COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP1038 **Cir. Ct. No. 2008CV4283**

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

HENSHUE CONSTRUCTION, INC.,

PLAINTIFF-RESPONDENT,

V.

TERRA ENGINEERING & CONSTRUCTION CORP. AND SAFECO INSURANCE COMPANY OF AMERICA,

DEFENDANTS-APPELLANTS,

SCOTT A. ZIMMERMAN,

DEFENDANT,

GENERAL CASUALTY COMPANY OF WISCONSIN,

INTERVENING DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 LUNDSTEN, P.J. This appeal concerns a construction project on the University of Wisconsin-Madison campus and unexpectedly heavy rainfall in 2008. Terra Engineering & Construction Corp., the general contractor for the project, subcontracted with Henshue Construction, Inc., to excavate, backfill, and perform other tasks associated with an underground system of steam pits and piping that heats certain facilities on the campus. Heavy rains that occurred during construction flooded a section of excavation which, in turn, caused water to flow into and damage part of the steam system. A jury trial was held to resolve questions relating to Terra's and Henshue's respective liability for the damage and to resolve breach of contract claims. Terra appeals. Henshue's insurer, General Casualty, co-appeals.

¶2 On appeal, Terra argues that the circuit court erred by failing to properly apply, to the jury verdicts, an indemnification clause in the Terra/Henshue subcontract that, Terra contends, required Henshue to indemnify Terra for the full cost of repairs for the flood damage. Terra also argues that Henshue failed to present any credible evidence that Henshue suffered any damages by Terra's draw-down on a letter of credit Henshue had secured through Anchor Bank.

¶3 General Casualty argues on appeal that the flood damage is not covered under Henshue's insurance policy because that damage was not the result of an "occurrence," or, alternatively, because the damage fell within one of the

policy's exclusions. General Casualty also argues that the circuit court erroneously required General Casualty to indemnify Henshue for more than the amount that the jury awarded, and that the circuit court misused its discretion in awarding statutory costs in favor of Henshue and against General Casualty.

¶4 As to Terra's appeal, we reverse the decision of the circuit court regarding indemnification and affirm as to the jury's award to Henshue. As to General Casualty's appeal, we affirm the decision of the circuit court.

Background

¶5 Terra entered into a construction contract with the State of Wisconsin as the general contractor to perform construction work on the West Campus Utility Improvement Project ("the Project"). The Project involved a system of steam pits, which are used to heat certain facilities at the University of Wisconsin-Madison campus.

¶6 Effective May 25, 2007, Terra entered into a subcontract with Henshue.[1] Henshue supplied an irrevocable letter of credit through Anchor Bank in the amount of $500,000 as security in the event of a default and failure to cure by Henshue. Pursuant to the subcontract, Henshue was to perform the "[e]xcavation and backfill [of certain specified] steam pits and box conduits" to be constructed or repaired on the Observatory Drive Corridor of the Project. Henshue was not responsible for the actual construction of the steam pits or the

[1] There is evidence in the record that Terra terminated the subcontract in August 2007, but that the parties re-signed a subcontract in mid-September 2007. As to this appeal, the differences between the original subcontract and the re-signed subcontract are irrelevant.

installation of the steam piping. Nor did the scope of Henshue's work include any work on existing steam pits or steam piping.

¶7 As part of its work on the Project, Henshue excavated a trench that ran between a new steam pit and an existing steam pit. In the course of this excavation, Henshue cut a storm sewer pipe that Henshue mistakenly believed carried relatively little storm water runoff. Henshue did not think that substantial amounts of water could flow through the storm sewer pipe's "cut" opening and therefore failed to provide for storm water diversion. Henshue instead "sand bagged" the ends of the storm sewer without realizing that such a measure was inadequate because the storm sewer pipe in fact carried storm water runoff from a large parking lot.

¶8 On April 10 and 11, 2008, heavy rains fell in the Madison area and, thus, significant amounts of water flowed from the large parking lot into a storm sewer inlet. The water then entered Henshue's excavation through the cut storm sewer pipe. From there, the water traveled through a "window" that had been cut into the existing steam pit, causing water to flood a series of existing steam pits and tunnels running south of the existing steam pit near Henshue's excavation. The water came into contact with steam pipes, turning to steam itself, melting components of the existing pipe system and damaging insulation, box conduits, and some electrical devices along with the newly constructed steam pits and box structures. Both the excavation and the existing steam pit system sustained damage that required repair.

¶9 On June 5, 2008, Terra formally notified Henshue that Henshue's failure to divert the storm sewer pipe constituted a breach of the parties' subcontract. Terra gave Henshue the contractually required 15 days to initiate

cure of its breach. Henshue made plans to undertake repairs of the damaged steam system, but did not begin implementing those plans. Henshue also filed a claim with its commercial general liability insurance carrier, General Casualty, seeking payment to Terra for repairs. General Casualty paid Terra $188,334.52, and then refused to pay more. On June 20, 2008, Terra terminated its subcontract with Henshue and, subsequently, Terra itself undertook and completed the necessary repairs. Terra set-off its repair costs against payments due to Henshue, and drew down on the full $500,000 letter of credit Henshue had used to secure the subcontract.

