COURT OF APPEALS
DECISION
DATED AND RELEASED

May 7, 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

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No. 95-1531

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

ALBERT TROSTEL & SONS COMPANY and ALBERT TROSTEL PACKINGS, LTD.,

Plaintiffs-Appellants,

v.

EMPLOYERS INSURANCE OF WAUSAU, a Mutual Company, ALLSTATE INSURANCE COMPANY, SENTRY INSURANCE, a Mutual Company and NORTHWESTERN NATIONAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from judgments of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed*.

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

WEDEMEYER, P.J. Albert Trostel & Sons Company and Albert Trostel Packings, Ltd. (collectively "Trostel") appeal from judgments granting

summary judgment to Employers Insurance of Wausau, Allstate Insurance Company, Sentry Insurance, and Northwestern National Insurance Company. Trostel claims that: (1) the trial court erred in concluding that this case was analogous to ***City of Edgerton v. General Casualty Co.***, 184 Wis.2d 750, 517 N.W.2d 463 (1994), resulting in its conclusion that Trostel did not have insurance coverage under any of the policies involved in the instant case; (2) the insurance companies breached their duty to defend and, therefore, are estopped from contesting coverage; (3) choice of law principles precludes the application of Wisconsin law; and (4) it is entitled to costs it incurred to defend the case up until the point in time when the coverage issue was decided. Because this case is governed by ***Edgerton***, because the insurers did not breach their duty to defend, because Wisconsin law applies, and because Trostel is not entitled to costs incurred prior to the coverage determination, we affirm.

I. BACKGROUND

Trostel filed suit in the Milwaukee County Circuit Court seeking damages for breach of contract and a declaration that Employers, Allstate, Sentry, and Northwestern National are obligated to defend and indemnify Trostel for costs it incurred or will incur with respect to environmental contamination caused by Trostel at eleven separate sites. The insurers filed a motion for summary judgment. The trial court, applying Wisconsin law, granted the insurers' motion for summary judgment, finding that none of the eleven sites involved "suits for damages" as those terms are used in comprehensive general liability policies as interpreted by ***Edgerton***. Trostel now appeals.

The sites involved.

The eleven sites and relevant facts relating to each are:

The first site is Commerce Street, Milwaukee, Wisconsin. This site, which was formerly owned by Trostel, was sold to the state. When the state tried to sell the property, it discovered soil and groundwater contamination. By letter dated January 25, 1989, the Wisconsin Department of Administration notified Trostel of the contamination. Trostel agreed to purchase the property

from the state and remediate the site. No lawsuit was ever filed against Trostel relating to the contamination at this site.

The second site is Thermo-Chem, Inc./Thomas Solvent Superfund, Muskegon, Michigan. Trostel received a "PRP" letter dated June 4, 1986, from the EPA regarding this site.[1] After a study of the site was conducted, the EPA issued a Record of Decision, which set forth its position as to what type of remediation was required to clean up the site. In May 1992, the EPA issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601, *et al*, directing that the Record of Decision be implemented. No lawsuit was filed against Trostel relating to this site.

The third site is West KL Avenue Landfill Superfund, Kalamazoo, Michigan. This site did involve a lawsuit by the EPA against certain potentially responsible parties. Trostel's unincorporated division—Eagle Ottawa Leather Company—was not named as an original defendant, but brought in later as a third-party defendant. The claim against Eagle Ottawa was based exclusively on its alleged liability for response costs under CERCLA.

The fourth site is Organic Chemical Superfund, Grandville, Michigan. In April 1991, the EPA advised Eagle Ottawa in a PRP letter regarding contamination discovered at this site. No lawsuit was ever filed.

The fifth site is Four County Landfill, Fulton County, Indiana. Eagle Ottawa received a PRP letter regarding this site from the Indiana Department of Environmental Management. No lawsuit was ever filed.

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[1] A "PRP" letter is a notification by a federal or state environmental agency to a **p**otentially **r**esponsible **p**arty of an environmentally contaminated piece of property. The letter identifies the recipient as a potentially responsible party and gives the PRP three options: "(1) do nothing and wait for the government to recover the costs of the cleanup; (2) clean up the affected site or join with other PRPs to effect a cleanup; or (3) litigate with the government so as to possibly secure a more favorable future result." *See* ***City of Edgerton v. General Casualty Co.***, 184 Wis.2d 750, 757 n.4, 517 N.W.2d 463, 467 n.4 (1994).

The sixth site is Berlin and Farro, Swartz Creek, Michigan. This site did involve a lawsuit brought by the United States and the State of Michigan pursuant to the provisions of CERCLA. Consent decrees required Eagle Ottawa to fund and/or conduct certain response activities at the site.

