COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2011AP214 **Cir. Ct. No. 2010CV1854**

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

PAMPERIN RENTALS II, LLC, PAMPERIN RENTALS III, LLC, AIRPORT SHELL, INC., BROOKSIDE SHELL, LLC AND D/D WILLIAMSON, LLC,

PLAINTIFFS,

GRAND CENTRAL, LLC AND PJ'S OF DEPERE, LLP,

PLAINTIFFS-RESPONDENTS,

V.

R.G. HENDRICKS & SONS CONSTRUCTION, INC., NATIONWIDE MUTUAL INSURANCE COMPANY AND AMCO INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

RED-D-MIX CONCRETE, INC.,

DEFENDANT-APPELLANT,

ABC INSURANCE COMPANY,

DEFENDANT,

INTEGRITY MUTUAL INSURANCE COMPANY,

INTERVENING-DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Reversed*.

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

¶1 PER CURIAM. Red-D-Mix Concrete, Inc., appeals an order granting summary and declaratory judgment to its insurers, Nationwide Mutual Insurance Company and AMCO Insurance Company (collectively, Nationwide) and Integrity Mutual Insurance Company. Various entities sued Red-D-Mix, alleging Red-D-Mix provided defective concrete for use in construction at several gas stations. Red-D-Mix tendered defense of the lawsuit to Nationwide and Integrity. The circuit court held that Nationwide and Integrity had no duty to defend or indemnify Red-D-Mix because their policies did not make an initial grant of coverage for the plaintiffs' claims. We conclude the plaintiffs' complaint arguably alleges a covered loss, and, therefore, Nationwide and Integrity do have a duty to defend Red-D-Mix.

BACKGROUND

¶2 R.G. Hendricks & Sons Construction, Inc., was hired to install concrete during construction of seven gas stations owned by the plaintiffs. Red-D-Mix provided the concrete that R.G. Hendricks installed. The plaintiffs subsequently sued both R.G. Hendricks and Red-D-Mix, alleging the concrete was defectively manufactured and installed.

¶3 With respect to Red-D-Mix, the plaintiffs alleged claims for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness. Specifically, they alleged the concrete Red-D-Mix supplied "was defective and has resulted in damages, including pitting and deterioration of the concrete, and will require replacement." They also alleged Red-D-Mix's breach

> has and will cause the Plaintiffs damage, including, but not limited to, concrete and asphalt repair, all appropriate testing for the installation of replacement concrete, all incidental and consequential damages related to the tear-out and replacement of concrete and asphalt, business interruption and lost profits, and all incidental and consequential damages including contractual liabilities related to business interruption.

¶4 Red-D-Mix tendered defense of the plaintiffs' complaint to its insurers, Nationwide and Integrity. Nationwide had insured Red-D-Mix from June 26, 2006 to June 26, 2009 under three commercial general liability policies and three commercial umbrella policies. Integrity insured Red-D-Mix under a commercial general liability policy beginning on June 26, 2009.

¶5 Nationwide and Integrity moved for summary and declaratory judgment, contending they had no duty to defend Red-D-Mix because their policies did not make an initial grant of coverage for the claims alleged in the plaintiffs' complaint. Alternatively, they argued certain exclusions barred coverage. Because the duty to defend is broader than the duty to indemnify, *see* ***General Casualty Co. v. Hills***, 209 Wis. 2d 167, 176 n.11, 561 N.W.2d 718 (1997), Nationwide and Integrity also argued that if the court determined they had no duty to defend, it should likewise determine they had no duty to indemnify.

¶6 The circuit court granted summary and declaratory judgment in favor of Nationwide and Integrity. The court determined the complaint did not allege either "property damage" or an "occurrence," both of which were required to trigger an initial grant of coverage under the policies. The court therefore determined Nationwide and Integrity had no duty to defend or indemnify Red-D-Mix, and, accordingly, it dismissed them from the case.

