COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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Nos. 95-1796 & 95-2591

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

95-1796
JOHNSON CONTROLS, INC.,

PLAINTIFF-APPELLANT,

V.

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL CO., F/K/A EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN, AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY), AMERICAN EMPLOYERS' INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INSURANCE COMPANY (THE), AMERICAN MOTORISTS INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA (THE), CONTINENTAL INSURANCE COMPANY (THE), EMPLOYERS MUTUAL CASUALTY COMPANY, EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LONDON MARKET (CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, AND LONDON MARKET INSURANCE COMPANIES), NATIONAL UNION FIRE

INSURANCE COMPANY OF PITTSBURGH, PA., NORTH STAR REINSURANCE CORPORATION, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE COMPANY), PURITAN INSURANCE COMPANY (F/K/A THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY), STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY (THE), UNITED NATIONAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY AND WESTPORT INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS,

ALLIANZ UNDERWRITERS INSURANCE COMPANY (F/K/A ALLIANZ UNDERWRITERS INC.), AMERICAN CENTENNIAL INSURANCE COMPANY, ASSOCIATED INTERNATIONAL INSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANTS.

95-2591
JOHNSON CONTROLS, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL CO., F/K/A EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN,

DEFENDANT-RESPONDENT-CROSS-APPELLANT,

AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE

COMPANY, ALLSTATE INSURANCE COMPANY, (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY), AMERICAN EMPLOYERS' INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INSURANCE COMPANY (THE), AMERICAN MOTORISTS INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA (THE), CONTINENTAL INSURANCE COMPANY (THE), EMPLOYERS MUTUAL CASUALTY COMPANY, EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LONDON MARKET (CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, AND LONDON MARKET INSURANCE COMPANIES), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NORTH STAR REINSURANCE CORPORATION, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE COMPANY), PURITAN INSURANCE COMPANY (F/K/A THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY), STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY (THE), UNITED NATIONAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, AND WESTPORT INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS,

ALLIANZ UNDERWRITERS INSURANCE COMPANY (F/K/A ALLIANZ UNDERWRITERS INC.), AMERICAN CENTENNIAL INSURANCE COMPANY ASSOCIATED INTERNATIONAL INSURANCE COMPANY, CALIFORNIA UNION INSURANCE COMPANY INDUSTRIAL INDEMNITY COMPANY, INTERNATIONAL SURPLUS LINES INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY AND REPUBLIC INSURANCE COMPANY,

DEFENDANTS.

APPEAL and CROSS-APPEAL from orders and judgments of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Orders and judgments vacated on the appeal and the matter remanded with directions that a single global judgment be entered embodying the decision set out in part I of this opinion; judgment on the cross-appeal reversed and the matter remanded for further proceedings.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. These cases involve an appeal and cross-appeal. We discuss the appeal first.

I.

Johnson Controls appeals in 95-1796 from orders and judgments that dismissed its actions against various insurance companies. Johnson Controls sought a court ruling that the insurance companies listed in the caption gave it environmental-cleanup coverage in connection with twenty-one contaminated landfill sites. Johnson Controls is alleged to be responsible for at least a part of the contamination at each of the sites. The insurance policies provide either primary or excess comprehensive general liability coverage and promise to defend and indemnify Johnson Controls for its liability for "damages." Some of the policies also use the phrase "for damages, direct or consequential, and expenses on account of" various covered risks, including "property damage." Still other policies use the phrases "loss" and "ultimate net loss," both of which, however, are defined as money that Johnson Controls is legally obligated to pay "as damages." The trial court held that under ***City of Edgerton v. General Casualty Co.***, 184

Wis.2d 750, 517 N.W.2d 463 (1994), *reconsideration denied*, 525 N.W.2d 736 (1994) (Table), *motion to vacate denied*, 190 Wis.2d 510, 527 N.W.2d 305 (1995), *cert. denied*, 514 U.S. 1017, costs of environmental-cleanup for which Johnson Controls might be liable were not "damages" under the policies. It is not clear whether all the orders and judgments are in accord with the following analysis. Accordingly, and to facilitate any further review, we remand this matter to the trial court for the entry of a global judgment, broken down into subparts that recite: (1) the property involved; (2) the insurance company or companies and the relevant dates of their policies that relate to that property; and (3) the result required by this opinion.

