COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 16, 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(1), STATS.

NOTICE

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No. 95-2012

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

NOR-LAKE, INC.,
A WISCONSIN CORPORATION,

Plaintiff-Appellant,

v.

AETNA CASUALTY AND
SURETY CO. AND EMPLOYERS
INSURANCE OF WAUSAU,

Defendants-Respondents,

ROYAL INSURANCE CO.
AND JOHN DOE INSURANCE
COMPANIES ONE THROUGH TWENTY,

Defendants.

APPEAL from a judgment of the circuit court for St. Croix County: ERIC J. WAHL, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Nor-Lake, Inc., appeals a summary judgment dismissing its claim against Aetna Casualty and Surety Co. and Employers Insurance of Wausau. Nor-Lake argues that: (1) a question of material fact precludes summary judgment, i.e., what portion of remediation expenses represents legal damages; (2) ***City of Edgerton v. General Cas. Co***., 184 Wis.2d 750, 517 N.W.2d 463 (1994), does not bar coverage under Wausau and Aetna's liability insurance policies; (3) the trial court misinterpreted the Aetna umbrella insurance policy; and (4) the trial court erroneously awarded costs.

We conclude that: (1) what portion of remediation costs represents legal damages poses a material issue of fact to preclude summary judgment; (2) ***Edgerton*** bars coverage under Wausau's and Aetna's policies for costs of remediation at Nor-Lake's Hudson facility; and (3) the trial court correctly interpreted the Aetna umbrella policy. We therefore affirm in part, reverse in part and remand for resolution of Nor-Lake's liability for property damage to another. In light of our remand, we do not address the issue of costs.

Nor-Lake filed this declaratory judgment action to obtain insurance benefits for costs incurred to satisfy claims by the Wisconsin Department of Natural Resources. Starting in 1965, Nor-Lake, a refrigeration and laboratory equipment manufacturer, used paints and solvents containing volatile organic compounds at its Hudson facility. In 1984, Nor-Lake tested for and discovered groundwater contamination at its Hudson facility, as well as at five nearby residential wells. After notifying the DNR as required by § 144.76(2), STATS., it participated in remediation, including the installation of monitoring wells, sampling of wells, groundwater extraction and an aeration system.

From 1976 to 1987, Nor-Lake contracted with a disposal service to dispose of its trash at what is commonly known as the Junker landfill. After groundwater contamination was discovered resulting from the Junker site, Nor-Lake participated in remediation to minimize potential liability. It is undisputed that the DNR never initiated suit against Nor-Lake.

Aetna issued Nor-Lake a comprehensive general liability policy for the time periods in question. Aetna also sold Nor-Lake an umbrella liability policy. Wausau issued general liability policies for five consecutive annual periods from 1984 to 1989.

Nor-Lake's complaint against its insurers seeks a declaration that the insurers have a duty to defend Nor-Lake "in connection with the groundwater contamination," and that the insurers have a duty to indemnify Nor-Lake "for all sums Nor-Lake has been legally obligated to pay as damages and will become legally obligated to pay as damages in the future in connection with the groundwater contamination ...."[1]

The trial court granted summary judgment in favor of the insurers based upon ***Edgerton***. Nor-Lake appeals the judgment of dismissal.

1. Damages

Nor-Lake argues that ***Edgerton*** is not dispositive of all pollution coverage claims as a matter of law. It points to language in ***Edgerton*** that holds the door open for "damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C)" as claims for damages recoverable under a comprehensive general liability policy. *See* ***id.*** at 784, 517 N.W.2d at 478. It argues that the trial court in this case was presented with a factual dispute: whether some of Nor-Lake's costs of remediation were in the nature of expenditures to compensate an injured party for losses sustained by a wrongdoer.

Summary judgment is reviewed de novo. ***American States Ins. Co. v. Skrobis Painting & Decorating***, 182 Wis.2d 445, 450, 513 N.W.2d 695, 697 (Ct. App. 1994). We apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Edgerton,*** 184 Wis.2d at 764, 517 N.W.2d at 470. To demonstrate a prima facie case for summary judgment, the moving party, here the defendant insurer, must show a defense that would defeat the claim. *See* ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). We conclude that to the extent Nor-Lake's expenditures may include expenses that compensate another for negligently damaging another's property, the insurers have failed to demonstrate a prima facie defense.

