COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

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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 Nos. 2011AP819
2011AP1965

Cir. Ct. No. 2009CV1090

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2011AP819

W. D. HOARD & SONS CO.,

PLAINTIFF-APPELLANT,

V.

THE SCHARINE GROUP, INC., TIRY ENGINEERING, INC., MICHAEL TIRY, ROACH CONCRETE, INC., SOCIETY INSURANCE COMPANY, RURAL MUTUAL INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY,

DEFENDANTS,

ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

NO. 2011AP1965

W. D. HOARD & SONS CO.,

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V.

THE SCHARINE GROUP, INC., TIRY ENGINEERING, INC., MICHAEL TIRY, ROACH CONCRETE, INC., RURAL MUTUAL INSURANCE COMPANY, ACUITY, A MUTUAL INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY,

DEFENDANTS,

SOCIETY INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 LUNDSTEN, P.J. These consolidated appeals concern a defective manure basin constructed for W.D. Hoard & Sons. Hoard hired an engineering entity, Tiry Engineering, to design and site the basin and to supervise installation. Roach Concrete installed the basin's concrete floor. Hoard alleged that Roach's work was flawed, causing the floor to crack and, at a later date, manure to leak into the groundwater. The dispute here is between Hoard and two companies that insured Tiry and Roach, Acuity and Society Insurance Company. Hoard argues that the Acuity and Society policies provide coverage for damages related to Roach's work, even though the policies were not in effect when the basin leaked. Hoard also contends that a Society policy issued to Tiry provides coverage, even though that policy excludes "professional services." The circuit court rejected

these arguments and dismissed Acuity and Society as parties. We affirm the circuit court.[1]

Background

¶2 Hoard's dairy farm expansion included a new manure basin. Hoard hired a general contractor, the Scharine Group, to construct the manure basin. Scharine hired a subcontractor, Roach Concrete, to pour the concrete floor and to do related work of installing rebar and water stops. Hoard also hired Tiry Engineering and engineer Michael Tiry (collectively Tiry) to design the manure basin and to select a site for it. In addition, Tiry was to "oversee and inspect" the installation.

¶3 After work on the project commenced, it was discovered in the summer of 2007 that the basin was above an artesian water source. The project nonetheless continued, and Roach installed the basin's concrete floor. Beginning in November 2007, prior to any manure being placed in the basin, the floor cracked and bowed upward. In an effort to repair the problem, a different contractor poured a second layer of concrete. On October 21, 2008, manure was first placed in the basin and, about a week later, manure was first detected in the groundwater.

¶4 Acuity was Roach's insurer for a one-year period ending on February 22, 2008, and during that time period the concrete floor cracked.

[1] Hoard has moved "to allow limited supplemental briefing" to address a supreme court opinion that was issued after the briefing in this case was complete. Hoard explains that the supreme court case relates to an alternative argument by Acuity and Society for affirming the circuit court. Because we affirm the circuit court without needing to address that alternative argument, we deny Hoard's motion.

Roach's Society policy became effective when the Acuity policy ended on February 22 and was in effect until October 15, 2008,[2] and during that time period the concrete floor bowed upward. It is undisputed that all of the manure leakage occurred after both the Roach/Acuity policy and the Roach/Society policy periods had ended.

¶5 Hoard's lawsuit alleged that Roach negligently installed the concrete floor by failing to properly pour the concrete and install rebar and water stops. Hoard sought damages that included damage to the groundwater caused by the manure leakage and damages relating to Hoard's inability to use the basin.

¶6 Hoard also sued Tiry and its insurers, Society (Tiry's "business-owners" policy) and Continental Casualty (Tiry's professional liability policy). As to Tiry, these appeals concern only the Tiry/Society "businessowners" policy. Pertinent here, Hoard alleged that Tiry negligently supervised Roach's installation of the concrete floor. For the same reason, Hoard alleged breach of contract.

¶7 The circuit court bifurcated the case to first address insurance coverage. The circuit court granted summary judgment to Acuity and Society and dismissed them from the suit. The court concluded that the policies did not provide coverage for the damages that Hoard sought from Roach and Tiry.

[2] Hoard tells us that the policy's end date was disputed before the circuit court, but Hoard does not pursue this issue on appeal.

Discussion

¶8 In these consolidated appeals, Hoard directs arguments at Roach's Acuity and Society policies and at Tiry's Society policy. When interpreting insurance policies, we apply the following general principles:

> "An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." The language of the policy is construed as it would be understood by a reasonable insured, and the reasonable expectations of coverage of an insured should be furthered by the interpretation given.… Ambiguities are resolved in favor of coverage.