¶10 Henshue sued Terra for breach of contract based on work completed and previously billed. Jury verdicts relating to this topic are not challenged on appeal. Henshue also sued Terra for improperly terminating the subcontract. Terra counterclaimed that Henshue had breached the subcontract by failing to properly perform Henshue's work under the subcontract and refusing to indemnify Terra under the subcontract's indemnification clause.

¶11 General Casualty accepted Henshue's defense, subject to a "full and complete reservation of its rights." Prior to trial, General Casualty moved for declaratory judgment, arguing that its commercial general liability (CGL) policy did not provide coverage for the counterclaims asserted by Terra and, therefore, General Casualty was not required to defend and indemnify Henshue. The circuit court denied General Casualty's motion.

¶12 At the close of evidence, General Casualty renewed its motion for declaratory judgment, asking that the circuit court reconsider its pretrial decision that General Casualty's CGL policy issued to Henshue provided coverage. The circuit court again denied General Casualty's motion.

¶13 The jury rendered verdicts finding that Terra had breached the subcontract with Henshue. The jury awarded Henshue $1,081,196, consisting of damages for outstanding billings, lost profit on remaining work, and $500,000 for Terra's draw-down on the letter of credit.

¶14 The jury found that Henshue also breached the subcontract with Terra, and determined that Terra was entitled to compensation in the amount of $137,224 for that breach.

¶15 The jury also found that the total cost of repairing the flood damage was $540,000.

¶16 Terra filed two post-verdict motions relevant to this appeal. One of Terra's motions asked the circuit court to apply the subcontract's indemnification clause to the special verdict and to change the jury's award of damages from $137,224 to $351,665.48 in order to fully compensate Terra for the $540,000 of repair costs. Terra's other motion asked the circuit court to change the jury's award to Henshue for Terra's draw-down on the letter of credit from $500,000 to $0. The circuit court denied both motions.

¶17 General Casualty filed a post-verdict motion for a new trial on the ground that the circuit court had refused to include a verdict question addressing an exclusion to the CGL policy. General Casualty complained that the circuit court failed to ask the jury whether the work performed by Henshue was interrelated to the remaining project. The circuit court denied this motion, and again confirmed its denial of General Casualty's motion for declaratory judgment regarding coverage. The circuit court entered a judgment confirming the jury's award of damages to Henshue and against Terra, and directing General Casualty to pay Terra $166,674 (a figure that included post-verdict interest) pursuant to

Henshue's CGL policy for damages awarded by the jury against Henshue and in favor of Terra. The judgment also directed General Casualty to pay statutory litigation costs to Henshue.

¶18 Subsequent to the circuit court's decision and order on post-verdict motions, the court revisited the subject of statutory costs. At this hearing, General Casualty argued that the award of costs in favor of Henshue and against General Casualty was duplicative because General Casualty had already paid Henshue's costs. The circuit court upheld its order requiring General Casualty to pay costs to Henshue.

Discussion

Terra's Appeal

¶19 Before addressing the parties' specific arguments, we make an attempt at describing the bigger picture and the net effect of our decision with respect to Terra's appeal.

¶20 Terra makes two arguments on appeal relating to costs which, it appears, the parties agree Terra incurred to repair damage caused by the flooding. The jury found, in effect, that Terra incurred $540,000 repairing the damage. The problem we have describing Terra's two related repair-costs arguments is the counter-intuitive fashion in which questions relating to repair costs were presented to the jury. In jury questions 1, 2, and 3, rather than parsing out the letter-of-credit issue (a repair cost issue), that issue is rolled in with the question of whether Terra breached its subcontract with Henshue as that subcontract relates to work Henshue

performed prior to the flooding and to lost profits for work Henshue had yet to perform when Terra unilaterally terminated the parties' subcontract.[2] We observe that, by including a question relating to "Letter of Credit" damages in this grouping of three questions, it would have been difficult for the jury to see the relationship between, on the one hand, the letter-of-credit question and, on the other, the damages question asking the jury, in effect, what amount Henshue owed Terra for repair costs.

¶21 Because we think the relationship between Terra's challenge to the indemnification award and its challenge to the letter-of-credit award is obscured by the way the verdicts were structured, we pause to look at the big picture.

¶22 The jury effectively found that Terra owed Henshue $581,196 for outstanding billings relating to work completed and for lost profits on work Henshue had yet to perform for Terra when Terra terminated the parties' subcontract. This award is distinct from issues relating to repair costs, and is not challenged.

¶23 Turning to the repair costs issue, our resolution of the parties' indemnification clause dispute requires that the jury verdict against Henshue and in favor of Terra be changed from $137,224 to $351,665.48. When this corrected $351,665.48 amount is added to the $188,334.52 that Terra has already received from Henshue's insurer, Terra recoups the full $540,000 in repair costs. Then there is the related issue of the letter of credit. We leave the verdicts in this regard untouched, but note that the jury's $500,000 letter-of-credit award to Henshue

[2] At least this appears to be the subject of jury questions 1 and 2 and the damages line items in question 3 for "Outstanding Billings" and "Lost Profit on Remaining Work."

from Terra does not cut into Terra's recouped repair costs. Prior to trial, Terra received $500,000 from Henshue's bank, and the verdict merely requires Terra to pay an equal amount to Henshue. Accordingly, as it relates to Terra, the $500,000 letter-of-credit award to Henshue is a wash.