The trial court decided this case on summary judgment, and this appeal presents us with only issues of law. Accordingly, although we have been assisted by the trial court's written decision, our review is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Johnson Controls's lawsuit was started in 1989, and, in an effort to keep our decision less cumbersome than the caption, we relate neither the procedural history nor facts that are not material to the legal issues presented by Johnson Controls's appeal.

The sites and related situations fall into four categories that are relevant to this appeal. The first category is where an insured who is responsible for the contamination cleans up the site pursuant to a directive issued by a government under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known by the acronym "CERCLA," 42 U.S.C. §§ 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, or its state counterparts. The costs of this remediation are not "damages." *See* ***City of Edgerton***, 184 Wis.2d at

782–786, 517 N.W.2d at 477–479; *see also* ***Amcast Indus. Corp. v. Affiliated FM Ins. Co.***, No. 96-2968, slip op. at 10–13 (Wis. Ct. App. July 29, 1998, ordered published Aug. 26, 1998) (government-ordered response costs, non-owned property). Although Johnson Controls contends that ***City of Edgerton*** was decided wrongly, it does not dispute that the decision is dispositive in connection with the sites that fall into this first category, and that there is no insurance coverage in connection with its remediation of those sites.[1]

The second category is where an insured is responsible for at least part of the contamination of a site that it does not own, but has not been directed by a government to remediate the site. A governmental agency has, however, directed others responsible for the contamination—either the site's owner or those who also polluted the property—to clean it up, and they sue the insured to recover the cleanup costs attributable to the insured. This situation is governed by ***General Casualty Co. v. Hills***, 209 Wis.2d 167, 561 N.W.2d 718 (1997), which held that an action by a non-governmental entity seeking those costs is a suit for "damages," for which there is coverage under the comprehensive general liability

[1] Johnson Controls argues that it "believes that Edgerton -- decided by a bare 5–4 majority [*sic*, it was four to three—there are only seven justices on the Wisconsin Supreme Court] in the face of overwhelming contrary precedent from other jurisdictions -- is bad law." We are, of course, bound by ***City of Edgerton***, and thus do not discuss the voluminous material submitted by Johnson Controls in an attempt to get us to ignore ***City of Edgerton***'s analysis of the crucial distinction between legal damages, for which there is coverage under the policies, and equitable monetary relief, for which there is not. *See* ***Regent Ins. Co. v. City of Manitowoc***, 205 Wis.2d 450, 463–464, 556 N.W.2d 405, 409–410 (Ct. App. 1996).

Johnson Controls also argues that the insurance industry represented to insureds that the CGL policies would cover the types of damages alleged in this case, that this fact was not presented to the supreme court when it decided ***Edgerton***, and that these representations therefore create a genuine issue of fact as to whether coverage exists under the policies. This same argument was raised and rejected in ***Amcast Industrial Corp. v. Affiliated FM Insurance Co.***, No. 96-2968, slip op. at 15–16 (Wis. Ct. App. July 29, 1998, ordered published Aug. 26, 1998). We are bound by that decision and, therefore, reject Johnson Controls' argument for the reasons explained in ***Amcast***.

policies. *See* ***id.***, 209 Wis.2d at 180, 561 N.W.2d at 724 ("[U]nlike *Edgerton*, neither the [Environmental Protection Agency] nor [Wisconsin Department of Natural Resources] have [*sic*] requested or directed [the insured/polluter] to develop a remediation plan or incur remediation and response costs under CERCLA or an equivalent state statute."); *see also* ***Wisconsin Pub. Serv. Corp. v. Heritage Mut. Ins. Co.***, 209 Wis.2d 160, 561 N.W.2d 726 (1997) (site contaminated by subcontractor's negligence; subcontractor not directed by government to remediate site; direct action against subcontractor's insurance carrier by party remediating the property pursuant to government cleanup directive; held: suit for "damages"); ***Spic & Span, Inc. v. Continental Cas. Co.***, 203 Wis.2d 118, 552 N.W.2d 435 (Ct. App. 1996) (site contaminated by insured; insured not directed by government to remediate site; action against insured by those remediating the property pursuant to government cleanup directive; held: suit for "damages"). Under ***Hills***, there is insurance coverage in connection with this second category of sites.

