COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 93-2479
95-0542

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

No. 93-2479

KOHLER COMPANY,
a Wisconsin corporation,

Plaintiff-Appellant-
Cross Respondent,

v.

EMPLOYERS INSURANCE
OF WAUSAU,

Defendant-Respondent-
Cross Appellant,

FIDELITY AND CASUALTY
COMPANY OF NEW YORK and
ALLSTATE INSURANCE COMPANY,

Defendants-Intervenors-
Respondents-Intervenors-
Cross Appellants,

UNITED STATES FIRE
INSURANCE COMPANY,

Defendant.

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No. 95-0542

**KOHLER COMPANY,
a Wisconsin corporation,**

Plaintiff-Appellant,

v.

**THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK,**

**Defendant-Intervening-
Respondent,**

**ALLSTATE INSURANCE COMPANY
and UNITED STATES FIRE
INSURANCE COMPANY,**

Defendants-Respondents,

**EMPLOYERS INSURANCE
OF WAUSAU,**

**Defendant-Intervening-
Respondent.**

APPEAL from orders of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Kohler Company appeals from an order dismissing its action against United States Fire Insurance Company, Fidelity and Casualty Company of New York, and Allstate Insurance Company for indemnification for the cost of investigation and cleanup of contaminated

groundwater at Kohler's landfill.[1] The dispositive issue is whether coverage exists under the various comprehensive general liability policies issued by the insurers, including Employers Insurance of Wausau.[2] We conclude that ***City of Edgerton v. General Casualty Co.***, 184 Wis.2d 750, 782, 517 N.W.2d 463, 477 (1994), *cert. denied*, 115 S. Ct. 1360, and *cert. denied*, 115 S. Ct. 2615 (1995), controls and that no coverage exists for the cleanup costs because such costs do not constitute damages within the meaning of the policies.[3]

In 1985, Kohler received notice from the Environmental Protection Agency (EPA) that it was a potentially responsible party for contaminates found in the groundwater underlying a landfill owned by Kohler. On September 22, 1985, Kohler entered into an administrative consent order (AOC) whereby Kohler agreed to perform a remedial investigation and feasibility study to

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[1] In appeal no. 93-2479, Kohler appeals from an order granting summary judgment dismissing Employers Insurance of Wausau on the ground that Kohler had breached the policy prohibition against voluntary payments. Fidelity and Casualty Company of New York and Allstate Insurance Company, which had similar prohibitions against voluntary payments in their policies, were granted leave to intervene in the appeal. Employers cross-appealed concerning the trial court's conclusion that before an alleged breach of a contractual duty to give timely notice negates coverage, prejudice must be shown. During the pendency of the appeal, the Wisconsin Supreme Court issued its decision in ***City of Edgerton v. General Casualty Co.***, 184 Wis.2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 115 S. Ct. 1360, and *cert. denied*, 115 S. Ct. 2615 (1995). The respondent insurers moved for summary disposition of the appeal based on ***Edgerton***. We denied the motion but remanded the case to the trial court for consideration of the effect of the ***Edgerton*** decision.

[2] Employers Insurance of Wausau did not join in the summary judgment motion which was filed following our remand after the decision in ***Edgerton***. However, it was allowed to intervene in the appeal taken from the order granting that motion.

[3] Because the issue raised by appeal no. 95-0542 is dispositive, we need not reach the merits of the issues raised in appeal and cross-appeal no. 93-2479. ***Community Newspapers, Inc. v. City of West Allis***, 158 Wis.2d 28, 34, 461 N.W.2d 785, 788 (Ct. App. 1990). Our holding that ***Edgerton*** controls provides an alternative reason for affirming the trial court's order dismissing Employers Insurance of Wausau. Therefore, we affirm that order for reasons different from those relied upon by the trial court. ***Lecander v. Billmeyer***, 171 Wis.2d 593, 602, 492 N.W.2d 167, 171 (Ct. App. 1992). Our affirmance in appeal no. 93-2479 is narrow and should not be construed as an opinion on the merits of the issues raised in appeal no. 93-2479.

determine the extent of the contamination and what remedial action was necessary.[4]

In August 1988, Kohler notified its various insurers of a potential claim. The insurers denied liability for various reasons. In November 1991, Kohler commenced this action seeking declaratory judgment that insurance coverage exists for the investigation and cleanup expenses. The trial court granted summary judgment that Kohler's entry into the AOC breached the policies' provision that the insured shall not make voluntary payments without authorization from the insurer. Upon remand from this court, the trial court ruled that under ***Edgerton*** none of the policies provide coverage.[5]

We review decisions on summary judgment de novo, applying the same methodology as the trial court. ***Armstrong v. Milwaukee Mut. Ins. Co.***, 191 Wis.2d 562, 568, 530 N.W.2d 12, 15 (Ct. App. 1995). That methodology, set forth in § 802.08(2), STATS., has been recited often and we need not repeat it here. *See* ***Armstrong***, 191 Wis.2d at 568, 530 N.W.2d at 15. Interpretation of an insurance contract is a question of law for our independent review. *See* ***Taryn E.F. v. Joshua M.C.***, 178 Wis.2d 719, 722, 505 N.W.2d 418, 420 (Ct. App. 1993).

