COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2017

Diane M. Fremgen
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. 2016AP299

Cir. Ct. Nos. 2014CV174
2014CV361

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

SECURA INSURANCE, A MUTUAL COMPANY,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

LYME ST. CROIX FOREST COMPANY, LLC, LYME ST. CROIX LAND COMPANY LLC, ST. CROIX FOREST PRODUCTS LLC, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, SAFECO INSURANCE COMPANY OF AMERICA, STATE FARM FIRE & CASUALTY COMPANY, WISCONSIN MUTUAL INSURANCE COMPANY, ERIE INSURANCE GROUP, WILSON MUTUAL INSURANCE COMPANY, USAA CASUALTY INSURANCE COMPANY, WESTERN NATIONAL INSURANCE COMPANY P/K/A WESTERN NATIONAL ASSURANCE COMPANY, AUTO-OWNERS INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, SENTRY INSURANCE COMPANY, A MUTUAL COMPANY, JEREMIAH NELSON, AMY NELSON, STEIGERWALDT TREE FARMS, LLC, STEIGERWALDT LAND SERVICES, INC., LFF III TIMBER HOLDING, FRANKENMUTH INSURANCE COMPANY, GENERAL CASUALTY COMPANY OF WISCONSIN, REGENT INSURANCE COMPANY, CONTINENTAL WESTERN INSURANCE COMPANY, FOREMOST INSURANCE COMPANY OF GRAND RAPIDS MICHIGAN, FOREMOST PROPERTY AND CASUALTY INSURANCE COMPANY, WEST BEND MUTUAL INSURANCE COMPANY, AMERICAN FAMILY HOME INSURANCE COMPANY, INTEGRITY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

HANOVER INSURANCE COMPANY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. In 2013, a forest fire in Douglas County burned thousands of acres of land. The two issues presented in this appeal concern insurance policies SECURA Insurance, A Mutual Company ("Secura"), issued to the logging company that owned the equipment suspected of causing the fire.

¶2 Secura appeals the circuit court's determination regarding the applicable policy limitation in a commercial general liability (CGL) policy Secura had issued. Applying ***Wilson Mutual Insurance Co. v. Falk***, 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156, the circuit court held that there was a separate "occurrence" each time the fire entered onto a new piece of real property and caused damage. Consequently, the court held that Secura's aggregate policy limit of $2 million applied, rather than the per-occurrence limit of $500,000. We agree that the aggregate limit applies, and we therefore affirm on that issue.

¶3 Hanover Insurance Company cross-appeals the circuit court's determination that there was no coverage under an umbrella business liability policy Secura had also issued to the logging company. We generally agree with Secura that coverage is precluded pursuant to an exclusion for property damage "arising out of" the destruction of standing timberland by fire. However, we cannot conclude the exclusion applies to all property damage, as the record shows there may have been property damage that occurred prior to the fire reaching standing timber. Accordingly, we reverse and remand for a factual determination on the issue of damages relevant to coverage under the umbrella policy.

BACKGROUND

¶4 In May 2013, a fire started near some logging and lumbering equipment on private industrial forest land in Douglas County. The fire has become known as the "Germann Road Fire." By the time it was contained, the fire had burned for approximately three days and had damaged 7,442 acres, including the real and personal property of numerous individuals and businesses.[1] Ray Duerr Logging, LLC ("Duerr") owned the logging and lumbering equipment suspected of causing the fire.

¶5 At the time of the fire, Duerr was insured by Secura under a CGL policy and a business umbrella liability policy. Secura commenced the present declaratory judgment action in Outagamie County Circuit Court in August 2013 to determine its coverage obligations. The action was transferred to Douglas County

[1] Lyme St. Croix Forest Company, LLC owned the property on which the fire started. For ease of reference, we will refer to all of the Defendants-Respondents to this appeal as "Lyme St. Croix," and where necessary we will refer to the "Lyme St. Croix Forest Company" individually by that designation.

and consolidated with an action that had been filed in November 2014 by two property owners affected by the fire.