¶24 So, at the end of the day, the jury verdict in favor of Henshue and against Terra for outstanding billings and lost profits in the amount of $581,196 stands, as does the $500,000 award to Henshue relating to the letter of credit. And, under our decision, Terra is fully reimbursed for the $540,000 it expended to repair damage caused, at least in part, by Henshue. We now proceed to address the parties' specific arguments.

I. Indemnification

¶25 Terra's argument starts with the proposition that the jury effectively found that Terra expended $540,000 to repair the damage caused by flooding. We agree. The jury was asked to identify the cost to repair identified portions of the steam heating system that the evidence showed were damaged by flooding. We do not understand Henshue to dispute this point.

¶26 Terra's next building block, in its overall argument, is the proposition that the jury's answer to jury question 18 shows that the jury must have found that Henshue was at least partially responsible for the flooding and resulting damage. In answering question 18, the jury found that $137,224 was the amount needed to compensate Terra for Henshue's breach and, in this respect, there is no dispute that the claimed breach was Henshue's failure to provide for storm water diversion. Henshue presents arguments relating to why the jury might have come up with this particular figure, but does not contest the proposition that

this $137,224 damages finding demonstrates that the jury found that Henshue was partially responsible for the flooding and resulting damage.

¶27 In Terra's view, the clear, albeit implicit, finding by the jury that Henshue was partially responsible for the flooding and resulting damage means, as a matter of law, that the particular damages amount the jury chose when answering question 18 is incorrect. According to Terra, when the indemnification clause is properly interpreted (a purely legal issue) and then applied to the jury's partial responsibility finding, the necessary result is that the jury's specific damages award ($137,224) is incorrect because the indemnification clause, if properly read, requires that Henshue indemnify Terra for the entire cost of the repairs ($540,000), even if Henshue and Terra share responsibility for causing the damage.

¶28 For the most part, we agree with Terra. We agree that the interpretation of the indemnification clause is a question of law and, for the reasons below, we agree that Terra's interpretation of the indemnification clause is correct. But we disagree with Terra's assertion on appeal that the correct answer to question 18 is $540,000. Rather, we agree with Terra's argument at the postconviction stage that the $540,000 figure must be reduced by the $188,334.52 payment General Casualty has already made to Terra on behalf of Henshue. That is, question 18 must be changed to the difference between $540,000 and $188,334.52, which is $351,665.48.

¶29 We turn our attention to the indemnification clause and the parties' dispute over its meaning.

¶30 Neither party contends that the indemnification clause is ambiguous. Both agree that their dispute over the meaning of the clause can be resolved by looking within the four corners of the contract, without consideration of extrinsic

evidence. Thus, we are presented with a question of law that we resolve without deference to the circuit court. *See* ***Gunka v. Consolidated Papers, Inc.***, 179 Wis. 2d 525, 531, 508 N.W.2d 426 (Ct. App. 1993) ("The construction of an unambiguous contract is a matter of law."). We apply the following principles:

> "The language of a contract must be understood to mean what it clearly expresses. A court may not depart from the plain meaning of a contract where it is free from ambiguity. [citation omitted.] In construing the terms of a contract, where the terms are plain and unambiguous, it is the duty of the court to construe it as it stands, even though the parties may have placed a different construction on it."

Dykstra v. Arthur G. McKee & Co., 92 Wis. 2d 17, 38, 284 N.W.2d 692 (Ct. App. 1979) (quoted source omitted).

¶31 The indemnification clause, with italics and insertions provided by this court, reads:

> *[A]ll* claims, *damages*, losses and expenses … *arising out of or resulting from the performance, or failure in performance, of [Henshue's] Work* under this Subcontract, *provided that* any *such* claim, *damage*, loss or expense (1) is attributable to … destruction of tangible property (other than the Work itself) including the loss of use resulting there from, and (2) *is caused in whole or in part by any negligent act or omission of [Henshue] … regardless of whether it is caused in part by [Terra]*.

As we briefly discuss later, this clause may sometimes produce harsh results, but its meaning is clear, at least as applied in this case.

¶32 The first requirement is that indemnification is limited to damages "arising out of or resulting from the performance, or failure in performance, of [Henshue's] Work." "[A]rising out of or resulting from" has, on its face and in common usage, broad meaning. That language simply requires that Henshue's work be *a* cause of the resulting damage.

¶33 The second requirement, as pertinent here, requires Henshue to indemnify Terra when the damages are "caused in whole or in part by any negligent act or omission of [Henshue] … regardless of whether it is caused in part by [Terra]." This means that there must be a finding that Henshue's negligence was a causal factor, but it also means that the relative negligence of Henshue and Terra is irrelevant.

¶34 Thus, if, under the first requirement, Henshue's work is a cause of the resulting damage, then, under the second requirement, Henshue is responsible for all of the damage if Henshue is causally negligent, even if Terra's negligence was greater than Henshue's. Because this interpretation of the indemnification clause is in keeping with Terra's interpretation, the remainder of our discussion is focused on Henshue's arguments.

¶35 According to Henshue, Terra's reading (and by implication our reading) "skips" the first requirement and "goes right to the second." Henshue asserts that, under Terra's reading, "Henshue is automatically responsible for the entire $540,000 in repair costs because 'the repair costs were caused in whole or in part by Henshue.'" We disagree.

