COURT OF APPEALS
DECISION
DATED AND RELEASED

May 9, 1996

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

NOTICE

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

No. 95-1065

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

MICHAEL P. NORKS,

Plaintiff,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant,

ALLAN J. DALLMAN AND LINDA M. DALLMAN,

Defendant-Third Party Plaintiff-Appellant,

HARTLAND CICERO MUTUAL INSURANCE COMPANY,

Third Party Defendant-Respondent,

STETTIN MUTUAL INSURANCE COMPANY,

Third Party Defendant.

APPEAL from a judgment of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

DYKMAN, J. Allan J. and Linda M. Dallman appeal from a judgment dismissing their third-party action for insurance coverage against Hartland Cicero Mutual Insurance Company. The Dallmans were sued by Michael P. Norks after a manure pit collapsed on a farm they sold to him. The trial court concluded that a pollution exclusion in the Hartland policy precluded coverage.

The issues presented are: (1) whether Hartland's policy provides coverage for losses which are caused by occurrences which take place before the policy's inception; (2) whether Norks suffered property damage within the meaning of the policy; and (3) whether coverage is excluded by the pollution exclusion or other provisions in the policy. We conclude that: (1) the policy provides coverage for losses which are caused by occurrences which predate the policy period; (2) Norks suffered property damage within the meaning of the policy; and (3) only the pollution exclusion excludes some, but not all, of the damages alleged by Norks.

BACKGROUND

In 1982, Allan J. and Linda M. Dallman constructed a manure pit on a dairy farm they had owned since 1971. They installed a gravity flow drainage system whereby a large pipe was placed in the bottom of the pit leading out to another part of the farm. A steel plate with a cable attached to it covered the pipe in the pit. When the pit grew full, someone would pull the cable and the manure would empty out of the pit through the pipe. The gravity flow system, however, never worked properly but instead of removing the drainage pipe, the Dallmans removed the cable from the steel plate and blocked off the drainage pipe at the other end with soil so that it was no longer visible. From then on, they used a mechanical pump to drain the pit.

The Dallmans used the manure pit without incident between 1982 and 1989. In 1989, they sold the farm to Michael P. Norks. During the sale to Norks, they did not discuss the existence of the drainage pipe.

In May 1992, the manure pit ruptured and manure drained out of the pit onto the surrounding land and streams. Norks filed suit against the Dallmans, alleging that during the sale, they negligently or intentionally failed to disclose a material concealed defect or condition which caused damage to his property. He also alleged that the Dallmans negligently designed, constructed and maintained the manure pit. He asked for damages covering the costs of cleaning up the manure, the structural damage to the manure pit and bringing the pit up to code.

At the time the Dallmans sold the farm to Norks, they owned a farmowner's insurance policy issued by Stettin Mutual Insurance Company. After the sale and when the manure pit ruptured, the Dallmans owned a farmowner's policy issued by Hartland Cicero Mutual Insurance Company. The Dallmans tendered defense of the action to both Stettin and Hartland, but both companies refused to defend them.

The Dallmans filed third-party actions against Hartland and Stettin, arguing their policies covered the liability and that they had a duty to defend. Hartland and Stettin denied that their policies entitled the Dallmans to

a defense or indemnification. Hartland and Stettin moved to bifurcate the trial and to have the coverage issue litigated before liability and damages were established. On Hartland's and Stettin's summary judgment motion, the trial court dismissed Stettin and concluded that Hartland's pollution exclusion applied but that it did not exclude all of the damages. Hartland moved for reconsideration and, after a hearing and additional briefing, the court reversed itself and concluded that Hartland's pollution exclusion applied to prevent coverage for all of the alleged damages. The Dallmans appeal.

STANDARD OF REVIEW

An appeal from a grant of summary judgment raises an issue of law which we review *de novo* by applying the same standards employed by the trial court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We first examine the complaint to determine whether it states a claim, and then the answer to determine whether it presents a material issue of fact. ***Id***. If they do, we then examine the moving party's affidavits and other supporting documents to determine whether that party has established a *prima facie* case for summary judgment. ***Id***. If it has, we then look to the opposing party's affidavits and other supporting documents to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. ***Id***. at 372-73, 514 N.W.2d at 49-50.