¶6 Secura eventually filed a motion for declaratory judgment and partial summary judgment. Secura first requested a determination that, in the event Duerr was found liable for the property damage caused by the fire, a $500,000 per-occurrence limitation in the CGL policy applied, rather than a $2 million aggregate limitation. Citing a "Logging and Lumbering Limitation," Secura also sought a determination that its umbrella policy afforded no coverage for any damages arising out of the fire.

¶7 Following briefing, the circuit court entered an order in which it rejected Secura's argument regarding the amount of the applicable CGL policy limit. The court concluded the $2 million aggregate limit applied because there was more than one "occurrence" under the CGL policy. Specifically, the court held there was a separate occurrence each time the fire spread to another property.

¶8 The circuit court agreed with Secura, however, that there was no coverage for any damages under the umbrella policy. The court concluded the record evidence showed the property damage arose out of the destruction of standing timber or timberlands. Further, there was no dispute that the damage and destruction were the result of the fire, which—for purposes of Secura's motion—Secura conceded was caused by Duerr's logging operation. Accordingly, the court held that all elements of the "Logging and Lumbering Limitation" had been satisfied.

¶9 Secura sought to appeal the circuit court's determination as to the applicable CGL policy limit, and Hanover sought to appeal the court's determination regarding the unavailability of umbrella coverage. By order dated

June 27, 2016, we granted the parties leave to appeal the circuit court's nonfinal order, concluding that granting interlocutory appeal would clarify the matters in litigation.

DISCUSSION

¶10 We review a grant of summary judgment de novo. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651, 476 N.W.2d 593 (Ct. App. 1991). A circuit court must grant a summary judgment motion if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16).[2] Whether summary judgment is appropriate is a question of law. ***Fortier***, 164 Wis. 2d at 651-52. The relevant facts in this case are undisputed.

¶11 Additionally, the issues presented in this appeal and cross-appeal turn on the language of the Secura insurance policies. Insurance policy interpretation presents a question of law, which this court reviews de novo. ***Plastics Eng'g Co. v. Liberty Mut. Ins. Co.***, 2009 WI 13, ¶27, 315 Wis. 2d 556, 759 N.W.2d 613. We construe insurance policies to give effect to the parties' intentions, at least insofar as they are expressed in the policy language. ***Id.*** We interpret an insurance contract as it would be understood by a reasonable person in the position of the insured, ***Schinner v. Gundrum***, 2013 WI 71, ¶38, 349 Wis. 2d 529, 833 N.W.2d 685, affording the language its ordinary and accepted meaning, ***Plastics Eng'g Co.***, 315 Wis. 2d 556, ¶27. Unambiguous language is enforced as written. ***Id.***

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Applicable Policy Limit—Number of Occurrences

¶12 Coverage under Secura's CGL policy is triggered by bodily injury or property damage caused by an "occurrence." The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Secura policy, as relevant here, contains two potentially applicable limits of insurance. The first is a "General Aggregate Limit" that caps Secura's exposure at $2 million regardless of the number of "occurrences." The policy also contains an "Each Occurrence Limit" of $500,000 for property damage caused by fire arising from logging or lumbering operations, which amount represents the most Secura will pay for all bodily injury and property damage arising out of any one "occurrence."

¶13 The parties dispute which policy limit applies. Secura asserts the fire constituted a single, uninterrupted cause of all the individual property owners' damages, and therefore the per-occurrence limit of $500,000 applies. Lyme St. Croix, on the other hand, argues there was an "occurrence" each time the fire spread to a new property. Consequently, Lyme St. Croix contends the $2 million aggregate limit applies.[3]

¶14 The circuit court's determination that the aggregate policy limit applies was based on its interpretation of ***Falk*** and that case's predecessor, ***Plastics Engineering Co.*** In ***Plastics Engineering Co.***, the United States Court of Appeals for the Seventh Circuit certified to our supreme court the question of "what constitutes an 'occurrence' in an insurance contract when [asbestos]