Bormann v. Sohns, 2007 WI App 12, ¶6, 298 Wis. 2d 250, 727 N.W.2d 341 (Ct. App. 2006) (citations omitted). In the following sections, we address and reject Hoard's arguments that the circuit court erred when granting summary judgment to Acuity and Society.

I. Hoard's Arguments Regarding Acuity

¶9 Hoard contends that the insurance policy issued by Acuity to Roach provides coverage for Hoard's alleged damages. Pertinent here, the Acuity policy provides coverage where:

> (a) The … *property damage* is caused by an *occurrence* that takes place in the *coverage territory*; and
>
> (b) The … *property damage* occurs during the policy period.

We explain below that Hoard fails to show there were covered damages during the policy period.

A. "Property Damage" During The Policy Period

¶10 Hoard contends that there is coverage because an "occurrence" caused "property damage" during the policy period. In support, Hoard directs our attention to the cracking that occurred in November 2007, during the policy period, which Hoard describes as "[s]ignificant cracking in the concrete floor of the manure basin, which was poured and installed by Roach."

¶11 We will assume, without deciding, that the cracking is an "occurrence" for purposes of the Acuity policy. However, the policy also requires that the property damage occur during the policy period. On this topic, Hoard fails to present a developed argument.

¶12 Hoard acknowledges that the cracking in Roach's concrete work is not covered by the policy. Hoard concedes that, for there to be coverage, there must be damage to other property. For example, Hoard states that the policy "does not cover defects in the work done by the insured [Roach]," and concedes that there is no coverage "merely for the cost of bringing the [concrete] pad up to the prescribed specifications." Similarly, Hoard does not dispute assertions in Acuity's responsive brief that the damage must be to "property other than that on which the insured is working."[3]

¶13 What we are left with is Hoard's assertion that the "impaired ... integrity of the entire [manure] basin" supports coverage because the entire basin is "other property." However, nothing in this part of Hoard's argument suggests

[3] We note that Hoard's concession regarding "other property" apparently relates to policy exclusions. We accept this concession without examining its underpinnings.

that any part of the basin, distinct from the cracked concrete, was damaged. Hoard simply points out that, *because of the cracked floor*, the basin had the potential to leak. Thus, so far as we can tell, Hoard's "entire basin" assertion is nothing more than a relabeling of the cracked concrete floor.[4]

¶14 We observe that Hoard relies on case law, but Hoard cites those cases for purposes of Hoard's "occurrence" argument. In particular, Hoard cites ***American Family Mutual Insurance Co. v. American Girl, Inc.***, 2004 WI 2, ¶¶5, 48-49, 268 Wis. 2d 16, 673 N.W.2d 65 (settling of soil was an "occurrence"), and ***Glendenning's Limestone & Ready-Mix Co. v. Reimer***, 2006 WI App 161, ¶¶42-43, 295 Wis. 2d 556, 721 N.W.2d 704 (manure scraper damage to rubber mats and puddling and backflow of urine and manure were "occurrence[s]"). We have assumed, in Hoard's favor, the existence of an "occurrence," and we decline to *sua sponte* examine these cases for purposes of addressing Hoard's "other property" argument.

¶15 Accordingly, we reject Hoard's contention that there is coverage because an "occurrence" caused "property damage" during the policy period.

B. Continuous Trigger Theory

¶16 Based on its interpretation of "continuous-trigger" case law, Hoard contends that there is coverage for damages occurring *after* the policy period.

[4] At one point, Hoard refers to damage "to other property outside the basin," but the only specific damage *during the policy period* that Hoard identifies is the concrete cracks. We note that, in its reply brief, Hoard first refers to alleged damage to "inflow pipes" and to "the integrity of the sides of the basin." To the extent that Hoard wishes to argue that these particular damages add anything, the argument comes too late. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286 ("[A]rguments advanced for the first time in a reply brief are waived.").