¶36 Under Terra's reading, and ours, both the first and second requirements must be met. Independent of the second negligence requirement, there must be a showing under the first requirement that damage arises out of or results from Henshue's work. For example, if Henshue provided negligent advice to Terra on the performance of Terra's work, and damage resulted entirely from Terra's work, then Henshue might be partially and causally negligent under the second requirement, but the indemnification clause would not apply because the

damage did not arise out of or result from Henshue's work.[3] Thus, our interpretation does not "skip" the first requirement.

¶37 Henshue argues that its interpretation of the indemnification clause is consistent with the general view that an indemnification agreement should not be interpreted to require indemnification for a situation not under the control of the indemnifying party. Accepting this legal proposition as true for purposes of this decision only, it does not help Henshue here. As explained elsewhere in this opinion, the undisputed facts show that Henshue *did* have control over a substantial cause of the resulting damage, namely, the failure to provide a storm water diversion system that would have prevented water from flowing through the "window" to the heating system.

¶38 Henshue also contends, in effect, that our reading of the indemnification clause is inconsistent with our reading of a similar indemnification clause in ***Mathy Construction Co. v. West Bend Mutual Insurance Co.***, 2010 WI App 46, 324 Wis. 2d 305, 784 N.W.2d 182 (No. 2008AP1326, unpublished slip op., Feb. 25, 2010), an unpublished opinion. There is, however, no inconsistency.

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[3] The Terra/Henshue subcontract separately defines Henshue's "Work" as including "Utilities, Excavation, Backfill and Miscellaneous work as outlined in the attached Work Scope." The Work Scope includes, in relevant part:

- Excavation and backfill for certain steam pits and box conduits;
- Localized dewatering efforts for excavation areas;
- Installation of certain storm sewer pipes and structures, including bypass pumping, to keep water out of excavation sites.

Thus, in our example above, Henshue's negligent advice would not be "Work" within the meaning of the contract.

¶39 We agree that the indemnification clause at issue in ***Mathy*** is similar to the one here.[4] But our decision in ***Mathy*** did not address the initial "arising out of or resulting from" requirement because, we concluded, the general contractor's argument failed under the second "in whole or in part" negligent requirement. We explained that "the claims against [the general contractor] were not caused in whole or in part by the negligence of [the subcontractor or its] subcontractors." ***Id.***, ¶19. We did not, in ***Mathy***, face a situation in which the "in whole or in part" negligence requirement was met. Thus, in ***Mathy*** we did not, as Henshue contends, "reject[] the argument now advanced by Terra, which seeks to shift all the repair costs to Henshue under the 'caused in whole or in part' language and irrespective of the initial scope of the indemnity provision."[5]

¶40 Having rejected each of Henshue's arguments, we are left with the plain meaning we set forth above: if, under the first requirement, Henshue's work is a cause of the resulting damage, then, under the second requirement, Henshue is

[4] The indemnification clause in ***Mathy Construction Co. v. West Bend Mutual Insurance Co.***, 2010 WI App 46, 324 Wis. 2d 305, 784 N.W.2d 182 (No. 2008AP1326, unpublished slip op., Feb. 25, 2010), required the subcontractor to:

> "defend, indemnify and hold harmless [the general contractor] ... against all claims, including claims for which [the general contractor] may be or claimed to be negligent or liable ... arising out of or resulting from the performance of the work in this Agreement or occurring or resulting from the use by [the subcontractor] ... of ... equipment, ... provided that any such claim ... is ... [c]aused in whole or in part by any negligent act or omission of [the subcontractor or its] subcontractors ...."

Id., ¶15.

[5] We note that this is not an accurate summary of Terra's argument but, even if it was, it is not an argument we rejected in ***Mathy***.

responsible for all of the damage if Henshue is at least partially causally negligent. What remains is the application of this plain meaning to the facts.

¶41 Although, in its appellate brief, Henshue's legal discussion of the meaning of "arising out of or resulting from" suggests that Henshue will follow up with a factual explanation as to why some specific portion of the damage did not arise out of or result from Henshue's performance of work, what we find instead is a discussion showing that the damage did not arise *solely* out of or result from Henshue's work. Henshue's factual discussion simply demonstrates that the jury might have, contrary to the plain language of the indemnification clause, attempted to apportion responsibility for the damage between Terra and Henshue based on relative negligence. For example, Henshue argues that the jury might have taken into account the amount of money Terra had already received from Henshue's insurance company ($188,334.52) and then added an additional $137,224 award to Terra "for Henshue's breach." Henshue then asserts that the total of these two amounts ($325,558.52) represents the jury's judgment regarding the proportion of damages that Henshue was responsible for. Henshue writes:

> [T]he jury could have determined that Terra would receive $325,558.52, or 60.29% of the total repair costs. This is a fair, if not generous, award considering the evidence demonstrating that the failure of Terra or its subcontractor to seal the "window" in existing steam pit 20.5/9 allowed the water to leave Henshue's excavation and damage the existing steam system starting at pit 20.5/9.

Notably, Henshue's discussion of Terra's negligence (in failing to seal a "window") simply demonstrates that Terra shares blame for the damage. The discussion does not demonstrate that Henshue's work was not one of the causes of the damage or, to closely paraphrase the indemnification clause, that the damage

did not arise out of or result from the performance or failure in performance of Henshue's work.