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[1] The complaint was filed on November 12, 1992. ***City of Edgerton v. General Cas. Co***., 184 Wis.2d 750, 517 N.W.2d 463 (1994), was released on June 16, 1994. On appeal, Nor-Lake confines its arguments to the issue of coverage in light of ***Edgerton.*** Therefore, we do not address the issue of duty to defend.

In ***Edgerton,*** the City of Edgerton and the owner of a landfill, Edgerton Sand and Gravel, Inc., received letters from the DNR ordering a remediation plan to address groundwater contamination at a landfill. ***Id***. at 759-60, 517 N.W.2d at 468. The landfill was used as a dump from the early 1950s to 1984. The city leased the landfill from 1964 to 1984. ***Id.*** at 758-59 n.5, 517 N.W.2d at 468 n.5.

Edgerton and ES&G asked their general comprehensive liability carriers to provide defense costs as well as to pay any liability resulting from the Environmental Protection Agency or DNR claims. ***Id.*** at 762, 517 N.W.2d at 469. They relied on the following policy language:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
> A. bodily injury or
> B. property damage
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages ....

Id. at 769, 517 N.W.2d at 472 (emphasis deleted).

In ***Edgerton,*** our supreme court held that Superfund response costs do not constitute "damages" as that term is used in a comprehensive general liability policy. ***Id.*** at 782, 517 N.W.2d at 477. "'Damages' as used in ... insurance policies unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature." ***Id.*** at 783-84, 517 N.W.2d at 478 (quoting ***Shorewood School Dist. v. Wausau Ins. Cos.***, 170 Wis.2d 347, 368, 488 N.W.2d 82, 89 (1992). "Damages" do not include injunctive relief. ***Id.*** Our supreme court concluded that because a DNR letter directing clean-up of ground water contamination did not constitute a suit, the insurer had no duty to defend. Also, because injunctive relief was sought instead of damages, it held the policy did not provide coverage. ***Id.*** at 786, 517 N.W.2d at 479.

Here, like ***Edgerton,*** the comprehensive general liability policies promise to pay on behalf of Nor-Lake "all sums which the insured shall become

legally obligated to pay as damages because of ... property damage ...." The insurers rely on ***Edgerton*** for the proposition that there is no coverage for Nor-Lake's remediation costs. ***Edgerton,*** however, did not involve remediation of neighboring properties. It addressed remediation due only to contamination at the property the insured owned or occupied. *See* ***id.*** at 758-62, 517 N.W.2d at 468-69. The insurers cite no authority for the proposition that § 144.76, STATS., compliance relieves an individual of legal liability for damages he negligently caused to another's property.[2]

In ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 522 N.W.2d 542 (Ct. App. 1994), we recognized that in a negligence action, a plaintiff could recover from a tortfeasor the costs to remediate a site in response to a letter from the DNR. ***Id***. at 103-04, 522 N.W.2d at 545. ***Nischke*** does not address whether a tortfeasor's insurer would be required to indemnify the tortfeasor. However, ***Nischke*** stands for the proposition that expenses of remediation can be an element of legal damages. ***Nischke*** states:

> Thus, assuming the bank was the negligent cause of the leak, its negligence has made Nischke legally obligated to incur costs to restore her property. These are recoverable as the normal measure of compensatory damages, despite the fact such expenses may exceed the diminution in fair market value.

Id. at 120, 522 N.W.2d at 552.

Here, Nor-Lake undertook remediation not only to clean up its own site, but to clean up the effects of contamination on five residential wells and a landfill. Nor-Lake has demonstrated a material issue of fact whether it is liable for negligently damaging neighboring wells and a landfill. To the extent that its negligence caused property damage for which it is legally liable, the policy affords coverage. The cost of remediation is not conclusory as to the amount of damages but is relevant evidence the court may consider in making a

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[2] "**Edgerton** will not be dispositive in all environmental coverage cases." Heidi L. Vogt, *CITY OF* ***EDGERTON*** *v. GENERAL CASUALTY COMPANY OF WISCONSIN: A LANDMARK DECISION IN WISCONSIN INSURANCE COVERAGE LAW*, WISCONSIN LAWYER 10 (May 1995).

determination of damages. The fact that Nor-Lake was legally required to remedy the property damage before it was sued goes to the issue of duty to defend, not to liability for damages. *See* ***Edgerton,*** 184 Wis.2d at 786, 517 N.W.2d at 479.