The insuring clauses of the policies provide that the insurer will indemnify Kohler for sums it is obligated to pay "as damages" for property damage. In ***Edgerton***, the court held that CERCLA superfund response costs do not constitute damages within the unambiguous use of that term in a comprehensive general liability policy. ***Edgerton***, 184 Wis.2d at 782, 517 N.W.2d at 477. The court notes that response costs are, by definition, equitable relief and cannot be equated with legal damages. ***Id.*** at 784, 517 N.W.2d at 478. "Therefore, as 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

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[4] The AOC was entered into with the EPA and the Wisconsin Department of Natural Resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or "superfund site" legislation.

[5] See note 1.

substitutionary—monetary compensation provided to make up for a claimed loss." ***Id.*** at 785, 517 N.W.2d at 478.

Kohler argues that an issue of fact exists as to the meaning of "damages." It contends that the doctrines of "latent ambiguity," estoppel and reasonable expectations serve to permit consideration of extrinsic evidence of the representations made and circumstances surrounding the solicitation of coverage. These doctrines do not apply unless an existing ambiguity in the contract is found. ***Edgerton*** concludes that the term "damages" is unambiguous. ***Id.*** at 783, 517 N.W.2d at 478. Neither an ambiguity nor a factual issue can be created by Kohler's extrinsic evidence.

Kohler next asserts that differences in the policy language makes ***Edgerton*** inapplicable. It points to the Allstate umbrella policy which indemnifies for "damages and expenses" and argues that the inclusion of the term "expenses" creates an ambiguity as to whether CERCLA response costs are covered. It also suggests that the policies which contain a definition of "damages" do so in an expansive matter so as to distinguish the limited technical and legal definition embraced in ***Edgerton***.[6]

The difference in policy language is not so great as to render ***Edgerton*** inapposite. The Allstate policy uses the phrase "damages and expenses." The conjunctive "and" expresses that coverage exists for expenses connected to legal damages incurred. Inclusion of the term "expenses" does not expand coverage beyond that contemplated in ***Edgerton***.

The same is true of the use of the term "includes" when defining damages. That word cannot be viewed in isolation as expanding the meaning of damages. Indeed, the authorities Kohler cites as giving an expansive meaning to the word recognize with equal force that the use of the word can be

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[6] The term "damages" was undefined in the policies at issue in ***Edgerton***. Here, two Allstate policies, one Employers policy and two Fidelity and Casualty policies provide in part that damages "includes damages for death and for care and loss of services resulting from personal injury and damages for loss of use of property resulting from property damages."

a source of limitation. *See* ***Milwaukee Gas Light Co. v. Wisconsin Dep't of Taxation***, 23 Wis.2d 195, 203, 127 N.W.2d 64, 68 (1963). We need not resolve which rule of construction will apply to determine whether the word "includes" is expansive or restrictive. Such rules of construction are necessary only where ambiguity exists. ***Edgerton*** concludes that no ambiguity exists with respect to the meaning of "damages." The use of the word "includes" does not create one and does not change the meaning of the word "damages" from anything other than legal damages.

Also in an attempt to distinguish ***Edgerton***, Kohler argues that an exclusionary clause—a "sister ship" exclusion—plays a role in expanding the definition of "damages."[7] There is no support for the proposition that an exclusionary clause serves to expand coverage. *See* ***Muehlenbein v. West Bend Mut. Ins. Co.***, 175 Wis.2d 259, 265-66, 499 N.W.2d 233, 235 (Ct. App. 1993) (an exclusion subtracts from coverage). Moreover, the sister ship exclusion pertains only to situations of product recall and has no application here. The totally unrelated provision does not create an ambiguity in the contract but merely defines the limit of the insurer's responsibility in the area of product recall.

The term "damages" remains unambiguous. We are bound to follow ***Edgerton***. A different result is not required simply because this is a declaratory judgment action rather than a duty to defend action like ***Edgerton***. Likewise, the possibility that the government will perform the remediation and then commence an action against Kohler for the costs incurred does not convert Kohler's claim to one for "damages" under the policies. The overriding consideration is whether the remediation expenses constitute damages under the policies. ***Edgerton*** concludes that response costs, whether incurred in response to injunctive relief or sought as a monetary claim for reimbursement,

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[7] The "sister ship" exclusion provides:

> This policy shall not apply ... to damages claimed for the withdrawal, inspection, repair, replacement or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein ....

are an "equitable form of relief." ***Edgerton***, 184 Wis.2d at 785, 517 N.W.2d at 478. It draws a line between remediation, cleanup or response costs and compensatory and substitutionary damages. The policies do not provide coverage for CERCLA superfund response and cleanup costs.

No costs allowed to defendant-respondent-cross appellant Employers Insurance of Wausau.[8]

By the Court.—Orders affirmed.

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

[8] Employers briefed only the issues relevant to the appeal and cross-appeal no. 93-2479. We did not consider the merits of those arguments because appeal no. 95-0542 is dispositive. Therefore, we deny costs to Employers.