[3] It appears undisputed for purposes of the coverage issue here that the fire damaged a sufficient number of separate properties to reach or exceed the $2 million aggregate limitation.

exposure injuries are sustained by numerous individuals, at varying geographical locations, over many years[?]" ***Plastics Eng'g Co.***, 315 Wis. 2d 556, ¶1. Under a definition of "occurrence" very similar to the one at issue in this case, the court held that the "occurrence" was each individual's exposure to asbestos, not the manufacture or sale of the asbestos-containing material. ***Id.***, ¶¶31-34. Accordingly, there were multiple occurrences because "each claimant's repeated exposure is one occurrence." ***Id.***, ¶39.

¶15 ***Plastics Engineering Co.*** applied ***Olsen v. Moore***, 56 Wis. 2d 340, 202 N.W.2d 236 (1972), the primary case on which Secura relies. *See* ***Plastics Eng'g Co.***, 315 Wis. 2d 556, ¶¶35-39. In ***Olsen***, our supreme court adopted the "cause theory" of determining whether one or more accidents had taken place. The "cause theory" holds that "a single, uninterrupted cause which results in a number of injuries or separate instances of property damage is yet one 'accident' or 'occurrence.'" ***Olsen***, 56 Wis. 2d at 349. However, if the cause is interrupted or replaced by another cause, the chain of causation is broken and there have been multiple occurrences. ***Id.***

¶16 Secura argues the circuit court's decision in this case inappropriately adopts the "effect theory," which holds that each injury produces a separate occurrence. *See* ***id.*** at 347-48. Our supreme court explicitly rejected the "effect theory" in ***Olsen***. ***Id.*** at 351. We disagree that the circuit court here applied the "effect theory" merely because it concluded the fire gave rise to multiple occurrences. The court in ***Plastics Engineering Co.***, applying the "cause theory" under ***Olsen***, nonetheless concluded that there were multiple occurrences because the "occurrence" was the act of repeated exposure. ***Plastics Eng'g Co.***, 315 Wis. 2d 556, ¶40. Accordingly, "[m]ultiple occurrences arise because each

individual's injury stems from his or her repeated exposure to asbestos-containing products." ***Id.***

¶17 Similarly, the "occurrence" here was not the accidental fire, which, had it not spread, would have affected only the real property on which the fire started. Rather, there was an "occurrence" each time the fire—fueled and expanded by the consumption of new materials—spread to a new piece of real property and caused damage. This expansion and refueling, which occurred variously over several days' time and geographic space totaling 7,442 acres of land, constituted a break in the chain of causation under the "cause theory."[4]

¶18 Any doubt that this is a proper application of the "cause theory" is dispelled by ***Falk***. In that case, the insureds had spread liquid cow manure onto their farm fields for fertilization, after which several neighbors lodged water well contamination complaints. ***Falk***, 360 Wis. 2d 67, ¶¶5, 6. The insurer filed a declaratory judgment action to determine its coverage obligations. ***Id.***, ¶41. The supreme court concluded the "unexpected and undesirable event" for which the insureds sought coverage was not the single application of the manure to the fields, but rather well contamination. ***Id.***, ¶¶28, 32 & n.10. Thus, applying ***Plastics Engineering Co.***, the court concluded there was an occurrence "each time manure seeped into a unique well." ***Falk***, 360 Wis. 2d 67, ¶67. "Further, because the manure had to seep into each individual well, rather than seep into one well which 'fed' the other wells, it cannot be said the seepage was 'so simultaneous or so closely linked in time and space as to be considered by the average person as

[4] In this sense, we disagree with the circuit court's conclusion that "there was one uninterrupted cause of the fire," although the court correctly concluded that "each 'seepage' of the fire onto another's property constitutes a separate occurrence for purposes of the policy."

one event.'" ***Id.*** (quoting ***Welter v. Singer***, 126 Wis. 2d 242, 251, 376 N.W.2d 84 (Ct. App. 1985)).