DISCUSSION

¶7 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[1] "Whether to grant a declaratory judgment is addressed to the circuit court's discretion." ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶6, 280 Wis. 2d 624, 695 N.W.2d 883. However, when the exercise of that discretion turns on the interpretation of an insurance policy, which is a question of law, we conduct an independent review. ***Id.***

¶8 Liability insurance policies impose two distinct duties on the insurer: a duty to defend and a duty to indemnify. ***Liebovich v. Minnesota Ins. Co.***, 2007 WI App 28, ¶3, 299 Wis. 2d 331, 728 N.W.2d 357. The duty to defend is broader than the duty to indemnify, *see* ***Hills***, 209 Wis. 2d at 176 n.11, and, accordingly, if an insurer has no duty to defend it also has no duty to indemnify.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶9 The duty to defend hinges on the nature, not the merits, of the plaintiff's claim. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 266, 593 N.W.2d 445 (1998). It is determined by comparing the allegations in the complaint to the terms of the policy. ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. The insurer has a duty to defend its insured if the allegations contained within the four corners of the complaint, would, if proved, result in a covered loss. ***Id.***[2] When comparing the allegations in the plaintiff's complaint to the terms of an insurance policy, we liberally construe the allegations in the complaint and resolve any doubt regarding the duty to defend in favor of the insured. ***Id.***, ¶20. In other words, whenever the allegations in the complaint state a claim that is arguably covered under the policy, the insurer has a duty to defend. *See* ***id.***; ***Maxwell v. Hartford Union High Sch. Dist.***, 2012 WI 58, ¶76, 341 Wis. 2d 238, 814 N.W.2d 484.

¶10 When we interpret an insurance policy, we first examine the policy's insuring agreement to determine whether it makes an initial grant of coverage for the plaintiff's claim. ***Olson v. Farrar***, 2012 WI 3, ¶41, 338 Wis. 2d 215, 809 N.W.2d 1. If the claim triggers an initial grant of coverage, we then determine whether any of the policy's exclusions preclude coverage. ***Id.*** Finally, we determine whether an exception to an exclusion reinstates coverage. ***Id.***

¶11 In this case, the Nationwide and Integrity policies provide an initial grant of coverage for "those sums that the insured becomes legally obligated to

[2] The parties dispute whether the "four corners" rule applies in this case. Nationwide and Integrity argue we may only consider the allegations within the four corners of the plaintiffs' complaint, while Red-D-Mix contends we may also consider extrinsic evidence. We need not resolve this dispute because, even without considering extrinsic evidence, we conclude Nationwide and Integrity have a duty to defend.

pay as damages because of … 'property damage' to which this insurance applies."[3] The policies further provide that the "property damage" must be "caused by an occurrence[.]" Thus, we first consider whether the plaintiffs' complaint alleges property damage and an occurrence. Because we conclude the complaint alleges both, we then consider whether any of the policies' exclusions apply. Finally, we address Integrity's argument that it is entitled to a declaration that it did not insure Red-D-Mix at any time relevant to the plaintiffs' claims.

I. Property damage

¶12 The Nationwide and Integrity policies define property damage as "[p]hysical injury to tangible property[.]" The plaintiffs' complaint alleges that Red-D-Mix's concrete was "defective and has resulted in damages, including pitting and deterioration of the concrete." The complaint also alleges that Red-D-Mix's breach "has and will cause the Plaintiffs damage, including, but not limited to, concrete and asphalt repair[.]" Thus, liberally construed, the complaint alleges physical injury to concrete and asphalt, both of which are items of tangible property. Consequently, the complaint alleges property damage, as that term is used in the Nationwide and Integrity policies.

¶13 Nationwide and Integrity contend the complaint does not allege any property damage because, in their view, it only alleges physical injury to the concrete itself. They contend that damage to the concrete itself is "economic loss," and, citing ***Wausau Tile***, 226 Wis. 2d at 268, they argue that economic loss cannot qualify as property damage. The economic loss doctrine precludes

[3] Aside from the use of quotation marks in certain instances, the relevant provisions of the Nationwide and Integrity policies are identical to one another.

recovery in tort for purely economic losses. *See* ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶35, 268 Wis. 2d 16, 673 N.W.2d 65. An economic loss is "the diminution in the value of [a] product because it is inferior in quality and does not work for the general purpose for which it was manufactured and sold." ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 925-26, 471 N.W.2d 179 (1991).

¶14 In ***Wausau Tile*** our supreme court stated, "Wausau Tile seeks only economic loss, which is not … 'property damage' under the plain language of the [commercial general liability] policy." ***Wausau Tile***, 226 Wis. 2d at 268. However, in ***American Girl***, the court clarified that the economic loss doctrine is "a remedies principle" that determines whether a loss can be recovered in tort or in contract. ***American Girl***, 268 Wis. 2d 16, ¶35. Thus, the economic loss doctrine "does not determine whether an insurance policy covers a claim, which depends instead upon the policy language." ***Id.*** Based on the policy language in this case, the damage to the concrete qualifies as property damage.