Under Hoard's theory, "property damage" that occurred after the Acuity policy period ended is covered because the cracking occurred during the policy period. We reject Hoard's argument. Unlike here, in the cases Hoard relies on, at least some damage occurred *during* a policy period.[5]

¶17 Hoard cites ***Society Insurance v. Town of Franklin***, 2000 WI App 35, 233 Wis. 2d 207, 607 N.W.2d 342. Like the scenario here, that case addressed insurance coverage for groundwater contamination. *See* ***id.***, ¶9. In ***Society Insurance***, we applied the continuous trigger theory where there were 15 years of continuous groundwater contamination and, during those 15 years, there were multiple one-year insurance policies. *See* ***id.***, ¶¶1-3, 9, 14-16. We explained that coverage depended on when the damage occurred. *See* ***id.***, ¶9. Because damage occurred during each policy period, each policy was triggered:

> Here, while there was only one ongoing occurrence, there was continual, recurring damage to the property. Contamination took place during each policy period over the years 1972 to 1987 because *during that time pollutants were seeping into the ground*. Thus, each [one-year] policy [in effect from 1972 to 1987] is available. *It is the time of the injury*, not the time of the occurrence, *that determines which policies are triggered*.

Id. (emphasis added).

¶18 Despite our bottom line in ***Society Insurance*** that it is "the time of the injury, not the time of the occurrence, that determines which policies are triggered," Hoard may believe a different statement in that case supports its

[5] Hoard's argument once again does not meaningfully address the specific Acuity policy language. Rather, Hoard seems to assume that the Acuity policy is substantially the same as the policies discussed in the cases Hoard cites. For purposes of this discussion, we will also assume this to be true.

argument. At one point, we stated that "all policies in effect while the *occurrence was ongoing* are triggered." *See* ***id.*** (emphasis added). However, this statement is explained by the fact that, in ***Society Insurance***, the ongoing occurrence and the ongoing property damage were simultaneous. *See* ***id.*** (stating that there was an "ongoing occurrence" with "continual … damage to the property"). Properly read, ***Society Insurance*** explains that *the time of the damage* is what matters because we expressly stated that it was the time of the injury, not the time of the occurrence, that triggered policy coverage. *See* ***id.***

¶19 Hoard also cites ***Plastics Engineering Co. v. Liberty Mutual Insurance Co.***, 2009 WI 13, 315 Wis. 2d 556, 759 N.W.2d 613. In that case, the court addressed exposure to asbestos that caused harm beginning with the first exposure, but where the harm was not "manifest" until a later date. *See* ***id.***, ¶¶6, 53. In this context, the court explained that, under the continuous trigger theory, "with harm occurring over several policy periods," all such policies were triggered. *See* ***id.***, ¶¶51-53 (insurer must fully defend lawsuit where "damage" occurs "'partly before and partly within the policy period'"). Thus, like ***Society Insurance***, ***Plastics Engineering Co.*** is an example of coverage "triggered" by the onset of injury, not by a circumstance that later led to injury.

¶20 Other continuous trigger cases cited by Hoard similarly apply coverage where damages occur during a policy period. *See* ***American Girl***, 268 Wis. 2d 16, ¶¶5, 33, 76 (applying the theory to "sinking, buckling, and cracking" of a warehouse); ***Wisconsin Elec. Power Co. v. California Union Ins. Co.***, 142 Wis. 2d 673, 675-81, 419 N.W.2d 255 (Ct. App. 1987) (addressing stray voltage from a power company's power system that caused damage to cattle over an extended period of time).

¶21 The situation here is different. There was no manure in the basin, and thus no possible damage by manure seepage, until after the policy period had ended. Accordingly, Hoard presents no reason for why the continuous trigger theory creates coverage.

¶22 We have discussed Hoard's argument in terms of groundwater contamination damage. Hoard also points to other possible damage, but does not develop separate arguments. For example, Hoard states that "cattle were injured and died" because "the basin could not be put to its intended use" and that "a nearby field was stripped so that its topsoil could be used as an additional insulating layer between the basin floor and the underlying artesian spring." But Hoard does not assert that these alleged damages occurred during the policy period. Hoard gives us no reason to further discuss these damages.

II. Hoard's Arguments Regarding Society

A. Society Policy Issued To Roach

¶23 Acuity was Roach's insurer for the one-year time period ending on February 22, 2008. Society was Roach's insurer from February 22, 2008, until October 15, 2008. The arguments Hoard directs at the Roach/Society policy, with one exception discussed below, are the same arguments Hoard directs at the Roach/Acuity policy. There are no differences in the facts or in the policy language that would lead to a different result. As with Acuity, the Society policy covers only "property damage" that occurs "during the policy period," and the policy period ended before any manure leaked. The manure was first placed in the basin on October 21, 2008, six days after Roach's Society policy ended. Accordingly, with respect to overlapping arguments, we reject Hoard's

Roach/Society policy coverage arguments for the same reasons we have rejected Hoard's Roach/Acuity policy coverage arguments.