The third and fourth categories present situations where the insured is responsible for at least part of the contamination of a site that it does not own, and *has* been directed by a government to remediate the site but has not done so. The insured is sued either by the government to recover money it spent to clean up the site, or by the site's owner or others also responsible for the contamination who cleaned up the site at the government's direction. In connection with this appeal: Johnson Controls does not and did not own the contaminated sites falling within categories three and four; Johnson Controls is alleged to be responsible for at least part of the contamination at those sites; Johnson Controls did not accede to a government demand that it remediate the contamination at those sites; and

Johnson Controls is being sued by either the government or by private parties to recover the costs of the cleanup attributable to Johnson Controls.

On the surface, the scenarios encompassed by categories three and four would also seem to be resolved by existing precedent, ***Regent Insurance Co. v. City of Manitowoc***, 205 Wis.2d 450, 556 N.W.2d 405 (Ct. App. 1996), which held that where the government sues "an insured to recover incurred cleanup costs under § 107(a)(4)(A) of the [Comprehensive Environmental Response, Compensation and Liability] Act, 42 U.S.C. § 9607(a)(4)(A), or to impose a plan for remediation, that action is not a 'suit for damages' but is, rather, a suit for 'equitable monetary relief,'" ***id.***, 205 Wis.2d at 463, 556 N.W.2d at 409 (quoting, among other authorities, ***City of Edgerton***, 184 Wis.2d at 784, 517 N.W.2d at 478). Johnson Controls argues, however, that the supreme court's decision in ***Hills*** has tacitly overruled ***City of Manitowoc*** on this point. We disagree.

Hills concerned the contamination of a landfill site by waste from a service station. ***Id.***, 209 Wis.2d at 171, 561 N.W.2d at 720. The United States sued the owner of the landfill site to force remediation of the site and for recovery of response costs. ***Id.***, 209 Wis.2d at 172, 561 N.W.2d at 721. The station owner was not sued by the government and was not directed by the government to remediate the site. ***Ibid.*** The site's owner sued the service station's owner seeking reimbursement of the remediation costs attributable to the service station's waste. ***Ibid.*** The service station's insurance policies, which were akin to comprehensive general liability policies, ***id.***, 209 Wis.2d at 172–173 n.9, 561 N.W.2d at 721 n.9, promised to pay "all sums" that the station "shall become legally obligated to pay as damages." ***Id.***, 209 Wis.2d at 173, 561 N.W.2d at 721. The trial court held that the landfill owner's action to recover cleanup costs imposed on it by the government did not seek "damages," and, therefore, General Casualty was not

obligated to defend the service station. ***Id.***, 209 Wis.2d at 174, 561 N.W.2d at 721. We disagreed and reversed. ***General Cas. Co. v. Hills***, 201 Wis.2d 1, 548 N.W.2d 100 (Ct. App. 1996). The supreme court affirmed.

The supreme court in ***Hills*** reiterated that the term "'damages' as used in an insurance policy 'unambiguously means legal damages.'" ***Id.***, 209 Wis.2d at 177, 561 N.W.2d at 723 (quoting ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis.2d 347, 368, 488 N.W.2d 82, 89 (1992)). ***Hills*** then held that there was coverage because "regardless of the nature of the underlying claim made by the United States against [the landfill owner], the fundamental remedy [the landfill owner] seeks from [the service station owner] is compensatory damages for the past injuries he allegedly inflicted on the [landfill] site." ***Id.***, 209 Wis.2d at 182, 561 N.W.2d at 725. This was consistent with the policy's purpose—"'to protect an insured against liability for negligent acts resulting in damage to third parties.'" ***Id.***, 209 Wis.2d at 183–184, 561 N.W.2d at 725 (quoted source omitted).

