶43-46. Although we declined to decide whether the stripping chemicals were a pollutant, *see* ***id.***, ¶45 n.12, we concluded the damage was not caused by a "release" or "discharge" of pollutants because the chemicals were applied deliberately to the siding for their intended purpose, ***id.***, ¶45. Because the Preislers and the Kuettels have not raised or briefed the issue, or even cited ***Arnold***, we do not address how or whether the principles of that case apply to the present facts.

[13] The endorsement states:

> For a reduced premium, you and we agree to amend this policy as follows:
>
> 1. Section II of this policy applies only to *bodily injury* or *property damage* caused by an *occurrence* which arises from the ownership, maintenance or use of the *insured premises*.
>
> 2. The definition of *insured premises* contained in the Definitions is deleted and replaced with the following:

(continued)

Secura would have no liability for damages that occurred on the Preislers' farm. Secura further argues that an affidavit by hydrogeologist Thomas Culp averring that septage spread on 4 D-K Farm's property may have affected the Preislers is contrary to his deposition testimony, constitutes a sham affidavit, and does not evince a sufficient degree of certainty to qualify as an expert opinion.[14]

¶42 Neither the Preislers nor the Kuettels respond to these arguments, other than the Preislers claiming, in two footnotes in their reply brief, that Hastings and Secura were required to file cross-appeals to raise the issues. That response, however, is insufficient because it is contrary to Wisconsin law. *See* ***Auric v. Continental Cas. Co.***, 111 Wis. 2d 507, 516, 331 N.W.2d 325 (1983) (respondent may raise an issue without filing a cross-appeal where the error raised, if corrected, would sustain the judgment); ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Accordingly, we grant Hastings' and Secura's motions to strike the offending footnotes in the reply briefs, and affirm the trial court's grant of summary judgment to Hastings and Secura on these alternative grounds.

> (a) Under Section II, "*Insured premises*" means only the Insured farm locations and *residence premises* described in the Declarations.
>
> Except as described above, all policy provisions applicable to Coverages G and H apply to this endorsement.

[14] At deposition, Culp conceded he could not state to a reasonable degree of professional certainty that septage spread on the Kuettels' land contributed to any alleged contamination of the Preislers' well. Culp then submitted an affidavit in which he changed his opinion, stating it was "probable" that septage from spreading on the Kuettels' land contaminated the Preislers' well, but again stating that he could not give this opinion with scientific certainty.

By the Court.—Judgment affirmed.

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