¶24 An additional argument regarding the Roach/Society policy is Hoard's assertion that Roach's work suffered a different type of damage during the period covered by the Society policy. Hoard states that, in May 2008: "Upward pressure from the artesian water bows the concrete floor, compromising the integrity of the floor and the water stops." Hoard asserts that this bowing, like the cracking, was a result of Roach's flawed work in combination with pressure from the artesian water. Hoard does not, however, provide any reason to think that the bowing matters. As described by Hoard, the bowing is damage to the concrete and water stops installed by Roach. That is, like the cracking discussed in the previous section, the bowing is non-covered damage to Roach's own work, not potentially covered damage to something other than Roach's own work.

B. Society Policy Issued To Tiry

¶25 Society also issued a policy to another party in this case, Tiry Engineering. In addition to design and site selection, Hoard hired Tiry to supervise construction of the manure basin. The general contractor, Scharine, was also responsible for supervising that construction. Hoard alleges that Tiry's negligent supervision of Roach's construction of the basin contributed to the basin's failure and the resulting manure leak and related damages.

¶26 The circuit court concluded that Society was entitled to summary judgment because there was no coverage. The circuit court reasoned that the policy excludes coverage for Tiry's "professional services," and the undisputed facts showed that Tiry's supervision of Roach was a professional service. We agree.

¶27 The Society "businessowners policy" issued to Tiry does not cover damages caused by Tiry's "professional services." Specifically, the policy excludes damage "caused by the rendering or failure to render any professional service." The policy states that "professional services" include, but are not limited to:

- "Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications";
- "Supervisory, inspection or engineering services."

Hoard has conceded that "much of the work done by [Tiry] involved application of knowledge, background, and learned expertise within the field and discipline of engineering" and "fall[s] squarely within the ambit of the Professional Services exclusion." For example, Hoard concedes that Tiry's design and siting work for the basin were "professional services."

¶28 Hoard, however, contends that a subset of Tiry's work was not a "professional service." Hoard refers to its allegation that Tiry agreed to supervise Roach's installation of the concrete floor, but failed to "properly and diligently … supervise [that] work." We disagree.

¶29 In deposition testimony, a Hoard representative named Larson agreed that Tiry was hired by Hoard "as an engineer":

> Q And in what capacity did you hire Mike Tiry or his company?
>
> A To do the design work for the siting and the manure handling system and storage.

> Q Design work for siting, and what was the other part of it?
>
> A Design the manure handling system and storage.
>
> Q Did you understand Mike to be an engineer?
>
> A Yes.
>
> Q You were hiring him as an engineer?
>
> A Um-hum.
>
> Q Yes?
>
> A Yes, I'm sorry.

Larson also explained that Tiry performed under an oral contract. Larson stated that the "terms and condition[s]" of that contract were as follows:

> [Tiry] would have been responsible for recommending the site of the new dairy operation, and then he would have been responsible for designing the system from the standpoint of the excavation needs for the entire facility, designing the manure transport, handling and storage facility, for representing us at the approval process, the permitting process, to interact with county and state officials and deliver to us a usable and workable manure storage and handling facility.

Larson further agreed that the services that Tiry performed were "design services, siting services, representation services for permitting, [and] supervisory services." When asked if Tiry did "any physical labor on the project," Larson answered, "Not that I know of." With regard to supervision, Larson went on to explain that Tiry was responsible for the following:

> to oversee and inspect the installation of the construction of the manure storage system, including … the floor—the manure storage area, including the concrete liner ....

Larson was further asked:

> Q And it's Hoard's contention that it was [Tiry's] job to make sure that [its] engineering design was properly carried out in the field?
>
> A Yes.

Larson also differentiated Tiry's services from the services of the general contractor, Scharine:

> Q Then what was Scharine supposed to do that was different or distinctive from what Tiry was doing?
>
> A As the general contractor, Scharine was responsible for the construction of the facilities, the buildings, providing many of the internal components, pieces of equipment, milking equipment, related equipment, livestock, handling supplies, the installation of the manure transport, handling and storage facility, of the new facilities.