¶19 Secura presents no compelling distinction between ***Falk*** and the present case. Secura's principal argument appears to be that we should disregard ***Falk*** given its extensive focus on a pollution exclusion and its comparatively summary treatment of the "number of occurrences" issue. However, we do not necessarily agree that our supreme court treated the issue in a summary fashion. Regardless, we cannot ignore a relevant supreme court decision, no matter how concisely reasoned. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (holding that only the supreme court may overrule, modify or withdraw language from a previous supreme court case).

¶20 Secura also argues ***Falk*** is distinguishable because "here the fire damage to all the claimants' properties [was] *closely linked in time and space*." We question the factual premise of this assertion. The fire at issue lasted for approximately three days and spread to over 7,000 acres of land. In any event, Secura eventually acknowledges that, here, the "occurrence" was "the damage to the properties caused by fire, not Duerr's operation" of its equipment. Secura further concedes the fire continually fed as it spread throughout the area, although it believes this fact inures to its benefit. To the contrary, the spread of the fire here is not materially distinguishable from the underground seepage of manure in ***Falk***, and Secura cites no facts in the ***Falk*** decision to show otherwise.

¶21 Finally, ***Falk*** specifically stated that the well contaminations were not "one event because manure had to seep into each individual well for the alleged contamination to occur." ***Falk***, 360 Wis. 2d 67, ¶67. Similarly here, the fire had to spread to each piece of real property for another property owner to

suffer property damage due to the fire. If the fire abated or was extinguished at any given time (as it eventually was), then no further properties would have sustained damage. In sum, although there may be some superficial appeal to Secura's argument that "the fire" was the sole, uninterrupted cause of all damages in this case, this assertion is not borne out by a close examination of the facts as compared to existing case law.

Umbrella Policy—Forest Fire Exclusion

¶22 Secura also insured Duerr under a business umbrella liability policy. An endorsement to the policy entitled "Logging and Lumbering Limitation" contained several exclusions. As relevant here, the endorsement stated the liability policy did not apply to "'Property damage' arising out of injury or damage to or destruction of standing timber or timberlands, including the loss of use thereof, caused by fire and arising out of operations performed by or on behalf of any insured."

¶23 Hanover argues the circuit court interpreted this exclusion too broadly. Hanover does not dispute several conditions relevant to the exclusion's applicability: (1) that there was property damage caused by a fire; (2) that the fire was caused by Duerr's operations; and (3) that the fire damaged or destroyed standing timber or timberlands. Rather, its argument focuses on the requirement that the property damage "arise out of" the damage or destruction of standing timber or timberlands. Hanover contends Secura has failed to demonstrate a direct causal nexus linking each claimant's property damage here to the destruction of standing timberlands.

¶24 Hanover's argument regarding the interpretation of the insurance policy fails. The phrase "arising out of," as used in liability policies, is "not so

much concerned with causation as it is with defining the risk for which coverage will be afforded." ***Lawver v. Boling***, 71 Wis. 2d 408, 415-16, 238 N.W.2d 514 (1976). The phrase is "very broad, general and comprehensive and is ordinarily understood to mean originating from, growing out of, or flowing from." ***Trumpeter Devs., LLC v. Pierce Cty.***, 2004 WI App 107, ¶9, 272 Wis. 2d 829, 681 N.W.2d 269. When "arising out of" is used in an exclusion, the insurer must show only "some causal relationship between the injury and the event not covered." ***Id.*** The language does not contemplate the need for such evidence as would be necessary to warrant a finding of "proximate cause" or "substantial factor" as those terms are used in the negligence arena. ***Lawver***, 71 Wis. 2d at 415.