In this case, unlike ***Hills***, ***Wisconsin Public Service***, and ***Spic & Span***, but like ***City of Manitowoc***, whose vitality subsequent to the supreme court's decision in ***Hills*** was recently reaffirmed, *see* ***Hydrite Chemical Co. v. Ætna Cas. & Surety Co.***, 220 Wis.2d 26, 39 n.5, 582 N.W.2d 423, 429 n.5 (Ct. App. 1998), a property owner is not seeking "legal damages" for injury to its property by one who has either caused or contributed to the pollution. Rather, the government, and property owners forced by the government to clean up contamination allegedly caused by Johnson Controls, are seeking what ***City of Edgerton*** noted was "equitable monetary relief," that is recompense for monies spent in complying with the nation's environmental-protection laws—*money that would have been spent by Johnson Controls if it had complied with the*

government's clean-up directives. *See* ***City of Edgerton***, 184 Wis.2d at 784, 517 N.W.2d at 478 ("Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C)."); *see also* ***City of Manitowoc***, 205 Wis.2d at 460–463, 556 N.W.2d at 408–409.

The only reason reimbursement is being sought from Johnson Controls under categories three and four is because: (1) Johnson Controls is alleged to have contaminated the sites; and (2) Johnson Controls did not voluntarily comply with directives that it remediate the contamination. If Johnson Controls *had* voluntarily complied with the directives, any assertion by it that its costs of compliance were "damages" would, as long as ***City of Edgerton*** remains the law in this state, be frivolous. The fact that Johnson Controls did not voluntarily comply does not transmute "equitable monetary relief"—which is not "damages"—into "legal damages" encompassed by the policies. *See* ***Wisconsin Power & Light Co. v. Century Indemnity Co.***, 130 F.3d 787, 792 (7th Cir. 1997). The analysis in ***Wisconsin Power & Light*** is directly on point:

> If the [polluter] flouts its duty to clean up a contaminated site, forcing others who bear that duty to sue it for its fair share of the expense, and as a result is able to shift that cost from its own shoulders to those of its insurers, the consequence is to reward wrongdoing. That is something insurance contracts are never interpreted to do. They invariably and for obvious reasons refuse coverage of intentional wrongdoing.

Ibid. The trial court recognized this when it wrote:

> If Johnson Controls' interpretation of Edgerton is correct, then a party responsible under a CERCLA directive to

> clean up contamination could opt to sit idly by, fail to remedy the site, and await the institution of a lawsuit by the government or another potential responsible party (PRP) and then tender the defense of the law suit to its insurer. This would produce the absurd result of rewarding one who does nothing and punishing the vigilant who undertake to comply with the environmental authorities.

We agree. Moreover, such a result would encourage delay, rather than foster the speedy clean up Congress and the state laws intended. The costs of remediation that Johnson Controls will have to pay under the scenarios in categories three and four are not "damages" under the policies, any more than these costs would have been "damages" had Johnson Controls paid them by complying with the government directives to remediate the sites—had it done so, it would not be subject to the claims for which it now seeks insurance coverage.

As noted in the beginning of this opinion, some of the policies express their coverage with the phrase "for damages, direct or consequential, and expenses on account of" various covered risks, including "property damage." Still other policies use the terms "loss" and "ultimate net loss," both of which, however, are defined as money that Johnson Controls is legally obligated to pay "as damages." We reject Johnson Controls's argument that this phrasing provides coverage, even under ***City of Edgerton***. This alternate language, like the word "damages" construed by ***City of Edgerton***, limits, not expands, the coverage, and does not provide coverage for equitable monetary relief. *See* ***Hydrite Chemical***, 220 Wis.2d at 40–43, 582 N.W.2d at 429–430; *see also* ***Amcast***, slip op. at 13–15. There is no insurance coverage in connection with the scenarios encompassed by categories three and four.

Based on the foregoing, we remand this matter to the trial court for the entry of a global judgment, broken down into subparts that recite: (1) the

property involved; (2) the insurance company or companies and the relevant dates of their policies that relate to that property; and (3) the result required by this opinion.

II.