The seventh site is Lake Geneva, Lake Geneva, Wisconsin. Trostel discovered contamination at this site and notified the Wisconsin Department of Natural Resources. The DNR responded by letter advising Trostel of its responsibility to clean up the contamination pursuant to Wisconsin statute. No lawsuit was ever filed.

The eighth site is Grand Haven Brass, Grand Haven, Michigan. Eagle Ottawa reported contamination at this site to the EPA and the Michigan DNR. It stated its intention to remediate the site and clean up the hazardous waste. No lawsuit was ever filed.

The ninth site is A-1 Disposal, Plainwell, Michigan. The Michigan DNR sued Eagle Ottawa for contamination at this site. The complaint sought recovery of past response costs and an injunction requiring remediation at the site.

The tenth site is Sunrise Landfill, Allegan County, Michigan. This site involved a lawsuit similar to the lawsuit involving the ninth site.

The eleventh site is Marina Cliffs Barrel, South Milwaukee, Wisconsin. The Wisconsin DNR sent Trostel a PRP letter regarding this site. No lawsuit was ever filed.

Trostel, which is a Wisconsin corporation, secured comprehensive general liability insurance policies and umbrella policies for the work it performed at each of these sites. Trostel alleged that Northwestern National provided coverage for the Commerce Street, Lake Geneva and Marina Cliffs sites. Trostel alleged that Wausau provided coverage for the Commerce Street, Organic Chemical, Lake Geneva and Marina Cliffs sites. Sentry and Allstate allegedly provided coverage for the remaining sites, i.e., Thermo-Chem, Inc.,

West KL, Four County Landfill, Berlin and Farro, Grand Haven Brass, A-1, and Sunrise Landfill.

The relevant policy language.

The Wausau policies granting primary coverage provide in pertinent part:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. Personal Injury or
>
> Coverage B. Property Damage
>
> to which this policy applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or property damage.

The Wausau policy granting excess coverage provides in pertinent part:

> I. COVERAGE. To pay on behalf of the insured all sums which the insured shall become obligated to pay, either by adjudication or compromise, by reason of the liability imposed upon the insured by law or assumed by the insured under any contract for damages because of personal injury and property damage.

Although there is some dispute at to whether Northwestern National actually issued any insurance policy to Trostel, it is conceded that if it did, the pertinent policy language would provide as follows:

> Insurer will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... property damage ..., and [the insurer] shall have the right and duty to defend any suit against the insured seeking damages on account of such ... property damage.

The Allstate policies granting primary coverage provide in pertinent part:

> Allstate will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of ... property damage ... to which this insurance applies, ... and Allstate shall have the right and the duty to defend any suit ... seeking damage on account of such ... property damage.

The Allstate umbrella policies at issue provide:

> Allstate will indemnify the Insured for all sums which the Insured shall be legally obligated to pay as ultimate net loss because of ... property damage.
>
> "Ultimate net loss" means the sum actually expended or payable in cash to procure settlement or satisfaction of the Insured's legal obligation for damages either by (1) final adjudication or (2) compromise with the written consent of Allstate.

The Sentry policies provide in pertinent part:

> The Company, hereby agrees to indemnify the insured for all sums which the insured shall be obligated to pay by reason of liability for damages imposed upon the insured by law or assumed under any contract, if

> such liability results from personal injury, property damage or advertising injury to which this policy applies, caused by an occurrence.
>
> The Company also agrees to indemnify the insured for all reasonable expenses incurred by the insured in connection with the investigation, negotiation, adjustment, settlement and defense of any claims or suits alleging personal injury, property damage or advertising injury and covered by this policy.

II. DISCUSSION

Our standard of review of summary judgments is *de novo*. ***Park Bancorporation, Inc. v. Sletteland***, 182 Wis.2d 131, 140, 513 N.W.2d 609, 613 (Ct. App. 1994). Moreover, interpretation of an insurance policy is a question of law that this court decides independently of the trial court. ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990).

A. ***Edgerton*** *Application.*

Trostel argues that the ***Edgerton*** case can be distinguished. The trial court disagreed, concluding that ***Edgerton*** applies. We agree with the trial court's determination.

In ***Edgerton***, the Wisconsin Supreme Court concluded that a comprehensive general liability insurer is not obligated to defend or provide coverage in a situation where federal and state agencies are demanding that the insured conduct an environmental cleanup, unless there is an actual "suit seeking damages." ***Edgerton***, 184 Wis.2d at 786, 517 N.W.2d at 479. The policy language at issue in ***Edgerton*** provided:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend *any suit against the insured seeking damages* on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Id. at 769-70, 517 N.W.2d at 472 (emphasis in original). The court's opinion discusses at length both the definition of "suit" and the definition of "damages" as used in the CGL policies. ***Id.*** at 766-86, 517 N.W.2d at 471-79. The court held that a suit is:

> [A]ny proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or equity.