¶42 We readily acknowledge that Henshue was not responsible for failing to seal the "window" through which water flowed to reach and damage a portion of the campus heating system. However, as Terra explains, but for Henshue's failure with respect to its work, there would not have been substantial water flowing through the open window to the system components that were damaged.

¶43 In sum, the only reasonable view of the evidence is that Henshue's work was a cause of the damage and, therefore, the damage arose out of Henshue's work. In addition, as we have seen, Henshue implicitly concedes that it was partially causally negligent. Accordingly, Henshue is responsible for the entire $540,000 that the jury determined was the cost to repair the damage to the steam system. As noted above, considering the $188,334.52 that General Casualty has already paid to Terra, the remainder owed to Terra is $351,665.48. Accordingly, on remand, we direct the circuit court to change the answer to jury verdict question 18 to $351,665.48 and revise the final judgment accordingly.

¶44 Before moving on, we note that, if the jury attempted to apportion the damages based on the relative negligence of Terra and Henshue, such an effort may have comported with a common-sense approach to a fair distribution of responsibility. But such an approach does not fit the plain language of the indemnification clause.

II. Letter Of Credit Draw-Down

¶45 In connection with its subcontract with Terra, Henshue entered into a $500,000 letter-of-credit agreement with Anchor Bank. Under the terms of that agreement, Terra was entitled to payments from Anchor Bank if Henshue failed to cure a default under the Terra/Henshue subcontract and Terra provided Anchor Bank with the required documentation to request a draw-down. After the flood damage, and based on Terra's claim that Henshue was responsible for such damage, Terra received payments from Anchor Bank totaling $500,000, the letter-of-credit limit.

¶46 In answering the letter-of-credit portion of jury question 18, the jury effectively found that Terra should pay Henshue an amount equal to the $500,000 that Terra received from Anchor Bank. Terra argues that there is insufficient evidence to support this verdict answer. More specifically, Terra contends that there was no evidence showing that Anchor Bank's payments on the letter of credit to Terra created a corresponding obligation on the part of Henshue to Anchor Bank and, therefore, in Terra's words, "the proceeds of the letter of credit were never Henshue's property and cannot, therefore, be evidence of its damages." Terra's reasoning is flawed.

¶47 Terra relies on case law establishing that the proceeds from a letter of credit are not the property of the party who applies for the letter of credit. *See* ***Admanco, Inc. v. 700 Stanton Drive, LLC***, 2010 WI 76, ¶38, 326 Wis. 2d 586, 786 N.W.2d 759 ("We agree that the proceeds of … letters of credit are not property of the debtor's estate. Rather, the proceeds are property of the issuer that are paid to the beneficiary upon a proper demand. They never have been property of the debtor."). ***Admanco*** explains that the letter of credit is the property of the

issuer (here Anchor Bank) and, once drawn down, the property of the beneficiary (here Terra).

¶48 We understand Terra to be arguing that, under ***Admanco***, evidence of the draw-down was insufficient to show damages are owed to Henshue because the letter of credit was not Henshue's property. However, even if we were to conclude that the letter of credit was not Henshue's "property" as that term is used in ***Admanco***, such a conclusion would not resolve the dispute over the letter-of-credit award. The pertinent question is whether there is some reason why the jury could not have found that Terra owed Henshue an amount equal to the $500,000 letter-of-credit draw-down. On that topic, Terra seems to argue that Henshue needed to present *direct* evidence that Terra's draw-down created a corresponding debt owed by Henshue to Anchor Bank or, perhaps, that Henshue forfeited to Anchor Bank collateral with a value of $500,000 or more. As explained below, we disagree.

¶49 We will sustain a jury's damage award if there is any credible evidence in the record to support it. *See* ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659; ***Tony Spychalla Farms, Inc. v. Hopkins Agric. Chem. Co.***, 151 Wis. 2d 431, 442, 444 N.W.2d 743 (Ct. App. 1989). Damages must be established by a reasonable certainty, and must be proven by "statements of facts rather than by mere conclusions of the witnesses." ***Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.***, 80 Wis. 2d 26, 31-32, 257 N.W.2d 847 (1977). We agree with Henshue that there was credible trial evidence on which the jury could base a finding that the draw-down by Terra created a corresponding Henshue debt to Anchor Bank and, thus, a damage amount supporting the jury's $500,000 award against Terra and in favor of Henshue.

¶50 The trial evidence supports a finding that Henshue was responsible for all of the charges and commissions associated with the letter of credit, and that Terra was required to return to Henshue any unused funds if Terra initiated a draw-down. A letter in evidence from Thomas Henshue to Terra refers to Terra's plan to submit a draw request "on the $500,000 letter of credit that we furnished to secure our work," and then states: "Essentially, by drawing on the letter of credit, Terra intends to use our funds to cover the cost of the repairs." Scott Zimmerman, Terra's CEO, testified that he did not immediately draw down on the letter of credit after terminating Henshue from the job because he "was ... concerned that if [he] drew on the letter of credit that Henshue would go out of business." And, Ron Henshue testified at trial that Terra's draw-down on the letter of credit was part of Henshue's damages: "So the billings of [$529,000], the lost gross profit and the letter of credit that was pulled in September, the total that is owed [to Henshue] is $1,172,640.40."