Employers Insurance of Wausau cross-appeals in 95-2591 from the trial court's dismissal of its counterclaim against Johnson Controls. The counterclaim sought the following alternative relief: First, Employers Insurance asked for a declaratory ruling that an exclusion clause in its Johnson Controls policies freed it from having to indemnify or defend Johnson Controls for any Johnson Controls-caused pollution that was gradual over time. Recognizing that ***Just v. Land Reclamation, Ltd.***, 155 Wis.2d 737 (*motion for reconsideration denied*, *opinion modified*, 157 Wis.2d 507), 456 N.W.2d 570 (1990), interpreted the clause to impose a duty to defend and indemnify an insured for gradual pollution, Employers Insurance alleged that it and Johnson Controls had bargained specifically for the exclusion and that it "embod[ied] their mutual intent to exclude from coverage under said policies all personal or property damage which arose out of gradual pollution." Second, Employers Insurance sought, in the alternative, reformation of the policies to reflect what the counterclaim describes as its agreement with Johnson Controls "that all liability policies beginning January 1, 1971, would exclude coverage for gradual pollution and [its] inten[t] and belie[f] that the wording of the pollution exclusion in the Wausau/Johnson Controls Pollution Exclusion Policies embodied and memorialized their mutual understanding and intent to exclude coverage for gradual pollution under these policies." The trial court dismissed the counterclaim, ruling that the issue of what

the clause meant had already been decided adversely to Employers Insurance's position by ***Just***.[2] We reverse.

Whether a complaint or, in this case, a counterclaim states a claim for relief presents a legal issue that we review *de novo*. *See* ***Hausman v. St. Croix Care Ctr.***, 214 Wis.2d 654, 661, 571 N.W.2d 393, 396 (1997). The exclusion clause in the Employers Insurance contracts declared that there was no coverage for "personal injury or property damage arising out of" the "discharge, dispersal, release or escape" of various pollutants unless "such discharge, dispersal, release or escape is sudden or accidental." This is also the clause considered by ***Just***. ***Just***, 155 Wis.2d at 744, 456 N.W.2d at 572. The trial court in ***Just*** ruled that "the term 'sudden and accidental' did not apply to pollution damage occurring over a substantial period of time." ***Ibid.*** On appeal, we agreed and held that "the phrase 'sudden and accidental' unambiguously means accidental and immediate." ***Ibid.*** The supreme court reversed, holding that the phrase was "ambiguous." ***Id.***, 155 Wis.2d at 746, 456 N.W.2d at 573. It then applied the maxim that "[w]hen ambiguous language appears in an insurance contract, we must construe the ambiguity in favor of the insured and against the insurance company that drafted the ambiguous language," noting that this was "especially true of exclusionary clauses." ***Ibid.*** Applying that maxim, the supreme court interpreted "sudden and

[2] The trial court contended that it was bound by the doctrine of *stare decisis*, and Johnson Controls mirrors that contention on appeal in support of the trial court's ruling that ***Just v. Land Reclamation, Ltd.***, 155 Wis.2d 737 (*motion for reconsideration denied*, *opinion modified*, 157 Wis.2d 507), 456 N.W.2d 570 (1990), prevents Employers Insurance from attempting to prove the actual intent of itself and Johnson Controls in contracting for the insurance. *Stare decisis* is the doctrine that binds the highest court of a jurisdiction to its own decisions. *See, e.g.,* ***Payne v. Tennessee***, 501 U.S. 808, 827–830 (1991). This court and trial courts in this state are bound by decisions of the Wisconsin Supreme Court because of its position in the judicial hierarchy, and may never "overrule" those decisions. This is not true under the doctrine of *stare decisis*, which recognizes that the highest court in a jurisdiction may, consistent with that doctrine, overrule its prior decision. *See* ***Payne***, 501 U.S. at 827–830.

accidental" to mean "unexpected and unintended," rather than giving it a "temporal meaning." ***Ibid.*** ***Just*** also examined the drafting history of the phrase, noting that there was "substantial evidence indicating that the insurance industry itself originally intended the phrase to be construed as 'unexpected and unintended.'" ***Id.***, 155 Wis.2d at 747, 456 N.W.2d at 573.

It is black-letter law that courts "may examine extrinsic evidence as an aid to determining the meaning of contract language when an insurance contract is ambiguous." ***Ibid.*** It is also black-letter law that all facts that are alleged in a complaint or, in this case, a counterclaim, must be taken as true, and that "a claim should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979) (quoted source omitted); *see also* ***Hausman***, 214 Wis.2d at 662, 571 N.W.2d at 396.[3] Here, Employers Insurance has alleged that irrespective of what the industry as a whole may have intended, and irrespective of how the supreme court may have interpreted the clause in ***Just***, it and Johnson Controls agreed specifically that the clause would exclude from coverage "gradual pollution." ***Just*** did not decide the effect, if any, of the alleged Johnson Controls-Employers Insurance negotiations and agreements. Thus, neither the trial court nor we are bound by ***Just***'s interpretation of the clause. Although it is true that unambiguous contractual language must be enforced as it is written "even though the parties may have