Id. at 774, 517 N.W.2d 474. The key factor is whether the parties to the action are involved in "actual court proceedings, initiated by the filing of a complaint." ***Id.*** at 775, 517 N.W.2d 474.

Wausau and Northwestern National

The policy language with respect to both Wausau's and Northwestern National's policies is identical or substantially similar to the

policy language at issue in ***Edgerton*** in that both companies require the existence of a "suit" before the duty to defend is triggered. As noted above, the sites allegedly covered by Wausau and Northwestern National are the Commerce Street, Lake Geneva, Marina Cliffs, and Organic Chemical sites. None of these sites involves a "suit" as that term has been defined by ***Edgerton***. Accordingly, our analysis with respect to these two insurers ends here. The policies have language identical to or substantially similar to the language at issue in ***Edgerton***, and none of the sites attributed to these insurers involve suits. Hence, the trial court was correct to grant summary judgment to Wausau and Northwestern National.[2]

Sentry and Allstate

The analysis for Sentry and Allstate, however, extends further. We conclude from our review of the pertinent language of both Sentry's and Allstate's policies that these policies are also similar to the policies at issue in ***Edgerton*** regarding use of the term "suits for damages." Nevertheless, four of the sites at issue with respect to these two insurers did involve actual suits. This, however, does not automatically trigger the duty to defend because ***Edgerton***'s analysis required that the suit involved actually be a suit *for damages*. ***Id.*** at 782-86, 517 N.W.2d at 477-79.

Edgerton defined damages as that term is used in insurance policies to mean "legal damages" and specifically held that "[r]esponse costs assigned either under CERCLA or [state statutes] are by definition, considered to be equitable relief." ***Id.*** at 784, 517 N.W.2d at 478. The court concluded that "as an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of injunctive action, while providing for remediation and cleanup of the affected site." ***Id.*** at 785, 517 N.W.2d at 478. Hence, the court held that this type of damage did not constitute "legal damages," and, therefore, was not covered under the policies. ***Id.***

[2] Trostel also argues that Wausau's excess insurance policy should apply even if its underlying policies do not because the excess policy contains language that triggers coverage. Trostel makes this argument for the first time on appeal, and therefore, we decline to address it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review issue raised for the first time on appeal).

This is the analysis that we must apply with respect to Sentry and Allstate and the four sites that actually involved lawsuits.[3] The four sites include Sunrise, A-1, Berlin and Farro and West KL. The Sunrise suit sought recovery of past response costs and an injunction requiring addition response actions. The A-1 suit sought recovery of past response costs and an injunction requiring that the responsible parties remediate contamination at the site. The Berlin and Farro suit required responsible parties to fund and/or conduct certain response activities at the site. The West KL suit sought only response costs from Eagle Ottawa.

Based on the foregoing, we conclude that the damages sought in each of these four lawsuits do not satisfy the definition of damages set forth in the ***Edgerton*** case. The damages in each of these four suits consist of response costs, other response activity, and injunctive relief. These types of damages are insufficient to trigger coverage under the CGL policies. ***Edgerton*** specifically held that response costs and other forms of equitable relief do not constitute damages under the terms of the CGL policies. ***Id.*** at 785, 517 N.W.2d at 478. Therefore, even the four sites that did involve suits, did not actually involve "suits seeking damages."[4] Because the sites did not involve suits seeking

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[3] Our conclusion regarding Sentry and Allstate with respect to the sites attributable to them, where no suits were ever filed, is identical to our conclusion regarding Wausau and Northwestern National. That is, if there is no suit, pursuant to the ***Edgerton*** case, the insurer's duty is not triggered.

Moreover, we reject Trostel's argument that an EPA order under § 106(e) of CERCLA should be considered a "suit." An EPA order, without an accompanying court proceeding to enforce the order, does not satisfy ***Edgerton's*** definition of a suit. ***Id.*** at 778-81, 517 N.W.2d at 476-77.

[4] Trostel argues that certain costs it incurred do constitute damages as that term is used in ***Edgerton***. It directs our attention to this court's recent pronouncement in ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 522 N.W.2d 542 (Ct. App. 1994), which held that a property owner can recover remediation costs from a third party as legal damages. Trostel's situation, however, is very different from the situation in ***Nischke***. Trostel seeks coverage under its CGL policies for contamination to property it owned or occupied and which was caused by its own actions. This situation is analogous to ***Edgerton***, but not ***Nischke***. In ***Nischke***, a landowner sought to recover for costs it incurred to clean up contamination caused by a negligent third party. ***Id.*** at 103-04, 522 N.W.2d at 545.