2. Aetna and Wausau CGL Policies

Nor-Lake argues that the trial court erroneously applied ***Edgerton*** to preclude coverage under the Aetna and Wausau CGL policies. It contends that the facts in this case can be distinguished from ***Edgerton*** so that ***Edgerton*** does not control. To the extent the trial court applied ***Edgerton*** to Nor-Lake's obligation to remediate the contamination at Nor-Lake's facility, we disagree.

The facts here and in ***Edgerton*** involve the same policy language; both involve costs incurred by the insured remediating ground water contamination at a site it owned or occupied, pursuant to a demand by the DNR. The trial court properly applied ***Edgerton*** to preclude coverage to remediate the Hudson facility site owned or occupied by Nor-Lake.

Nor-Lake argues that ***Edgerton*** can be distinguished based on the parties' intent when entering the insurance contracts. Nor-Lake argues that its insurance company's own records evince an intent to provide coverage under the circumstances presented. We are unpersuaded.

Insurance policies are construed like other contracts. ***Sprangers v. Greatway Ins. Co.***, 182 Wis.2d 521, 536, 514 N.W.2d 1, 6 (1994). Absent an ambiguity in its terms, its plain language controls. ***International Chiropractors Ins. Co. v. Gonstead***, 71 Wis.2d 524, 527, 238 N.W.2d 725, 727 (1976). Whether an ambiguity exists is a question of law. Extrinsic evidence is irrelevant if the contract is unambiguous. ***Capitol Invest., Inc. v. Whitehall Packing Co.***, 91 Wis.2d 178, 189, 280 N.W.2d 254, 258 (1979). Because Nor-Lake fails to persuade us that the policies are in any way ambiguous, we agree with the trial court that extrinsic evidence of the parties' intent in the form of company records and internal documents is irrelevant. *See* ***Hope Acres, Inc. v. Harris,*** 27 Wis.2d 285, 291, 134 N.W.2d 462, 465 (1965). Except in case of ambiguity, "the intent of the parties must be determined from the four corners of the insurance policy itself." ***Sambs v. City of Brookfield***, 66 Wis.2d 296, 317, 224 N.W.2d 582, 593 (1975).

Nor-Lake argues that in ***Edgerton,*** our supreme court relied on "facts" outside the four corners of the insurance policies, even though the court found the terms of the policy unambiguous. *See* ***id.*** at 781, 517 N.W.2d at 477. It points to the court's observation that "CGLs were formulated and revised between 1940 and 1973. Risk assessment in pre-1980 CGLs did not incorporate liability under CERCLA," ***id.*** at 780 n. 26, 517 N.W.2d at 476 n. 26, and that the insurers did not have a "coverage expectation" to defend notices that were not lawsuits. ***Id.*** at 781, 517 N.W.2d at 477.

We disagree. The ***Edgerton*** court interpreted the parties' intent through the plain and ordinary meaning of the contract. "[T]he words of a policy are to be given their plain and ordinary meaning. [A]n insured's expectations may not be satisfied in contradiction to policy language which clearly identifies the scope of the insured's coverage." ***Id***. at 480, 517 N.W.2d at 476-77 (citation omitted). ***Edgerton***'s observations cited by Nor-Lake were statements unnecessary to its analysis. Although a variety of factors may require a court to look beyond the four corners of a document to discern the meaning of a contract, none are evident here. Nor-Lake has failed to persuade us that the record presents a basis for admitting extrinsic evidence to vary the plain meaning of the insurance contracts.

3. Aetna's Umbrella Policy

Nor-Lake argues that the trial court erred by misinterpreting the Aetna umbrella policy; that the policy is ambiguous, and that it must be read in favor of coverage. We conclude that the policy is unambiguous and that the trial court correctly applied the umbrella policy to the remediation costs at Nor-Lake's facility.

The Aetna umbrella policy provides:

> 2.1 COVERAGE. The company will indemnify the insured for ultimate net loss in excess of the applicable underlying limit which the insured shall become legally obligated to pay as damages because of
> A. Personal Injury,
> B. Property Damage, or
> C. Advertising Offense

to which this policy applies, caused by an occurrence anywhere in the world, provided that: ....