[3] The trial court ignored this principle by basing, at least in part, its decision to grant Johnson Controls's motion to dismiss Employers Insurance counterclaim on its finding that the "language in the pollution exclusion was not negotiated because it's standard form language." Of course, even "standard form language" can be used by the parties to express their bargained-for intent, even when this bargained-for intent differs from interpretations given to the language by others.

placed a different construction on it," ***Cernohorsky v. Northern Liquid Gas Co.***, 268 Wis. 586, 593, 68 N.W.2d 429, 433 (1955), parol evidence may be used to discern the intent of parties to a contract where the language is ambiguous, ***Kasten v. Markham***, 1 Wis.2d 352, 356, 83 N.W.2d 885, 887–888 (1957). ***Kasten*** expressed the universal rule:

> "Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate."

Ibid. (quoted source omitted). Although "[a]n insurance policy must be construed in accordance with ... what a reasonable person in the position of an insured would have understood the words to mean," ***McPhee v. American Motorists Ins. Co.***, 57 Wis.2d 669, 676 205 N.W.2d 152, 156–157 (1973), insurance contracts are interpreted as are any other contracts; where the language is ambiguous, the court must try to ascertain the parties' actual intent—provisions in an insurance policy must be given the "meaning intended by the parties." ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis.2d 555, 562, 278 N.W.2d 857, 860 (1979) ("The rules governing construction and interpretation of insurance policies are those applicable to contracts generally. The objective in interpreting and construing a contract is to ascertain the true intention of the parties."); ***Kuehn v. Safeco Ins. Co. of America***, 140 Wis.2d 620, 626, 412 N.W.2d 126, 128 (Ct. App. 1987) ("Insurance contracts should be construed to effect the parties' true intent and the extent of policy coverage."). Moreover, where extrinsic evidence is offered, the construction of the ambiguous language is for the fact finder. *See* ***Kraemer Bros.***, 89 Wis.2d at 561, 278 N.W.2d at 860. Employers Insurance has a

right to try to prove that Johnson Controls understood, intended, and contracted specifically for the clause to do what Employers Insurance contends it does.[4]

By the Court.—Orders and judgments vacated on the appeal and the matter remanded with directions that a single global judgment be entered embodying the decision set out in part I of this opinion; judgment on the cross-appeal reversed and the matter remanded for further proceedings.

Publication in the official reports is recommended.

[4] ***McPhee v. American Motorists Insurance Co.***, 57 Wis.2d 669, 677, 205 N.W.2d 152, 157 (1973), upon which the trial court and Johnson Controls rely for the proposition that deference must be given to the insurance industry's construction of insurance-policy language is not on point because neither party to the insurance contract in that case attempted to introduce evidence of their actual intent. We also reject Johnson Controls's attempted use of the doctrine of "judicial estoppel," based on Employers Insurance's position in a discovery dispute before the trial court, as a tool to prevent Employers Insurance from proving the actual, bargained-for intent underlying the policies' use of the "sudden and accidental" phrase in the pollution exclusion. Johnson Controls has not even made a colorable showing here for the application of judicial estoppel, which requires both the assertion of two "irreconcilably inconsistent" positions, and a "manipulative perversion of the judicial process." *See* ***State v. Petty***, 201 Wis.2d 337, 353–354, 548 N.W.2d 817, 823 (1996). Additionally, the trial court's decision in the discovery dispute is not, as Johnson Controls argues, the "law of the case"—the order flowing from that decision was never the subject of an appellate ruling, *see* ***Univest Corp. v. General Split Corp.***, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989) ("decision on a legal issue by an appellate court establishes the law of the case"); ***State v. Brady***, 130 Wis.2d 443, 446, 388 N.W.2d 151, 153 (1986) ("law of the case doctrine generally restrains a circuit court from reconsidering an order that an appellate court has affirmed"), and, moreover, a successor trial-court judge may always modify or reverse rulings made by a predecessor judge, ***Dietrich v. Elliott***, 190 Wis.2d 816, 822, 528 N.W.2d 17, 20 (Ct. App. 1995).