¶15 Moreover, the economic loss doctrine does not bar claims that a product caused damage to property other than the product itself. ***Wausau Tile***, 226 Wis. 2d at 247. Thus, even assuming that damage to the concrete is "economic loss," and therefore does not qualify as property damage, the complaint also alleges damage to other property—namely the asphalt.

¶16 Citing ***Wausau Tile***, Nationwide argues the asphalt is not other property because it is part of an "integrated system" and "[d]amage by a defective component of an integrated system to either the system as a whole or other system components is not damage to 'other property' which precludes the application of the economic loss doctrine." ***Id.*** at 249. ***Wausau Tile*** held that concrete paving

blocks made of cement, aggregate, water, and other materials were integrated systems. ***Id.*** at 241, 251. Consequently, damage to the pavers caused by defective cement used to manufacture them did not qualify as damage to other property, for purposes of applying the economic loss doctrine. ***Id.*** at 251-52. The defective cement was "an indistinguishable, integral part of the pavers" that could not be "separately identified from the finished product." ***Id.*** at 251 (quoting the circuit court's summary judgment decision).

¶17 Nationwide contends that the driveways at the various gas stations are integrated systems, and the concrete and asphalt are both parts of those integrated systems. However, concrete and asphalt portions of a driveway are not indistinguishable parts of that driveway. They can be separately identified from each other and from the finished product. Accordingly, the concrete and asphalt in this case are not part of an integrated system in the same way that the cement in ***Wausau Tile*** was part of an integrated system. Damage to the asphalt caused by the defective concrete therefore qualifies as damage to other property. Thus, even if damage to the concrete itself is economic loss, the complaint nevertheless alleges property damage in the form of damage to the asphalt.

II. Occurrence

¶18 Although the plaintiffs' complaint alleges property damage, to be covered under the Nationwide and Integrity policies that property damage must have been "caused by an occurrence[.]" The policies define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policies. In ***American Girl***, our supreme court noted that the dictionary definition of "accident" is "an event or condition occurring by chance or arising from unknown

or remote causes." ***American Girl***, 268 Wis. 2d 16, ¶37 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 11 (2002)). Red-D-Mix contends that the faulty manufacturing of the concrete in this case was an accident, because it was unintentional and unexpected.

¶19 Nationwide and Integrity do not dispute that the faulty manufacturing of the concrete was accidental. Instead, they argue that faulty workmanship that only damages the insured's own work or product does not qualify as an occurrence under a commercial general liability policy. *See* ***Kalchthaler v. Keller Constr. Co.***, 224 Wis. 2d 387, 395, 591 N.W.2d 169 (Ct. App. 1999) ("Under well-established case law, a CGL policy does not cover faulty workmanship, only faulty workmanship that causes damage to other property."). We agree with Nationwide and Integrity that, to the extent the complaint alleges damage to the concrete itself, that damage is damage to Red-D-Mix's own product caused by faulty workmanship. Consequently, damage to the concrete was not caused by an occurrence, and, as a result, it is not covered under the Nationwide and Integrity policies.

¶20 However, as discussed above, the plaintiffs' complaint also alleges damage to the asphalt. Thus, even though the defective concrete is faulty workmanship, that faulty workmanship allegedly caused damage to other property. The damage to other property qualifies as an occurrence. Accordingly, because the complaint arguably alleges property damage caused by an occurrence, Nationwide and Integrity have a duty to defend Red-D-Mix, unless one of the exclusions applies.

III. Exclusion j(5)

¶21 Exclusion j(5) provides that the Nationwide and Integrity policies do not cover property damage to "[t]hat 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[.]" For two reasons, we conclude exclusion j(5) does not apply.

¶22 First, the complaint does not allege that Red-D-Mix or its agent "perform[ed] operations" at any of the gas station sites. The complaint alleges that R.G. Hendricks installed the concrete at the gas station sites, and that Hendricks contracted with Red-D-Mix to provide the concrete. The complaint also alleges that Red-D-Mix "supplied" defective concrete. The complaint does not allege that Red-D-Mix performed any operations at any of the gas station sites.

