COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2001

Cornelia G. Clark
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.

No. 00-2666

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

STATE OF WISCONSIN,

PLAINTIFF,

TOWER INSURANCE COMPANY,

INTERVENING PLAINTIFF,

GENERAL CASUALTY COMPANY OF WISCONSIN AND

INTERVENING PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY,

INTERVENING PLAINTIFF-RESPONDENT,

HAWKEYE-SECURITY INSURANCE COMPANY,

INTERVENING PLAINTIFF-THIRD-PARTY PLAINTIFF,

V.

CITY OF RHINELANDER,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

CHAMPION INTERNATIONAL CORPORATION, BANTA CORPORATION, AND TRIUMPH TWIST DRILL COMPANY,

DEFENDANTS,

BOREL AUTO BODY & ALIGNMENT SERVICE, NICOLET AREA TECHNICAL COLLEGE, NICOLET SERVICE CENTER, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN DEPARTMENT OF TRANSPORTATION, SWEO TRANSFER, CONTINENTAL INSURANCE COMPANY, CAROLYN V. WOLSKI AND THE AMERICAN INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS,

SENTRY INSURANCE, A MUTUAL COMPANY,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from judgments and an order of the circuit court for Oneida County: ROBERT A. KENNEDY, Judge. *Affirmed.*

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

¶1 PER CURIAM. The City of Rhinelander appeals summary judgments dismissing its action against several insurance companies. The City contends that its liability insurers must indemnify the City for expenses it agreed to pay for landfill remediation in a settlement with the State. The City also claims that the insurance companies breached their duty to defend the City, even though

the companies provided the City with counsel. General Casualty cross-appeals an order denying its motion for summary judgment on its umbrella policy. It argues that the policy does not provide coverage for the settlement and that the "known loss doctrine" precludes coverage under the policy as a matter of law. We affirm each of the summary judgments dismissing the actions on the primary policies and affirm the order denying General Casualty's motion on the umbrella policy.

¶2 The State brought this action against the City and other defendants seeking damages and remediation of a landfill that was leaching into the groundwater and a nearby stream. The insurance companies denied coverage and hired attorney George Richards to represent the City. Nonetheless, the City continued to retain attorney James Lonsdorf to represent its interests. The insurance companies' initial motions for summary judgment, based on ***City of Edgerton v. General Cas. Co.***, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), were denied on the ground that a part of the State's claim was for "damages." The parties then negotiated a settlement in which the City agreed to pay one-third the cost of remediation, and the State agreed to forego collection of damages. On the insurance companies' renewed motions for summary judgment, the trial court concluded that the liability policies do not promise to indemnify the City for losses arising out of the stipulation because the stipulated settlement did not include any damages. On General Casualty's umbrella policy, however, the court concluded that coverage is not limited to damages and the policy provides coverage as a matter of law. The court further concluded that issues of material fact precluded summary judgment on the known loss doctrine.

¶3 The trial court correctly concluded that the primary liability policies do not provide coverage for expenses the City will incur complying with the stipulation because those policies only cover sums payable "as damages." The City contends that the ***Edgerton*** rule does not apply because the settlement extinguished claims for damages by cross-claiming defendants and involved remediation of groundwater and property that was not owned by the City. We disagree. The City's argument confuses the distinction between the duty to defend and the duty to indemnify. After judgment has been rendered, the focus is on the judgment, not the pleadings. Because the judgment includes no "damages," there is no coverage under the liability policies. Remediation costs incurred by a policyholder pursuant to State enforcement proceedings are not damages. *See* ***id.*** at 784. The cross-claims by private parties, offsite contamination and groundwater contamination alleged in the pleadings are irrelevant. The stipulation to forego all damages precludes any recovery under the insurance policies that are limited to losses incurred "as damages," regardless of the nature of the claims that were settled by the stipulation.

¶4 The trial court also correctly concluded that the insurance companies did not violate their duty to defend the City. The City contends that it was required to continue to retain Lonsdorf even though the insurance companies retained Richards to represent the City's interest. The City asserts that a conflict of interest, or potential conflict of interest, arose because Richards had represented the insurance companies in other litigation, albeit not on coverage questions. The City, however, does not question Richards' conduct in the litigation. We conclude that there is no breach of the duty to defend as a matter of law merely because the attorney hired by the City represented the insurance companies in other litigation.

¶5 The City contends that it was forced to continue Lonsdorf's representation because the insurance companies delayed responding to the City's queries regarding Richards' qualifications. We are unpersuaded. The City never asked Richards about his qualifications, and it offers no explanation for its decision to retain Lonsdorf for several months before it inquired about Richards' qualifications. To accept the City's argument would allow an insured to select its own attorney at the insurer's expense. While that is an option the insurance company can employ, an insurance company is free to select an attorney to represent the insured without input from the insured. The trial court could reasonably have found that the insurance companies hired a competent attorney with a good reputation to give his undivided loyalty to the City, and spent over $180,000 defending the City. By doing so, the insurance companies fulfilled their contractual obligation to defend the City. *See* ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 528, 385 N.W.2d 171 (1986). In an excess of caution, the City continued its relationship with Lonsdorf. The insurance policies do not provide coverage for excessive caution.