¶51 Based on the above evidence and common sense, the jury could find that the agreement between Henshue and Anchor Bank was that, if Anchor Bank paid out funds on the letter of credit to Terra, such action necessarily created a corresponding duty on Henshue's part to reimburse Anchor Bank. Terra may be correct that there was no *direct* evidence proving that Henshue was ultimately responsible for the amounts Anchor Bank paid to Terra but, based on the evidence, that is the only sensible conclusion. Terra's conjecture that a third party might have collateralized the letter of credit is unsupported speculation. Why would a third party make itself liable for what would otherwise be Henshue's responsibility?

¶52 Therefore, we affirm the decision of the circuit court upholding the jury's $500,000 letter-of-credit award to Henshue.

General Casualty's Appeal

¶53 General Casualty makes three arguments on appeal. We address and reject each below.

I. CGL Policy Coverage And Exceptions

¶54 The first two issues in General Casualty's appeal concern the circuit court's denial of General Casualty's motion for declaratory judgment regarding coverage under a CGL policy issued to Henshue. "The grant or denial of a declaratory judgment is addressed to the circuit court's discretion. However, when the exercise of such discretion turns upon a question of law, we review the question independently of the circuit court's determination." ***Olson v. Farrar***, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1 (citation omitted). The issue before us turns on the interpretation of Henshue's CGL insurance policy, which presents a question of law that we review de novo.[6] ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

¶55 The method used to interpret an insurance contract was set forth in ***American Girl***:

> First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes

[6] There is some dispute in the briefs as to the standard of review we should apply in deciding the coverage issues. Terra argues that General Casualty has failed to establish whether General Casualty's appeal challenges the circuit court's initial declaratory judgment order or the circuit court's denial of what Terra characterizes as General Casualty's motion for reconsideration on the issue. Terra argues that differing standards of review apply depending on which decision we are reviewing. It may be that, in theory, General Casualty could challenge the pretrial summary judgment decision, but it is apparent from General Casualty's argument, which references trial evidence, that General Casualty is challenging the circuit court's latter decision. And, as we have explained in the text, because this issue presents a question of law, our review is de novo.

> an initial grant of coverage. If it is clear that the policy was not intended to cover the claim asserted, the analysis ends there. If the claim triggers the initial grant of coverage in the insuring agreement, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain.

Id., ¶24.

A. Coverage For An Occurrence

¶56 General Casualty's first coverage argument is that Henshue's CGL policy provides no coverage because the damage was not caused by an "occurrence." We briefly set forth the policy language and settled law on the meaning of "occurrence," and then address General Casualty's specific arguments.

¶57 The policy states that it applies to "'property damage' only if" such damage "is caused by an 'occurrence.'" The policy defines an "occurrence" as "an accident," but does not define the term "accident." However, the ***American Girl*** court addressed the meaning of "accident":

> The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." Black's Law Dictionary defines "accident" as follows: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental."

Id., ¶37 (citations omitted).

¶58 General Casualty makes two arguments as to why the damage to the steam system was not caused by an "occurrence."

¶59 First, General Casualty cites to ***American Girl*** and points to language in that opinion stating: "CGL policies generally do not cover contract

claims arising out of the insured's defective work or product ...." ***Id.***, ¶39. General Casualty then asserts that the conclusion of the supreme court in ***American Girl*** with respect to the facts in that case "was simply an exception to this general proposition [that CGL policies generally do not cover contract claims arising out of the insured's defective work]." We are unsure what to make of this part of General Casualty's argument. As the ***American Girl*** court explained, this generalization is true because CGL policies have business risk exclusions, not because of a lack of an "occurrence" under the policy. *See* ***id.*** And, as we wrote in ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, 295 Wis. 2d 556, 721 N.W.2d 704: "***American Girl*** clearly establishes that the circumstances giving rise to a breach of contract or breach of warranty claim may be an 'occurrence' within the meaning of a CGL policy: the analysis focuses on the factual basis for the claim and not on the theory of liability." ***Id.***, ¶25. Thus, we reject General Casualty's first "occurrence" argument.

¶60 General Casualty's second "occurrence" argument is that there was no "occurrence" here because the damage was anticipated. General Casualty argues that, unlike in ***American Girl***, "Henshue's breach of contract resulted in damages **anticipated** by the parties in the event of such a breach." General Casualty argues that Henshue deliberately cut into the storm sewer pipe and did not provide the means for storm water diversion. According to General Casualty, both Terra and Henshue "anticipated that the exact damages that occurred in this case would happen if Henshue breached its contractual obligations to keep the site dry." We are not persuaded.

¶61 At most, the testimony that General Casualty points to establishes that, *if* water entered the excavation, the type of damage that occurred was expected. This testimony does not help General Casualty because the correct

"occurrence" question is whether the event that caused the damage, that is, the flooding event resulting from Henshue's failure to divert storm water, was an accident. *See* ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶40, 311 Wis. 2d 492, 753 N.W.2d 448 ("[I]t is the causal event that must be accidental for the event to be an accidental occurrence.").