¶23 Second, even assuming that Red-D-Mix performed operations at the gas station sites, for exclusion j(5) to apply, those operations must have damaged "[t]hat particular part" of the property on which Red-D-Mix performed operations. No Wisconsin case has addressed the meaning of the "that particular part" language in exclusion j(5). However, the Fifth Circuit has held that identical language in exclusion j(6)[4] means that the exclusion only applies to damage to the specific property on which the insured performed work. *See* ***Gore Design***

[4] Exclusion j(6) bars coverage for property damage to "[t]hat particular part of any property that must be restored, repaired, or replaced because 'your work' was incorrectly performed on it." In the circuit court, Integrity asserted that exclusion j(6) precluded coverage of the plaintiffs' claims against Red-D-Mix. However, exclusion j(6) "does not apply to 'property damage' included in the 'products completed operations hazard.'" On appeal, Integrity concedes that the "products completed operations hazard" exception to exclusion j(6) applies. Nationwide has never argued that exclusion j(6) precludes coverage.

Completions, Ltd. v. Hartford Fire Ins. Co., 538 F.3d 365, 371-72 (5th Cir. 2008); ***Mid-Continent Cas. Co. v. JHP Dev. Inc.***, 557 F.3d 207, 214 (5th Cir. 2009). In other words, if the insured's operations cause property damage to a part of the property on which the insured did not perform work, then that damage is covered and the exclusion does not apply.

¶24 In ***Gore***, an in-flight entertainment system on an aircraft was improperly wired, causing damage to the aircraft's other electrical systems and eventually grounding the plane. ***Gore***, 538 F.3d at 367-68. The court held that exclusion j(6) only precluded coverage for damage to the in-flight entertainment system itself—the "particular part" of the plane on which the insured worked—and did not preclude coverage for damage to other parts of the plane. ***Id.*** at 371-72.

¶25 In ***Mid-Continent***, the insured failed to properly water-seal the exterior of a condominium development. ***Mid-Continent***, 557 F.3d at 210. The court determined the "that particular part" language in exclusion j(6) referred to property that "(1) must be restored, repaired or replaced (2) because the insured's work was incorrectly performed on it." ***Id.*** at 215. Thus, the exclusion barred coverage for damage to the exterior finishes and retaining walls of the condominium development because the insured incorrectly performed work on those portions of the property. ***Id.*** at 217. However, the exclusion did not bar coverage for damage to other parts of the property on which the insured did not perform defective work—namely, the interior drywall, stud framing, electrical wiring, and wood flooring. ***Id.***

¶26 In this case, the complaint alleges that Red-D-Mix supplied defective concrete, and the defect in the concrete caused damage to the concrete

itself and to adjacent asphalt. Following the reasoning of ***Gore*** and ***Mid-Continent***, exclusion j(5) bars coverage for damage to the concrete itself, because the concrete is "that particular part" of the property upon which Red-D-Mix performed operations.[5] However, exclusion j(5) does not bar coverage for damage to the asphalt, because Red-D-Mix never performed any operations on the asphalt. In other words, the asphalt is not "that particular part" of the property on which Red-D-Mix performed operations.

IV. Exclusions k and l

¶27 Integrity and Nationwide next argue that exclusions k and l apply. Exclusion k provides there is no coverage for "'Property damage' to 'your product' arising out of it or any part of it." Under exclusion l, there is no coverage for "'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" Both of these exclusions bar coverage for any damage to Red-D-Mix's concrete caused by the concrete itself.[6]

¶28 Furthermore, as Nationwide and Integrity point out, to the extent the complaint alleges the plaintiffs are entitled to "all incidental and consequential damages related to the tear-out and replacement of [the] concrete," that claim is also barred by exclusions k and l. Under ***Jacob v. Russo Builders***, 224 Wis. 2d 436, 450, 592 N.W.2d 271 (Ct. App. 1999), exclusions k and l bar coverage not

[5] Although, as discussed above, there is no initial grant of coverage for damage to the concrete because that damage was caused by faulty workmanship, and faulty workmanship is not an occurrence unless it damages other property. *See supra*, ¶19.

[6] Again, while exclusions k and l bar coverage for damage to the concrete itself, we also note that there is no initial grant of coverage for damage to the concrete. *See supra*, ¶19.

only for damage to an insured's own work or product, but also for costs directly related to the repair and replacement of the insured's work or product.