The interpretation of an insurance contract is a question of law which we review *de novo*. ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis.2d 206, 212, 341 N.W.2d 689, 691 (1984). The object of contract construction is to determine the intent of the contracting parties, and we begin by looking to the language used by the parties to express their agreement. ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 455, 485 N.W.2d 426, 432 (Ct. App. 1992). Our duty is to give the policy language its plain meaning and determine what a reasonable person in the position of the insured would have understood the words to mean. ***Garriguenc v. Love***, 67 Wis.2d 130, 134-35, 226 N.W.2d 414, 417 (1975). When the language is unambiguous, we construe the contract as it stands. ***Yee v. Giuffre***, 176 Wis.2d 189, 192-93, 499 N.W.2d 926, 927 (Ct. App. 1993). Contractual language is ambiguous only when it is reasonably susceptible of more than one construction. ***Id***. at 193, 499 N.W.2d at 927. Whether a contract is ambiguous is itself a question of law. ***Borchardt v. Wilk***, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990).

OCCURRENCE

To determine whether Hartland's policy provides coverage, we must first determine whether the policy requires that the occurrence which caused the alleged losses had to take place after the policy's inception.[1] The introduction of Hartland's policy states that the parties agreed to the following: "This policy, subject to all of its ***terms***, provides: insurance against loss to property, personal liability insurance and other described coverages during the policy period in return for payment of the required premium." The general grant of liability insurance provides the following:

Coverage L - Personal Liability

We pay, up to ***our*** limit of liability, all sums for which any ***insured*** is legally liable because of ***bodily injury*** or ***property damage*** caused by an ***occurrence*** to which this coverage applies.

We will defend any suit seeking damages, provided the suit resulted from ***bodily injury*** or ***property damage*** not excluded under this coverage.

This first paragraph was later amended to read:

> We pay, up to the limit of our liability, on behalf of the insured, all sums which the insured shall become legally obligated to pay as compensatory damage only because of bodily injury or property damage, excluding all common law punitive, and statutory multiple damages, caused by an occurrence to which this coverage applies.

[1] The trial court never decided this issue but instead determined that the alleged losses were excluded by another provision in the policy.

The policy defines an occurrence as "an accident, including continuous or repeated exposure to substantially similar conditions."

Hartland contends that its policy only provides coverage when the event or occurrence giving rise to the loss and the loss itself take place after the policy's inception and that its policy was not in effect when the occurrences which caused the losses in this case took place. Hartland relies upon ***Fidelity & Deposit Co. v. Verzal***, 121 Wis.2d 517, 530-31, 361 N.W.2d 290, 296 (Ct. App. 1984), in which we held that under the terms of the policy in that case, both the event giving rise to the losses and the losses themselves had to take place during the policy period.

In ***Fidelity***, the insurer "agree[d] to indemnify the insured for all sums which the insured shall be obligated to pay by reason of liability imposed on the insured by law for loss on account of property damage `caused by or arising out of each *occurrence* happening anywhere in the world *during the policy period*.'" ***Id.*** at 528, 361 N.W.2d at 295. The policy defined an "occurrence" as:

> an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage, or advertising liability *during the policy period*. All such exposure to substantially the same general conditions existing at or emanating from one premises or location shall be deemed one occurrence.

Id. (emphasis added). We concluded that the use of the phrase "during the policy period" in both the general grant of liability coverage and the definition of occurrence required that both the event giving rise to liability and the resulting losses had to take place during the policy period. ***Id.*** at 529-30, 361 N.W.2d at 296. We reasoned that the parties could not have reasonably expected the policy to cover losses arising during the policy period as the fortuitous consequence of negligence which occurred at some time before the policy's inception. ***Id.*** at 531, 361 N.W.2d at 296.

Hartland's policy does not limit the definition of an occurrence temporally; it contains broad coverage which includes all accidents and events which cause damages. Unlike the policy in ***Fidelity***, the introduction of the

policy indicates that the loss, not the occurrence, must take place during the policy period. It is undisputed that the Dallmans' alleged intentional or negligent misrepresentations of the condition of the farm and the alleged negligent design, installation and maintenance of the manure pit took place before its policy took effect. It is also undisputed that the losses occurred during the term of the policy. Thus, the policy specifically provides coverage for the damages caused by these occurrences.

PROPERTY DAMAGE

Hartland also asserts that Norks has not suffered property damage within the meaning of the policy by the Dallmans' alleged breach of contract and intentional and negligent misrepresentations. Property damage is defined as "injury to or destruction of tangible property including the loss of its use." Hartland relies upon ***Benjamin v. Dohm***, 189 Wis.2d 352, 362, 525 N.W.2d 371, 375 (Ct. App. 1994), in which we concluded that causes of action in negligent and strict liability misrepresentation were demands for economic loss, not property damage.

