COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2116 **Cir. Ct. No. 2009CV220**

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

LOREN H. LAUFMAN, FRANCES E. LAUFMAN, ROBERT D. WOOD, ALEXANDER BONDS, JANET BONDS, LEON CAPES AND NORMA CAPES,

PLAINTIFFS,

ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

INTERVENING PLAINTIFFS-RESPONDENTS,

V.

SAFECO INSURANCE COMPANY OF AMERICA,

INTERVENING DEFENDANT-RESPONDENT,

NORTH CENTRAL POWER CO., INC., JOHN E. DAHLBERG, MARK F. DAHLBERG, DAVID M. DAHLBERG, DEAN J. DAHLBERG AND ROBERT H. THORSON,

DEFENDANTS-PETITIONERS-APPELLANTS.

APPEAL from an order of the circuit court for Sawyer County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. North Central Power Co., Inc.; Robert Thorson; and John, Mark, David, and Dean Dahlberg (collectively, "North Central") appeal an order granting summary judgment and dismissing their insurers from the action. North Central argues the court erroneously determined the policies did not provide coverage. We affirm.

BACKGROUND

¶2 North Central is a privately-held electric public utility. In 1959, it purchased the Grimh Dam, a hydroelectric dam on the Couderay River. North Central produced power at the dam until 1997.

¶3 In 1990, the Federal Energy Regulatory Commission (FERC) inspected the dam and, in 1991, informed North Central it would have to license the dam or cease generating power. North Central applied for a license. It learned in 1997 that it would cost approximately $1,000,000 to bring the dam up to federal licensing standards. Thus, North Central made a business decision to cease operating the dam. Having decided against repairs, North Central's options at that point were to either abandon (i.e., remove) the dam or transfer it to another owner who would repair it.

¶4 Beginning in 1998, North Central engaged in discussions with other hydroelectric operators and various local governments about transferring the dam, but no one wanted it because of the high repair costs. In fact, North Central could not give the dam away even when it offered to include money and land.

¶5 In the fall of 1998 and spring of 1999, the Wisconsin DNR inspected the dam. On May 24, 1999, it sent North Central a copy of its inspection report, together with a proposed timeline for required repairs, maintenance, and upgrades. On July 24, 2000, the DNR ordered North Central to immediately draw down the lake above the dam to the lowest possible level, by completely opening the dam gates.[1] Among other concerns, the DNR had recently discovered "[s]erious undermining of the emergency spillway with several holes extending approximately three feet into the base of the dam[]" and "[d]eterioration of the cement joints holding the main … structure together." The DNR ordered North Central to keep the lake permanently drawn down until the dam was reconstructed. Further, it required North Central to notify the DNR by January 1, 2001, whether the dam would be reconstructed or abandoned. North Central's board of directors, however, had already met on June 22, 2000, and decided to abandon the dam.

¶6 Local lakefront property owners sued North Central because the sixty-two-acre lake above the dam reverted to a river.[2] North Central's insurers intervened and moved for a coverage determination. The circuit court granted the insurers' respective motions for declaratory or summary judgment, holding there was no coverage under the policies. North Central now appeals.[3]

---

[1] The dam had a "structural height over 30 feet[.]"

[2] The DNR's website identifies the former lake above the dam as Grimh Flowage, having one boat landing and a maximum depth of sixteen feet. *See* http://dnr.wi.gov/lakes/lakepages/LakeDetail.aspx?wbic=2385100 (last visited 5/2/13).

[3] North Central also appealed an interlocutory determination that the plaintiffs had stated a claim. However, North Central settled with the plaintiff property owners after filing its initial brief on appeal. We therefore address only the insurance coverage issues.

DISCUSSION

¶7 North Central argues the circuit court erroneously determined that policies from two different insurers did not provide coverage. Interpretation of an insurance contract presents a question of law subject to our independent review. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65. When interpreting an insurance policy, we seek to determine and give effect to the intent of the contracting parties. ***Id.***

Safeco Policy

¶8 Safeco Insurance Company of America provided North Central a claims-made "Private Company Directors and Officers and Corporate Liability" policy.[4] That policy provided coverage for claims arising from a "Wrongful Act," which was defined as "any error, misstatement, misleading statement, act, omission, neglect or breach of duty actually or allegedly committed or attempted by … the Directors …." However, the policy contained exclusion IV(A.)5, which precluded coverage for any claim:

> Based upon or attributable to a Wrongful Act which any of the Directors and Officers had knowledge of prior to 4/19/00 and that any of the Directors and Officers had

[4] The declarations page provided:

> NOTICE: This is a claims-made policy which … applies only to any claim first made against any of the insureds during the policy period. The limit of liability available to pay damages, judgments or settlements shall be reduced by amounts incurred as defense costs. Any defense costs that are incurred shall be applied against the applicable retention. This policy does not provide any duty by the insurer to defend any of the insureds.