¶62 We conclude that the flooding event was an accident and thus an "occurrence." Based on its review of engineering drawings, Henshue mistakenly believed that the storm sewer pipe that crossed its excavation was connected only to two small inlets in a driveway. For this reason, Henshue did not install a temporary diversion pipe. The storm sewer pipe, however, was connected to the storm sewer for a large parking lot. The result of Henshue's failure to divert the storm water was that significant amounts of water entered the excavation when heavy rains fell in the area. The flooding was not an event that Henshue anticipated. As Henshue points out: "Henshue did not divert the storm pipe precisely because it did not expect any water to travel through the pipe and into the excavation." Henshue did not anticipate that its work would result in flooding that would cause damage, and thus the flooding event was an accident and an occurrence requiring coverage under the policy. *Cf.* ***American Girl***, 268 Wis. 2d 16, ¶¶5, 37-38 (holding that faulty site-preparation advice of a soil engineer resulting in settling soil that, in turn, caused damage to a building was an occurrence).[7]

[7] General Casualty may also mean to argue that there was no "occurrence" because the cause of the damage was Henshue's faulty workmanship. General Casualty seems to say that the circuit court erred because the court concluded that Henshue's faulty workmanship could be an "occurrence" and that such reasoning was rejected in ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, 295 Wis. 2d 556, 721 N.W.2d 704. If General Casualty means to make this argument, it has no merit. It is true that faulty workmanship itself is not an (continued)

B. Insurance Policy Exceptions

¶63 Even if the CGL policy provides an initial grant of coverage, General Casualty contends that the following exclusion applies:

> **J. Damage To Property**
>
> "Property damage" to:
>
> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

General Casualty argues: "[T]he damage to each of the components of the Project was 'so associated with the property' that Henshue was effectively working on 'that particular part' of property in accordance with Exclusions j(5) and j(6)." That is, because Henshue's work included "Project-wide responsibilities" that were "interconnected" to the property that was damaged, the exclusions apply. We disagree.

¶64 General Casualty acknowledges that this exclusion argument is inconsistent with our decision in ***Acuity v. Society Insurance***, 2012 WI App 13, 339 Wis. 2d 217, 810 N.W.2d 812. However, General Casualty argues that our

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occurrence, but "faulty workmanship may cause, or be a cause of, an 'occurrence.'" ***Id.***, ¶30. In that respect, the situation here is analogous to the facts in ***Glendenning's*** and ***American Family Mutual Insurance Co. v. American Girl, Inc.***, 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65, where the occurrence was arguably caused by faulty workmanship, but was not the faulty workmanship itself. *See* ***Glendenning's***, 295 Wis. 2d 556, ¶29; ***American Girl***, 268 Wis. 2d 16, ¶¶3-5, 48-49.

analysis in ***Acuity*** was faulty and that we should not give that case any weight because the supreme court has granted review of our decision. This argument has no merit because, unless they are reversed or overturned, we are bound by our past decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997) ("[O]fficially published opinions of the court of appeals shall have statewide precedential effect."). Moreover, we note that the parties in ***Acuity*** recently settled their appeal. Accordingly, that case was dismissed on November 6, 2012, leaving our decision as the final appellate decision in that dispute.

¶65 When applied to the facts here, ***Acuity*** plainly supports the conclusion that the exclusions do not apply. And, General Casualty does not appear to argue that its interconnectedness argument would succeed if we are bound by ***Acuity***. In ***Acuity***, this court interpreted identical exclusion language and concluded that the policy phrase "that particular part" applies "only to those parts of a building on which the defective work was performed, which is determined based on the scope of the construction agreement." ***Acuity***, 339 Wis. 2d 217, ¶40. As we have previously discussed, the scope of Henshue's work was defined by its subcontract with Terra. The scope of Henshue's work included excavation and backfill of certain steam pits, but it did not include any work on the existing steam pit system that was damaged. The repair costs at issue on appeal are for the damage to the existing steam system, including an existing steam pit and the piping that continues south along the existing steam pit system. These structures fall outside of Henshue's scope of work.

¶66 We conclude that the damage to the existing steam system was not "that particular part" of the Project on which Henshue was working.[8] Thus, neither exception J(5) nor J(6) in the policy applies, and General Casualty must provide coverage. We therefore affirm the circuit court's determination that General Casualty had a duty to defend and indemnify Henshue.

II. General Casualty's Challenge To The Judgment

¶67 The judgment includes an award against General Casualty and in favor of Henshue relating to the amount Henshue owed to Terra for repairs. The judgment directs General Casualty to pay Henshue $116,674.[9] This amount is a result of the circuit court's view that the jury intended to award Henshue $137,224 *in addition* to the $188,334.52 that General Casualty had already paid toward repairs for which Henshue was responsible. General Casualty argues that the circuit court misconstrued the jury's finding relating to this amount. According to General Casualty, if the circuit court properly construed the verdict, the court would have determined that the judgment was satisfied and that General Casualty has no further indemnity obligation. We disagree.

¶68 More specifically, General Casualty points to a jury answer in which the jury found that Henshue owed Terra $137,224. The circuit court's judgment

[8] Because we conclude that the damage was not to "that particular part" of the Project on which Henshue was working, we need not address Henshue's or Terra's argument that exclusion J(5) is also inapplicable because Henshue had completed its work before the damage occurred.