¶30 To summarize, the submissions establish that Hoard hired Tiry as an engineer, and that the oral contract required Tiry to design, site, and supervise construction of the manure basin. The general contractor, Scharine, had some overlapping supervisory responsibility in that Scharine had overall responsibility for the "construction of the facilities."[6]

¶31 Hoard's argument includes two assertions that we assume are true for purposes of summary judgment. The first is legal—Hoard asserts that just because a professional provides *some* "professional" services does not mean that *all* services provided by that professional are "professional" within the meaning of

[6] Nothing in Hoard's appellate briefs directs our attention to contrary information. Without significant discussion of the content, Hoard provides record cites to two brief statements by Larson. These statements simply repeat, in general terms, that Tiry performed supervision and oversight services. At one point in its brief-in-chief, Hoard has a "see generally" cite to approximately 42 pages of summary judgment submissions, but the cite is not accompanied by a discussion of specifics that might support Hoard's arguments.

the Society policy. Hoard's second assertion is factual—Hoard asserts that, so far as the submissions reveal, the general contractor for the project could have performed Tiry's supervisory services and the general contractor is, for purposes of the policy, a nonprofessional. That is to say, we will assume there is no evidence that, during construction, something unexpected occurred that required Tiry to step in with its expertise and provide direction that the general contractor (a nonprofessional for this purpose) could not have provided.

¶32 Even making these assumptions in Hoard's favor, we reject Hoard's argument. The question here is whether, in light of the submissions, the "professional services" exclusion applies and, in particular, whether a reasonable insured would have understood that that exclusion applies. *See* ***Bormann***, 298 Wis. 2d 250, ¶6 ("The language of the policy is construed as it would be understood by a reasonable insured …."). We conclude that a reasonable insured would have believed that Tiry's supervisory role was a "professional service."

¶33 The only reasonable inference from the submissions is that Hoard hired Tiry to supervise because of Tiry's particular expertise and because Tiry's expertise might have been needed. While Hoard does not concede this point, we agree with Hoard's apparent assertion that Hoard's purpose in hiring Tiry does not resolve the matter. Rather, the coverage question is whether Tiry actually performed a "professional service." To this end, we understand Hoard's argument to be that, so far as the evidence shows, the supervision performed would have been the same even if the general contractor had been Roach's only supervisor. Hoard argues, in effect, that Society had the burden of pointing to unrebutted evidence that Tiry actually employed its expertise when supervising Roach's installation of the concrete floor, that is, that Tiry gave Roach a directive about installation that the general contractor did not have the expertise to give. Although

the analogy might not be perfect, we think the following example explains the flaw in Hoard's argument. Suppose an individual hires a tax professional to do his or her tax returns. It would defy common sense to say that the tax professional did not provide a professional service because, as it turns out, the client's situation was so simple that no tax expertise was required to prepare the returns. We understand the circuit court to have applied essentially the same reasoning here—that no reasonable insured would have thought Tiry was not providing a professional service because Tiry merely provided a professional eye but did not actually give a professional directive.

¶34 We do not attempt here to define the line between a professional that actually provides a professional service and a professional that does not. Under different facts, it might be obvious that there was no need for professional expertise and that no reasonable insured would think that a professional service was being provided. And, just as plainly, there may be situations that fall in a gray area, but this is not one of those. The policy here expressly excludes coverage for "professional services," including "engineering" and "[s]upervisory" services. There is no dispute that the manure basin was a complex project requiring professional skills. Hoard hired Tiry "as an engineer" to work on the project, and Tiry agreed to design, site, and supervise installation of the manure basin. The only reasonable inference from these submissions is that Tiry provided a "professional service" in all three respects.

¶35 Finally, we note that Hoard relies on ***American Girl***, 268 Wis. 2d 16, and ***Leverence v. United States Fidelity & Guaranty***, 158 Wis. 2d 64, 462 N.W.2d 218 (Ct. App. 1990), *overruled in part by* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶77, 274 Wis. 2d 220, 682 N.W.2d 405. But Hoard's reliance on these cases adds nothing because this part of Hoard's discussion assumes Tiry's supervision

was a nonprofessional service. More specifically, Hoard argues that we should apply an "inextricably combined" concept found in the cases because Tiry's *professional* engineering services "inextricably combined" with Tiry's *nonprofessional* supervisory services. Because of this combination, Hoard contends, the "professional services" exclusion is inapplicable. *See* ***American Girl***, 268 Wis. 2d 16, ¶¶81-84 (discussing an "inextricably combined" concept found in ***Leverence***, 158 Wis. 2d at 83-85). It suffices to observe that Hoard's premise assumes that Tiry performed *nonprofessional* supervisory services. As we have discussed, the submissions do not show this.

Conclusion

¶36 For the reasons discussed, we affirm the circuit court.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.