Because of this significant difference, Trostel's case is governed by ***Edgerton***, not by ***Nischke***. *See also*, ***General Casualty Co. v. Hills***, No. 95-2261, (Wis. Ct. App. March 12, 1996, ordered published, April 30, 1996); ***Wisconsin Public Serv. Corp. v. Heritage Mut. Ins. Co.***, No. 95-2109,

damages as required by ***Edgerton***, and because the policy language of Sentry and Allstate's policies are substantially similar to the policies in the ***Edgerton*** case, we conclude that both insurers are entitled to summary judgment.[5]

B. Duty to Defend.

Trostel next argues that all four insurers breached their duty to defend and, therefore, each insurer has waived the right to contest coverage. The trial court determined that there was not a breach of the duty because the duty was never triggered. We agree.

The duty to defend was never triggered in this case because none of the sites involved "suits for damages." ***Edgerton***, 184 Wis.2d at 766-86, 517 N.W.2d at 471-79. Because the duty to defend never arose, it logically follows that the insurers did not breach that duty.

C. Choice of Law.

Trostel also argues that Wisconsin law does not apply. Trostel argues that Michigan law should apply because many of the sites were located in Michigan; or that Illinois law should apply because Allstate is headquartered in Illinois. The trial court rejected Trostel's choice of law arguments. We must do the same.

In engaging in a choice of law analysis, we begin with the premise that the law of the forum state generally governs, especially when the forum is

(..continued)
(Wis. Ct. App. March 12, 1996, ordered published, April 30, 1996) (both cases distinguishing the ***Edgerton*** holding when contamination was caused by negligent third party).

[5] Trostel also argues that Sentry's umbrella policies should apply even if its underlying policies do not because the umbrella policy contains language that triggers coverage. Trostel makes this argument for the first time on appeal, and therefore, we decline to address it. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court will generally not review issue raised for the first time on appeal).

chosen by the insured. ***Hunker v. Royal Indem. Co.***, 57 Wis.2d 588, 598-600, 204 N.W.2d 897, 902-03 (1973). This presumption applies unless non-forum contacts are of greater significance. ***Id.***

In the instant case, the insured, Trostel, chose Wisconsin circuit court as the forum for resolution of this case. It is undisputed that Trostel is a Wisconsin corporation. It is undisputed that Wausau, Northwestern National and Sentry are Wisconsin corporations. Moreover, although Allstate is headquartered in Illinois, it engages in substantial business in Wisconsin. It is also undisputed that all of the contaminated sites which Northwestern National is allegedly responsible for are located in Wisconsin and that three of the four sites attributed to Wausau are located in Wisconsin. Further, Trostel alleged in its complaint that the policies were sold, issued and delivered in Wisconsin.

Based on all of these factors, as well as the fact that the issue in this case is the scope of insurance coverage, the fact that many of the sites are located outside of Wisconsin is not of great significance. *See* ***American Family Mut. Ins. Co. v. Powell***, 169 Wis.2d 605, 609-10, 486 N.W.2d 537, 538-39 (Ct. App. 1992) (if contract of insurance has significant contact with Wisconsin, Wisconsin law will apply even if events giving rise to liability occurred in other states).

The record demonstrates that the insurance contracts at issue in this case have significant contact with Wisconsin. The insured was a Wisconsin corporation. The insurers (with the exception of Allstate) were Wisconsin corporations. The policies were negotiated, sold, issued and delivered to Trostel in Wisconsin. We conclude that any choice of law analysis decidedly favors choosing Wisconsin law as the law applicable to this case.

D. Costs.

Finally, Trostel claims it is entitled to costs incurred prior to the date of coverage determination. We do not agree.

Trostel cites ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 522 N.W.2d 261 (Ct. App. 1994) in support of his argument. ***Kenefick*** stands for the proposition that when coverage is contested, an insured is entitled to recover defense costs up to the time of the coverage determination *if* there was an ongoing duty to defend up until that time. ***Id.*** at 235-36, 522 N.W.2d at 268.

The instant case is distinguishable from ***Kenefick*** because in the instant case, the duty to defend never arose. The duty never arose because none of the underlying claims ever involved a "suit seeking damages." Because the duty never arose, there is no basis on which to hold the insurers liable for Trostel's defense costs incurred prior to the coverage determination. Accordingly, we reject Trostel's request.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*concurring*). I write separately to emphasize that we have not rejected Trostel's cogent argument regarding Wausau's excess policy and Sentry's umbrella policy. There may be a significant difference between a policy that applies not only to "suits," but also to "claims or suits." There also may be a significant difference between a policy that covers not only "damages," but also, "expenses incurred ... in connection with the investigation, negotiation, adjustment, settlement ...." As the majority notes, however, Trostel failed to argue this theory in the trial court. *See* ***Leon's Frozen Custard, Inc. v. Leon Corp.***, 182 Wis.2d 236, 246 n.2, 513 N.W.2d 636, 641 n.2 (Ct. App. 1994) ("Appellate courts are not at liberty to reverse cases on appeal based on theories of law never argued in the trial court.").