We would agree with Hartland if that was Norks's only claim. Norks, however, has two distinct claims. He has asked for damages he incurred to cleanup the manure which escaped from the pit *and* for structural damage to the pit itself. The latter, he alleges, was caused by the Dallmans' negligent design, construction and maintenance of the manure pit. This is a common law negligence claim and it squarely falls within the property damage definition as it is injury to or destruction of tangible property.

POLLUTION EXCLUSION

Having concluded that Norks has alleged damages covered by the policy, we must next determine whether any of the other provisions suggested by Hartland exclude coverage. First, Hartland argues that the pollution and waste material provision excludes coverage. Provisions of an insurance contract which are intended to limit the insurer's liability are strongly construed against the insurer. ***Tempelis v. Aetna Casualty & Sur. Co.***, 169 Wis.2d 1, 9, 485 N.W.2d 217, 220 (1992). Ambiguities in the language are resolved in favor of the insured. ***Id.***

This provision excludes coverage for "the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or water course, body of water, bog, marsh, swamp or wetland." The Dallmans argue that "liquified manure" is not a liquid, waste material or pollutant and, therefore, is not excluded by this provision. They argue that the term "waste material" is overly broad and ambiguous because while the common sense use of the word would include manure, it also has other meanings. We disagree.

While the term "waste material" may have more than one definition, that fact, alone, does not render the term ambiguous if we conclude that only one meaning applies in the context of the provision and comports with the parties' reasonable expectations. ***Sprangers v. Greatway Ins. Co.***, 182 Wis.2d 521, 537, 514 N.W.2d 1, 7 (1994). "A term is not ambiguous merely because it is general enough to encompass more than one option. Broad terms may be used to permit flexibility in the choice of methods available without creating an ambiguity." ***Mattheis v. Heritage Mut. Ins. Co.***, 169 Wis.2d 716, 722, 487 N.W.2d 52, 54 (Ct. App. 1992) (citation omitted). In the context of this policy, we conclude that a reasonable person in the Dallmans' position would have understood that damages caused by "the discharge, dispersal, release or escape of ... waste materials" would include cow manure which has leaked from a manure pit onto the surrounding lands and streams.[2] Therefore, the environmental damage and cleanup costs incurred by the leakage are excluded by this provision.

The Dallmans next argue that even if this provision excludes coverage for the cleanup of the leaked manure, it does not exclude coverage for the structural damage to the manure pit. Hartland argues, however, that the pollution exclusion is broad and excludes coverage for all of the alleged damages. It contends that this exclusion is similar to the one in ***American States Ins. Co. v. Skrobis Painting & Decorating, Inc.***, 182 Wis.2d 445, 513 N.W.2d 695

[2] Looking at this somewhat differently, the Dallmans also ask us to focus on the fact that manure may be both a waste product and a valuable fertilizer. But, again, we look to the language of the *policy* to determine whether that language excludes coverage for the damages alleged here. The policy excludes coverage for the release of "waste materials." We do not think that all of the possible subsequent uses of manure transforms it from its initial nature as a "waste material," or that the different uses for manure means it does not fall within the policy exclusion for damages caused by released waste material.

(Ct. App. 1994), in which we concluded that an absolute pollution exclusion precluded coverage for cleanup costs incurred regardless of the theory of liability, when about 100 gallons of diesel fuel spilled out of a tank and onto the ground.

In ***American States***, the policy excluded coverage for "`property damage' arising out of the actual ... discharge, disbursal, release or escape of pollutants." ***Id.*** at 449, 513 N.W.2d at 696. The insured argued for coverage because the damage was not caused by the "disbursal, release or escape of pollutants," but from the negligent spilling of diesel fuel. ***Id.*** at 452-53, 513 N.W.2d at 698. In rejecting the insured's claim, we said:

There is a difference between theories of liability for an occurrence and an occurrence itself. Although the theory of liability asserted may change, the occurrence that caused the injury will not. Here, application of the absolute pollution exclusion does not depend on "theories of liability" regarding whether, in some metaphysical sense, the property damage was caused by initial negligence, subsequent pollution, or both, but merely on the fact or "occurrence" of property damage as a result of the pollution.

Id. at 453, 513 N.W.2d at 698.