¶6 Next, the trial court properly denied General Casualty's motion for summary judgment on the umbrella policy. At a minimum, the policy is sufficiently ambiguous that it must be construed in favor of coverage. *See* ***Garriguenc v. Love***, 67 Wis. 2d 130, 135, 226 N.W.2d 414 (1975). The policy provides in relevant part:

> "Coverage: The company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability … imposed upon the Insured by law, … for ultimate net loss on account of … property damage."

"Ultimate Net Loss" is defined as "The sum actually paid or payable in cash in settlement or satisfaction of losses for which the Insured is liable either by adjudication or compromise with the written consent of the company …." The policy contains no other limitations, terms or conditions that limit coverage. Specifically, and unlike the policy in ***Edgerton***, this section of the policy contains no language limiting its coverage to damages.[1] The reason the ***Edgerton*** court drew a distinction between damages and the cost of injunctive relief is because the policy limited coverage to damages. In the absence of any similar restriction, the trial court properly concluded that General Casualty's policy provides coverage for the remedial expenses arising out of the stipulation.

¶7 Nonetheless, General Casualty argues that Section II of the policy limits the scope of coverage. Section II provides in relevant part:

> Defenses. Settlement and Supplementary Payments: When Underlying Insurance Does Not Apply To an Occurrence:
>
> With respect to any occurrence not covered by the underlying insurance listed in Item 3 of the Declarations, or other underlying insurance applicable to the insured, but covered by this policy except for the amount specified in Item 4 of the Declarations, the company will, in addition to the amount of the ultimate net loss payable: (a) Defend any suit against the insured seeking damages on account of personal injury, property damage ….

Section II does not limit or reduce the coverage granted in Section I. The reference to lack of other insurance does not imply that Section I is limited to circumstances when other insurance does apply. Rather, it provides coverage under some circumstances "in addition to" the coverage provided in Section I.

[1] All of the cases General Casualty cites limit liability to losses payable "as damages" or other words that are defined in the policies using the term "damages."

Section II limits the duty to defend to circumstances when no other insurance applies and the lawsuit seeks damages. These restrictions apply only to the duty to defend, not the duty to indemnity for "all sums" as promised in Section I and in the definition of "Ultimate Net Loss."

¶8 General Casualty notes that, under this construction, its duty to indemnify is greater than its duty to defend. It correctly notes that, ordinarily, the duty to defend is broader than the duty to indemnify. That is true because the duty to defend arises from examining the complaint and the duty to indemnify involves construction of the judgment. Ordinarily, the complaint is broader than the judgment. However, no law requires an insurance policy to provide broader coverage for defense than for indemnity. This policy could be understood by a reasonable insured to indemnity the City for all sums it is required to pay in settlement of a lawsuit for property damage, and provide a defense only if the lawsuit seeks damages.

¶9 General Casualty argues that this is a third-party liability policy that is not designed to compensate the insured for the cost of complying with an injunctive decree. While that may have been General Casualty's intent, nothing in the policy language reflects that intent. "Ultimate Net Loss" is defined as the sum actually paid or payable in cash in the settlement or satisfaction of losses for which the insured is liable. "Losses" is a broader term than the restriction found in ***Edgerton*** where the policy limited coverage to "all sums which the insured shall become legally obligated to pay as damages because of … property damage." ***Edgerton***, 184 Wis. 2d at 769.

¶10 Finally, the trial court properly denied General Casualty's motion for summary judgment based on the known loss doctrine. Outstanding issues of

material fact preclude summary judgment on that issue. *See* WIS. STAT. § 802.08(1) (1999-2000). The known loss doctrine is rooted in prevention of fraud. As noted in this court's opinion in ***City of Edgerton v. General Cas. Co.***, 172 Wis. 2d 518, 561, 493 N.W.2d 518 (Ct. App. 1992), it provides that insurance coverage does not extend to known losses or losses that are in progress at the commencement of the policy term.[2] We agree with General Casualty that an objective standard should be applied when analyzing known loss. The question is whether the City knew or should have known that a claim was likely. The subjective standard noted in ***Estate of Logan v. Northwestern Nat'l Cas. Co.***, 144 Wis. 2d 318, 330, 348, 424 N.W.2d 179 (1988), reflects the language in the professional liability, claims-made policy that raised the question whether the insured had a basis to believe that he had breached a professional duty. In the absence of similar policy language, the subjective test set out in ***Logan*** is inapplicable.

¶11 Nonetheless, General Casualty has not established that it is entitled to judgment as a matter of law based on the objective test. While the City received notice that there were problems with the landfill, the record does not conclusively show that the City knew its previous remedial efforts would fail. The knowledge that materials were leaching into a stream does not necessarily mean that the City knew that a loss or a claim existed. Some correspondence from the DNR suggested that imposing restrictions on the materials accepted at the landfill and following leachate abatement procedures might resolve the problem without

[2] For purposes of this appeal, our references to the known loss doctrine include the arguably separate doctrines of "known event," "known risk" and loss-in-progress." *See, generally,* ***Insurance Co. of N.A. v. Kayser-Roth***, 1999 WL 813661 (R.I. Super.)

any formal claim being made. Whether the City knew that the leachate contained unacceptable levels of contaminants and whether it knew its remedial efforts to reduce leachate production failed are matters for the jury to determine.

By the Court.—Judgments and order affirmed. Costs to the respondents except General Casualty Company. No costs on the cross-appeal.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).