¶25 We therefore reject Hanover's interpretation of the umbrella policy's "Logging and Lumbering Limitation." It was not necessary for Secura to present evidence showing that each specific instance of property damage was directly caused by "injury or damage to or destruction of standing timber or timberlands" due to fire. Rather, almost any causal connection or relationship will do. ***Tasker by Carson v. Larson***, 149 Wis. 2d 756, 761, 439 N.W.2d 159 (Ct. App. 1989). The exclusion's use of the phrase "arising out of" made clear that Secura would not cover property damage for which the burning of standing timber bore some causal connection.

¶26 Hanover counters with the observation that "[a] basic canon of construction in Wisconsin is that exclusions in an insurance policy are narrowly construed against the insurer." ***Day v. Allstate Indem. Co.***, 2011 WI 24, ¶29, 332 Wis. 2d 571, 798 N.W.2d 199. However, we will enforce exclusions that are clear from the face of the policy. ***Id.*** Although exclusions as a whole are given restrictive readings and any ambiguities in them are construed in favor of

coverage, *see* ***id.***, these principles do not help Hanover here because the "arising out of" language on which Hanover relies has a well-established meaning under Wisconsin law. That meaning does not turn on whether the language is found in an exclusion, *see* ***Garriguenc v. Love***, 67 Wis. 2d 130, 137, 226 N.W.2d 414 (1975), or some other part of the policy, *see* ***Lawver***, 71 Wis. 2d at 415-16.[5]

¶27 Given this interpretation, the record demonstrates that most of the property damage "arose out of" the forest fire. It is well established that Secura, in addition to its obligation to demonstrate no genuine issue of material fact on its summary judgment motion, bore the burden of proving the applicability of the "Logging and Lumbering Limitation." *See* ***Day***, 332 Wis. 2d 571, ¶26. Secura submitted a Department of Natural Resources report containing the result of the DNR's fire investigation. This report sufficiently establishes that the excluded risk of fire damage to standing timber or timberlands bore some causal connection to most of the property damage at issue.

¶28 The report states that the fire started in a cutting head and spread to grasses in the origin area. Much of the area surrounding the origin area consisted of dense jack pine, including the area to the north and west of the origin site. The wind at the time of ignition was blowing from the south and southeast at approximately eleven miles per hour. According to the employee who was operating the equipment at the time the fire started, it spread from the grass beneath the cutting head to a pile of jack pine that had just been felled, then it "took off into the woods and there was no catching it." The DNR, chronicling the

[5] Although a complete recitation of the case law supporting this point is not necessary, we also refer the parties to Secura's brief, which contains a thorough review of the applicable authorities.

probable fire behavior, concluded that the crowns of the felled jack pine burst into flames, then the fire "spread to the adjacent crowns of standing jack pine. The forest fire then became a running crown fire with a separate surface fire beneath. The distance from point of origin to the advancing area where the crown fire ignited was approximately 30 to 40 yards."

¶29 Any property damage sustained after the fire ignited the standing timber and became a "running crown fire" is unambiguously within the scope of the exclusion, and there can be no coverage for such damages under the umbrella policy. However, the DNR report indicates that approximately thirty to forty yards of real property burned before the fire became a standing timber fire. Damage to this segment of property—which was owned by Lyme St. Croix Forest Company, LLC, and not Duerr—does not fall within the scope of the exclusion. We therefore reverse the circuit court's grant of summary judgment and remand for a factual determination of what damages, if any, were sustained to property within that area.

¶30 Hanover contends any relationship between the standing timber fire and the damages that followed from that point is based on "pure speculation." We disagree and conclude the only reasonable inference, based on the facts of record, is that the forest fire bore a causal connection to most of the complained-of property damage. Indeed, if the fire was not a cause of the claimants' losses, they would have no basis to seek compensation from Secura for damages arising from the fire in the first instance. In sum, we conclude Secura made a sufficient prima facie showing that most of the property damage "arose out of" the forest fire. Although Hanover contends Secura failed to meet its burden of production, Hanover does not actually assert—let alone point to any record evidence—that the fire did not cause the vast majority of the property owners' losses.

¶31 No WIS. STAT. RULE 809.25 costs awarded on appeal.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

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