In this case, besides requesting damages for the cleanup of the manure, Norks has asked for damages covering the structural damage to the manure pit caused by the Dallmans alleged negligent construction, design and maintenance of the pit. Hartland confuses the existence of multiple types of damages which is at issue in this case, with the issue in ***American States*** which dealt with multiple theories of liability for one type of damage. In ***American States***, the only damages at issue were expenses incurred from the government's request to cleanup the spilled diesel fuel. ***Id.*** at 449, 513 N.W.2d at 696-97. We conclude that Hartland's policy provides coverage because there are damages, aside from those incurred for cleaning up the manure, which do not fall under the pollution exclusion.

OTHER OWNED PREMISES EXCLUSION

Hartland also argues that the policy provides no coverage for personal liability "resulting from premises owned, rented or controlled by an ***insured*** other than the ***insured premises***." It asserts that this provision means that its policy only covers property for which the Dallmans purchased the policy and presently own. In other words, it does not cover losses which occur on uninsured lands. We disagree.

The plain language of this exclusion applies to insureds who own, rent or control other property besides the covered property. It does not apply to this situation because the Dallmans do not presently own, control or rent Norks's property. At the very least, the exclusion is ambiguous because it could refer to premises that the insureds presently own or other premises owned by the insureds at any time. We must construe ambiguous provisions designed to limit coverage against the insurer. ***Tempelis***, 169 Wis.2d at 9, 485 N.W.2d at 220. Consequently, we conclude that coverage is not excluded by the provision.

BUSINESS EXCLUSION

Hartland next asserts that the alleged damages are excluded by a business exclusion which provides that the policy does not apply to liability which arises "from activities in connection with an ***insured's business***, except as provided under Incidental Liability and Medical Payments Coverages." It contends that between 1971 and 1981, the Dallmans were engaged in farming and that the design, construction and maintenance of the manure pit was incidental to the farming business. We disagree.

First, by the very terms of the policy, coverage is not excluded by this provision. The policy defines "business" as "a trade, profession or occupation including rental of property to others all whether full or part time. ***Business*** does not include ***farming***." Farming is defined as "the ownership, maintenance or use of premises for the production of crops or the raising or care of livestock, including all necessary operations. ***Farming*** also includes the operations of roadside stands and ***farm*** markets maintained principally for the sale of the ***insured's*** own ***farm*** products." The work performed with relation to the manure pit is farming and therefore does not fall within the business exclusion.

Second, the policy is a farmowner's policy. By its very nature, it contemplates that the insured, the Dallmans, would be operating a farming business on the premises. We do not think that the Dallmans reasonably agreed to purchase a farmowner's policy with the belief that any property damage which occurred on the farm relating to the farming business would be excluded. Consequently, this provision does not exclude coverage.

INTENTIONAL ACTS

Hartland next argues that there is no coverage for liability "resulting from ***bodily injury*** or ***property damage*** caused intentionally by or at the direction of any ***insured***." They contend that this provision excludes coverage for any damage resulting from the Dallmans' alleged misrepresentations. We disagree.

The complaint alleges that the Dallmans negligently *or* intentionally failed to disclose a material concealed defect or condition which caused damage to his property. Norks also alleged that the negligent design, construction and maintenance of the manure pit caused structural damage to the pit. This latter claim does not allege any intentional acts. Consequently, we conclude that this provision does not exclude coverage.

CONTRACTUAL EXCLUSION

Hartland also argues there is no coverage for liability "assumed under any contract or agreement, except as provided under Incidental Liability and Medical Payments Coverages." It argues that any liability the Dallmans may have to Norks because of a breach of the real estate agreement is excluded by this provision. We disagree.

Norks has not alleged that the Dallmans' negligent design, construction and maintenance of the manure pit were performed pursuant to any contractual obligation with him. Instead, he has presented a common law negligence claim. This provision does not exclude coverage.

PERSONAL LIABILITY

As a final matter, Hartland argues that Norks has no viable claim against the Dallmans because under ***McCarty v. Covelli***, 182 Wis.2d 342, 345-46, 514 N.W.2d 45, 46 (Ct. App. 1994), a vendor of land is not subject to liability for physical harm to his vendee caused by any dangerous condition on the land after the vendee has taken possession which existed at the time the vendee took possession. In essence, Hartland asks us to rule on the merits of Norks's claims. But the trial was bifurcated at Hartland's request to address the coverage issue before any proceedings took place on the merits of Norks's claims. We may decline to review issues raised for the first time on appeal. ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). We decline to do so here. Accordingly, we reverse and remand for a trial on the merits of Norks's claims.

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

Not recommended for publication in the official reports.