¶29 In ***Jacob***, a subcontractor performed defective masonry work during the construction of the Jacobs' residence. ***Id.*** at 441. The subcontractor's commercial general liability policy contained an exclusion for "property damage to the named insured's products arising out of such products or any part of such products[.]" ***Id.*** at 445 n.3. We determined this exclusion barred coverage for the cost of repairing and replacing the insured's defective masonry work, but it also barred coverage for the cost of repairing the Jacobs' landscaping, driveway, patio, and sidewalk. ***Id.*** at 443-44, 450. The landscaping, driveway, patio, and sidewalk were damaged in order to repair the defective masonry, and therefore, the cost to repair them was directly related to the repair of the insured's defective product. ***Id.*** at 450. As such, the cost to repair the landscaping, driveway, patio, and sidewalk was barred by the exclusion for damage to the insured's own product. ***Id.*** Following ***Jacob***'s reasoning, exclusions k and l in the Nationwide and Integrity policies bar coverage for "incidental and consequential damages" caused by the repair or replacement of Red-D-Mix's defective concrete.

¶30 However, in addition to alleging damage to the concrete and "incidental and consequential damages" caused by the repair of the concrete, the plaintiffs' complaint also alleges damage to other property—namely, the asphalt. Damage to the asphalt does not fall within exclusions k and l. Accordingly, exclusions k and l do not bar coverage of the plaintiffs' claim that Red-D-Mix's concrete damaged the asphalt.

V. Exclusion m

¶31 Integrity argues that the plaintiffs' complaint only alleges damage to impaired property, and exclusion m therefore bars coverage. Exclusion m provides that the Nationwide and Integrity policies do not cover:

> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"[.]

The policies define "impaired property" as:

> [T]angible property, other than "your product" or "your work" that cannot be used or is less useful because:
>
> a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous ….
>
> ….
>
> if such property can be restored to use by
>
> a. The repair, replacement, adjustment or removal of "your product" or "your work"[.]

Thus, "impaired property" must be capable of being restored to use by "the repair, replacement, adjustment or removal" of the insured's work or product. If property cannot be restored to use, it does not qualify as impaired property. *See* ARNOLD P. ANDERSEN, WISCONSIN INSURANCE LAW § 5.172 (6th ed. June 2010).

¶32 Here, the complaint alleges that Red-D-Mix's defective concrete has caused damage to asphalt. If the asphalt is damaged, it cannot be restored to use by the repair, replacement, adjustment or removal of the concrete. Instead, the asphalt itself will need to be removed and replaced. Consequently, the asphalt is

not impaired property, and exclusion m does not bar coverage for damage to the asphalt.

VI. Exclusion n

¶33 Nationwide argues that exclusion n bars coverage for the plaintiffs' claims against Red-D-Mix. Exclusion n states there is no coverage for:

> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of
>
> (1) 'Your product,'
>
> (2) 'Your work,' or
>
> (3) 'Impaired property'[.]

The exclusion only applies "if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." There is no evidence Red-D-Mix's product has been withdrawn or recalled from the market or from use. Thus, exclusion n does not preclude coverage for the plaintiffs' claim that Red-D-Mix's concrete damaged asphalt.

VII. Integrity's alternative argument

¶34 Integrity also argues it is entitled to a declaration that it did not insure Red-D-Mix at any time relevant to the plaintiffs' claims. Integrity's policy covers "property damage" that "occurs during the policy period." Integrity notes that it did not insure Red-D-Mix until June 26, 2009, and all of the dates mentioned in the complaint predate June 26, 2009. Integrity therefore suggests

there cannot have been an occurrence that caused property damage during Integrity's policy period.

¶35 However, as Red-D-Mix notes, the complaint does not provide any information about: (1) when Red-D-Mix supplied concrete to the various gas station sites; or (2) when the defective concrete caused damage to the asphalt. Instead, the complaint merely provides dates when R.G. Hendricks contracted with the plaintiffs to complete concrete work at the gas stations. Some of these dates are as late as 2008. For instance, the complaint alleges that R.G. Hendricks entered into contracts to perform concrete work at Brookside Shell on April 23, 2008, at Airport Shell on June 30, 2008, and at Bellvue Crossing on June 9, 2008, with change orders as late as December 15, 2008. The complaint does not specify when Red-D-Mix supplied the defective concrete to these sites, when R.G. Hendricks installed it, or when the damage to the asphalt actually occurred. Thus, it is impossible to tell from the complaint alone whether the occurrences causing property damage happened before Integrity's policy period began. As a result, Integrity is not entitled to a declaration that it did not insure Red-D-Mix at any time relevant to the plaintiffs' claims.

By the Court.—Order reversed.

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