[9] The precise dollar amount of this award does not fit the remaining numbers in the text because it was adjusted upward for post-verdict interest ($1,170.07) and downward for an amount the parties agree that General Casualty was not obligated to pay Henshue ($21,720). It is undisputed that the total repair costs include $21,720 for the repair to an area Henshue excavated, that Henshue was responsible for, and for which there is no coverage.

assumes that this jury award, properly adjusted,[10] represented the remaining amount Henshue owed Terra and, thus, the remaining amount that General Casualty owed Henshue under the CGL policy. General Casualty challenges the circuit court's assumption, arguing that the correct interpretation is that it means what it says on its face. That is, that the jury found that the *total* Henshue owed to Terra was $137,224. It follows, according to General Casualty, that General Casualty overpaid because it had already paid Terra $188,334.52 for repairs on Henshue's behalf. Thus, General Casualty argues, it overpaid Terra $51,110 ($188,334 less $137,224), and has already fulfilled its obligation under the judgment.

¶69 We agree with the circuit court's contrary interpretation of the verdicts. The circuit court concluded that the most logical reading of the jury's award is that the jury "accounted for the 188,000, and then in addition [it] gave Terra a 137,000." As General Casualty admits, the circuit court instructed the jury that "General Casualty has paid $188,334.52 to Terra Engineering and you may consider that fact in calculating any damages." Moreover, Terra's damage analysis was presented to the jury in terms of the amount, *in addition to* the $188,334.52 that General Casualty had already paid, necessary to make Terra whole. We find nothing in General Casualty's argument explaining why it is more reasonable to assume that the jury had in mind that its verdict would leave General Casualty having overpaid Terra by $51,110.

¶70 Thus, we agree with the circuit court that the jury finding of $137,224 represents an additional amount owed to Terra and, thus, an amount

[10] *See* n.9, *supra*.

General Casualty owes to Henshue. We note that, elsewhere in this opinion, we have concluded that the $137,224 verdict answer must be changed to $351,665.48. *See* ¶43, *supra*. We note here that, just as the judgment reflected adjustments to the $137,224 verdict answer (*see* n.9, *supra*), there will need to be adjustments to the new $351,665.48 verdict answer.

III. Payment Of Costs

¶71 In its order regarding post-verdict motions, the circuit court awarded costs, as provided by WIS. STAT. § 814.04,[11] in favor of Henshue and against General Casualty, jointly and severally with Terra and Terra's insurer. At a subsequent hearing on the bill of costs, the circuit court confirmed its award of costs. Although it appears that Henshue originally argued for costs under WIS. STAT. § 814.01, as the prevailing party in the litigation, the circuit court determined that "[WIS. STAT. §] 814.036, the omnibus cost provision, would apply … in this situation vis-à-vis Henshue and General Casualty." The circuit court therefore used its discretionary authority under WIS. STAT. § 814.036 to award costs in favor of Henshue and against General Casualty. *See* § 814.036 ("If a situation arises in which the allowance of costs is not covered by ss. 814.01 to 814.035, the allowance shall be in the discretion of the court.").

¶72 General Casualty argues that the circuit court erroneously determined that General Casualty has the duty to pay costs to Henshue as the prevailing party. According to General Casualty, this would amount to double

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

recovery for Henshue because, as Henshue's insurer, General Casualty has already paid Henshue's defense costs.

¶73 General Casualty's double recovery argument is undeveloped. More specifically, General Casualty does not explain why we should conclude that it has already paid fees and costs *incurred by Henshue* in the course of Henshue litigating the coverage issue against General Casualty. Thus, we address the topic no further.

¶74 In the alternative, General Casualty argues that an insured is not entitled to recover, from an insurer, costs and fees incurred during a coverage dispute. In support, General Casualty appears to contend that the court in ***Reid v. Benz***, 2001 WI 106, ¶37, 245 Wis. 2d 658, 629 N.W.2d 262, held, in blanket fashion, that an insurer is never obligated to pay an insured's fees and costs, absent a breach by an insurer of its duty to defend. However, we find no such blanket holding in ***Reid***, and General Casualty provides no explanation as to why such a blanket holding is implicit. Rather, so far as we can tell from our review of ***Reid***, and the case it interprets, ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), the attorney fees issue there involved a different statutory authority, WIS. STAT. § 806.04(8), and the question was whether "***Elliott*** permits recovery of attorney fees expended solely in establishing coverage, where there has been no breach of the duty to defend." *See* ***Reid***, 245 Wis. 2d 658, ¶¶24, 29. General Casualty provides no explanation as to why cases interpreting § 806.04(8) are applicable, or apply by analogy, to a discretionary decision under WIS. STAT. § 814.036. Notably, the parties in ***Reid*** appear not to have disputed an award of statutory costs and disbursements and, thus, the court did not address that particular issue. *See* ***Reid***, 245 Wis. 2d 658, ¶11 n.2.

¶75 In sum, we reject General Casualty's arguments regarding costs based on a lack of sufficient development. We therefore affirm the circuit court's decision awarding costs to Henshue against General Casualty, jointly and severally with Terra.

Conclusion

¶76 As to Terra's appeal, we affirm the circuit court's decision to leave unchanged the part of verdict answer 3 awarding $500,000 to Henshue, and we remand to the circuit court with directions that it change the answer to verdict question 18 from $137,224 to $351,665.48. We further direct that the circuit court modify the judgment, taking into account the change to verdict question 18 and appropriate adjustments thereto (*see* n.9, *supra*), and conduct any further proceedings, consistent with this opinion, as necessary.

¶77 As to General Casualty's appeal, we affirm the decision of the circuit court in all respects.

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

Not recommended for publication in the official reports.