Aetna defined "ultimate net loss" to mean:

> 5.13 "ultimate net loss" means the sum actually paid or payable in cash in the settlement or satisfaction of *any claim* or suit for which the Insured is liable either by adjudication or settlement with the written consent of the company, after making proper deduction for all recoveries and salvages collectible. (Emphasis added.)

Nor-Lake argues that the specific definition of "ultimate net loss" controls Aetna's obligations under the umbrella policy. It argues that in order to give meaning to every term so that none is rendered meaningless, the phrase "any claim" must be interpreted separately from the term "suit,' and means a "[d]emand for money" and "[r]ight to payment, whether or not such right is reduced to judgment, liquidated, unliquidated ...." BLACK'S LAW DICTIONARY 247 (6th ed. 1990). Relying on this broad definition, Nor-Lake maintains that the DNR's demands requiring remediation of contamination at Nor-Lake's facility constitutes "any claim" encompassed by Aetna's policy definition of "ultimate net loss." In the alternative, Nor-Lake argues that "any claim" is sufficiently broad as to create an ambiguity.

We reject Nor-Lake's arguments. "The meaning of the terms of the policy is assessed by a reasonable person in the position of the insured and that reasonable insured's expectations of coverage." ***Edgerton,*** 184 Wis.2d at 780, 517 N.W.2d at 476-77. Even given an expansive interpretation of the term "any claim," its context refers to "any claim" for damages within the meaning of the policy. In addition to its definition, the term "ultimate net loss" is further modified by the propositional phrase "in excess of the applicable underlying limit which the insured shall become legally obligated to pay as damages ...." Nor-Lake's reading ignores this qualifier. To read the umbrella policy as providing coverage for "any claim" without qualification would be unreasonable. *See* ***Nichols v. American Employers Ins. Co.,*** 140 Wis.2d 743, 751, 412 N.W.2d 547, 551 (Ct. App. 1987) (liability policy not to be interpreted to defend such actions as child custody suits, for example). Because "any claim"

for damages does not include a claim for injunctive relief, ***Edgerton,*** 184 Wis.2d at 786, 517 N.W.2d at 479, we reject Nor-Lake's proposed interpretation of the Aetna umbrella policy.

Nor-Lake further argues that its liability under a consent decree resulting from a DNR administrative adjudication falls within the meaning of "any claim or suit." An administrative proceeding is not the equivalent of a suit or claim for legal damages. ***Id.*** at 781, 517 N.W.2d at 477. "Therefore, no matter how coercive the language of the DNR letter was considered to be, it was used within the realm of an *administrative* proceeding. It did not have the effect of initiating a suit." ***Id***. at 782, 517 N.W.2d at 477 (emphasis in original).

Nor-Lake further argues that the purpose of an umbrella policy is to provide coverage to include losses of a different character than the more typical losses covered by underlying liability insurance. We agree that one purpose of an umbrella policy may be to provide broader coverage. Our first duty, however, in the interpretation of an insurance policy is to read its plain language. Nor-Lake has not pointed to any policy language that evinces an intent to expand the scope of coverage. We agree that the trial court properly interpreted the policy not to cover remediation expenses at the Nor-Lake facility.

4. Costs

Nor-Lake argues that the trial court misinterpreted the law when it concluded that it had no discretion but to award costs against Nor-Lake. Because we affirm in part and reverse in part, costs will be re-evaluated after remand. Consequently, it is unnecessary to address this issue.

5. Conclusion

We address only the narrow issues presented here: whether the trial court properly applied ***Edgerton*** to require dismissal of all of Nor-Lake's claims as a matter of law. We agree that the trial court properly interpreted the

insurance policies to conclude that ***Edgerton*** precludes coverage for remediation expenses at Nor-Lake's facility. ***Edgerton***, however, did not address coverage for remediation expenses for injury to neighboring wells or landfills not owned or occupied by the insured. The insurers cite no authority for the proposition that §§ 144.60 to 74 and § 144.76, STATS., compliance relieves an individual of legal liability for damage he negligently caused to another's property.

Consequently, we conclude that the insurers have not demonstrated, as a matter of law, that the policy fails to provide coverage for Nor-Lake's costs related to property damage it may have negligently caused to another's property. We remand for resolution of Nor-Lake's liability for property damages to another.

By the Court. – Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal

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