(Capitalization omitted.)

> reason to believe that such known Wrongful Act could reasonably be expected to give rise to a Claim[.[5]]

North Central argues the circuit court erroneously applied this exclusion.

¶9 North Central first asserts the alleged wrongful act giving rise to coverage was its June 2000 decision to abandon the dam. North Central fails, however, to develop an argument by explaining in the first instance how that decision constituted a wrongful act under the policy.[6] We may therefore reject North Central's argument. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed.").

¶10 Moreover, North Central fails to address the circuit court's rationale. The court determined that the alleged wrongful act was North Central's failure to maintain or repair the dam, which in turn led to the DNR's order to draw down the lake. In support of its determination, the court quoted three lengthy paragraphs from the complaint. When an appellant ignores the ground upon which the trial court ruled, it thereby concedes the validity of that holding. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Thus, we further reject North Central's straw-person argument as to what constituted the wrongful act.

---

[5] We have recited the exclusion as modified by an endorsement. The endorsement inserted "4/19/00" in place of the following language: "the Policy Inception Date, or in the event that this is a renewal or replacement of a previous similar policy issued by the Insurer, then prior to the inception date of such first policy[.]"

[6] North Central's argument is further lacking in that it asserts Safeco breached its duty to defend, and cites legal standards applicable to that issue. The circuit court, however, was asked to, and did, decide the issue of coverage. Moreover, as we observe in footnote four, Safeco's policy did not include a duty of defense.

¶11 North Central also argues it had no reason to believe prior to April 19, 2000, that it could reasonably expect that a claim would be made. It contends that, as of that date, "the outcome was unclear" because it still hoped to transfer ownership to another entity and it did not decide to abandon the dam until June 2000. It argues, "[t]hus, as of April 19, 2000, any concerns were based on hypothetical outcomes of hypothetical decisions."

¶12 North Central's expectation-of-claim argument fails because it ignores both the policy language and the circuit court's determinations as to what constituted the alleged wrongful act and why North Central had reason to expect a claim would arise. *See* ***Flynn***, 190 Wis. 2d at 39 n.2; ***Schlieper v. DNR***, 188 Wis. 2d at 322. For the exclusion to apply, North Central need not know with certainty that it would be sued. Rather, it need only have "had reason to believe that [the failure to maintain the dam] could reasonably be expected to give rise to a Claim." North Central acknowledged they knew as of 1999 that they were going to receive a DNR drawdown order if they were unable to transfer ownership of the dam. And, as the circuit court observed, North Central "admitted in their deposition that they 'assumed' the company would be sued" if the lake was drawn down.

¶13 Although it is a prevailing party, Safeco shall not recover any WIS. STAT. RULE 809.25(1) appellate costs.[7] Safeco refers throughout its brief to parties by their two- or three-part party designations, rather than by name as required by WIS. STAT. RULE 809.19(1)(i), (3)(a)2. More concerning, however, is

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

Safeco's misrepresentation of the record. Safeco informs us the "circuit court specifically found that as early as 1997 North Central Power stated its intent to cease 'all upkeep maintenance and care for the Grimh Dam and its left and right embankments.'" It subsequently tells us North Central "stated their intent to cease 'all upkeep maintenance and care for the Grimh Dam and its left and right embankments.'" Both statements are accompanied by the same record citation; that citation does not, however, lead to either a circuit court finding or an alleged statement or testimony by North Central. Instead, the language Safeco quotes is merely an excerpt of an allegation in the complaint that refers to neither statements nor intent. Safeco's misrepresentations and improper citations violate WIS. STAT. RULE 809.19(1)(e), (3)(a)2. As a penalty for its violations of the rules of appellate procedure, Safeco shall forfeit its appellate costs. *See* WIS. STAT. RULE 809.83(2).

St. Paul Policy

¶14 St. Paul Fire and Marine Insurance Company issued North Central an occurrence-based policy on an annual basis during all times relevant to this appeal. The policies provided:

> We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that … [1] happens while this agreement is in effect; and … [2] is caused by an event.
>
> ….
>
> *Event* means accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The circuit court agreed with St. Paul that there was no coverage because the complaint failed to allege an "event," which means an "accident."[8]

¶15 North Central argues there is coverage because the complaint uses the term "neglect" when referring to North Central's failure to maintain the dam. It then asserts generally, without regard to the policy language here, that commercial general liability policies are intended to protect an insured against liability for negligent acts. North Central contends "neglect" is synonymous with negligence.

¶16 We reject North Central's argument, which ignores the context of the complaint's use of the term neglect. The complaint alleges:

> [North Central]'s long time and *intentional neglect* of their upkeep, maintenance and operation duties … were *intentionally calculated* by them to leave the DNR no option but to require the drawdown of Grimh Lake …. Such *intentional neglect* constituted a malicious and intentional disregard of the rights of the plaintiffs ….

(Emphasis added.) Additionally, North Central does not dispute that it made a business decision to not repair the dam long before the DNR ordered the drawdown.

¶17 Intentional conduct, including intentional failure to maintain or repair a dam, does not constitute an "accident." "Accident" is defined as "an event or condition occurring by chance or arising from unknown or remote causes." ***American Girl***, 268 Wis. 2d 16, ¶37. It has also been defined as "an unexpected,

[8] St. Paul also argues the circuit court correctly determined that the complaint failed to allege any "property damage." We need not reach this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

undesirable event" or "an 'unforeseen incident' which is characterized by a '*lack of intention.*'" ***Id.***, ¶44 (emphasis added). Further, an "accident" is an "*unintentional* occurrence." ***Id.*** (emphasis added).

¶18 Although it is a prevailing party, St. Paul shall not recover any WIS. STAT. RULE 809.25(1) appellate costs. St. Paul filed a three-volume, 845-page appendix. Pages 17-845 consist solely of the three policies it issued to North Central for the 2000-01, 2001-02, and 2002-03 policy years. In a footnote, St. Paul offers this rationale for its corpulent appendix:

> Because a complete copy of Exhibit 6 to the Ertz Affidavit was not reproduced in Appellants' Appendix, it is provided in Respondent St. Paul's Supplemental Appendix in order to permit a full review of the 2000 to 2003 policies, which will show that they all contain similar insuring agreements requiring covered property damage to have been caused by an accident during the policy period, as well as the same exclusions relied on by St. Paul herein.

¶19 First, we observe that North Central never claimed in the first instance that any relevant policy language differed or failed to apply based on the policy year. Indeed, both parties quote precisely the same policy language in their respective briefs. Second, even had there been such a dispute, it would have been superfluous to provide copies of each 200-plus page policy to address a mere one or two components. Third, North Central already included 279 pages of appendix, consisting of the entire 2000-01 policy plus two excerpts depicting the changes in the two subsequent policy years. Thus, St. Paul's appendix was largely redundant, and unnecessary. Fourth, St. Paul's counsel signed the appendix certification, representing that it had complied with the rule for appendices. *See* WIS. STAT. RULE 809.19(2)(b), (3)(b); ***State v. Bons***, 2007 WI App 124, ¶¶23-25, 301 Wis. 2d 227, 731 N.W.2d 367 (failure of an appendix to comport with the certification is a serious infraction and is grounds for imposition of a penalty). An appendix is to

be "short" and include "limited portions of the record essential to an understanding of the issues raised." WIS. STAT. RULE 809.19(2)(b); *see also* ***State v. Nielsen***, 2011 WI 94, ¶11, 337 Wis. 2d 302, 805 N.W.2d 353 (appendix should be "a very abbreviated document with only those items absolutely essential to an understanding of the case"). An irrelevant, redundant, 800-plus page appendix is inappropriate and does not aid the court in any manner.[9]

¶20 Costs denied. *See supra*, ¶¶13, 18-19.

By the Court.—Order affirmed.

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

[9] While we make no assumptions, the only purpose of St. Paul's appendix that we can imagine would be to unnecessarily drive up costs. In any event, it would have had that effect. Had we chosen to overlook St. Paul's excessive appendix, St. Paul would have recovered $1,616.55 in costs from North Central, just from preparation of the appendices alone (829 pages x .15/page x 13 required copies). *See* WIS. STAT. RULES 809.19(8)(a)2., 809.25(1)(b)1.