COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2465 **Cir. Ct. No. 2007CV230**

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

WATERTOWN TIRE RECYCLERS, LLC,

PLAINTIFF-APPELLANT,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THOMAS SPRINGER,

INVOLUNTARY-PLAINTIFFS,

V.

JAMES W. NORTMAN AND ROBERTSON RYAN & ASSOCIATES, INC.,

DEFENDANTS-RESPONDENTS,

ACE PROPERTY AND CASUALTY INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. This appeal concerns a negligence claim by Watertown Tire Recyclers against an insurance agent for the agent's alleged failure to procure a policy that protected Watertown against a substantial and anticipated risk, a stockpile tire fire. More specifically, Watertown alleged that the agent negligently procured a policy with a broad pollution exclusion that resulted in a denial of coverage after a serious accidental tire fire. After determining that the policy would have precluded coverage regardless of the alleged negligence, the circuit court granted summary judgment in favor of the agent. We affirm.

Background

¶2 Watertown operated a large tire recycling facility on leased property. In July 2005, a stockpile tire fire started and burned for five days. Firefighters used an estimated ten million gallons of water to extinguish the fire. Watertown was covered by a commercial general liability policy from ACE Property and Casualty Insurance Company, procured by Watertown's insurance agent, James Nortman.

¶3 The fire left Watertown's leased property contaminated with debris and pools of fire suppression water. Wisconsin's Department of Natural Resources and the United States Environmental Protection Agency (EPA) required Watertown to remove the on-site debris and contaminated fire suppression water to address risks posed to the public groundwater and the nearby Rock River. Watertown contracted to have the debris removed and agreed to have the EPA treat the contaminated water. Watertown then sought reimbursement for these clean-up expenses from its insurer, ACE.

¶4 ACE denied coverage based on the policy's "absolute pollution exclusion," which states that the insurance "does not apply to any injury, damage, [etc.,] arising out of or in any way related to pollution, however caused." Watertown then sued its insurance agent, Nortman, and his employer, Robertson Ryan & Associates, Inc. (collectively, Nortman), alleging that, unbeknownst to Nortman, the ACE policy contained the absolute pollution exclusion and that Nortman was negligent in procuring the ACE policy because it "did not cover [Watertown's] known and ongoing fire-related risks."

¶5 Nortman moved for summary judgment. Among other arguments, Nortman contended that the ACE policy would have precluded coverage of the clean-up expenses regardless of the alleged negligence because other exclusions precluded coverage, in particular, the owned property exclusion. In argument before the circuit court, Watertown clarified that its theory of negligence was that, unlike prior policies, the ACE policy Nortman procured in the year before the fire contained an absolute pollution exclusion. Watertown did not argue that Nortman was negligent because the policy, viewed as a whole, did not cover Watertown's clean-up expenses. Indeed, Watertown maintained as its sole position that, absent the pollution exclusion, the ACE policy did provide coverage. The circuit court agreed with Nortman that the alleged negligence did not affect coverage because, regardless of the pollution exclusion, the ACE policy did not provide coverage. The court granted summary judgment in favor of Nortman. Watertown appeals.

Discussion

¶6 Watertown argues that it was injured by a lack of coverage caused by agent Nortman's negligent act of procuring a policy with an absolute pollution exclusion. Watertown contends that the circuit court erred when it granted

summary judgment in favor of Nortman and dismissed Watertown's negligence claim against Nortman.

¶7 We review summary judgment *de novo*, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08). Applying this standard, we affirm the circuit court.

A. The Owned Property Exclusion

¶8 In moving for summary judgment, Nortman argued that any alleged negligence with respect to the absolute pollution exclusion was non-causal because, regardless of the pollution exclusion, the ACE policy did not provide coverage. In particular, Nortman argued that clean-up costs were excluded by the owned property exclusion. The circuit court agreed, observing that the same owned property exclusion language found in the ACE policy was also contained in prior policies.

¶9 Watertown argues that the owned property exclusion in the ACE policy does not affect coverage because, in general, owned property exclusions do not apply when an insured's property threatens public groundwater or a natural resource. In support, Watertown points to ***United Cooperative v. Frontier FS Cooperative***, 2007 WI App 197, 304 Wis. 2d 750, 738 N.W.2d 578, *review denied*, 2009 WI 23, 315 Wis. 2d 721, 764 N.W.2d 531 (No. 2006AP2704), and other cases holding that owned property exclusions did not remove coverage under similar circumstances. This argument is flawed because there is no such general rule that applies regardless of specific policy language, and the owned property

exclusion language in the cases Watertown relies on differs from the language at issue here. In the following paragraphs, we first examine the ACE owned property exclusion. We then explain why the cases Watertown relies on are inapposite.

¶10 The ACE owned property exclusion states:

> This insurance does not apply to:
>
> ….
>
> "Property damage" to:
>
> (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property *for any reason, including prevention of injury to a person or damage to another's property* ....

(Emphasis added.) The plain language of this exclusion precludes coverage because the clean-up expenses claimed by Watertown were for restoring the damaged rented property for a reason specified in the exclusion—the "prevention of ... damage to another's property."

¶11 Watertown does not address this specific policy language in its brief-in-chief and, instead, first makes arguments on this topic in its reply brief. Therefore, Watertown has effectively conceded that the particular language of the ACE owned property exclusion precludes coverage for Watertown's clean-up expenses. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) ("We do not generally address arguments raised for the first time in reply briefs."). We note, however, that, even if we were to address Watertown's arguments based on the specific language in the ACE policy, we would reject those arguments because they lack merit. We discuss one representative argument.

¶12 Focusing on the "repair, replacement, enhancement, restoration or maintenance" language in the exclusion, Watertown equates "repaired" with fixed, "replaced" with substituted, "enhanced" with improved, "restored" with renewed, and "maintained" with preserved, and argues that the cleanup of its polluted property does not fit any of these terms. That is plainly incorrect.

¶13 Watertown incurred its expenses when it complied with DNR and EPA directives that it remove contaminated on-site debris and water. Watertown's insurance claims were for the bills from these clean-up projects. Giving the term "restoration" its ordinary meaning, it is apparent that returning contaminated property to something much closer to its former non-contaminated state is "restoration" or, as Watertown would have it, "renewal." The dictionary definition of "restoration" is "an act of restoring … a bringing back to or putting back into a former position or condition." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1936 (unabr. ed. 1993). The definition of "restore" includes "to bring back to a healthy state: cause to recover." ***Id***. These definitions are apt descriptions of Watertown's clean-up activities.

¶14 We turn our attention to the case law Watertown relies on.

¶15 Watertown argues that ***United Cooperative***, 304 Wis. 2d 750, stands for a general proposition—that owned property exclusions do not remove coverage when expenses relate to the public's groundwater. This assertion misapprehends the analysis in ***United Cooperative***, which was limited to interpreting the specific language in that case.

¶16 In ***United Cooperative***, the owned property exclusion stated that coverage did not apply to "property damage to … property owned or occupied by or rented to the insured."[1] We held that this language did not exclude from coverage clean-up costs related to groundwater contamination because groundwater is not "owned property." ***Id.***, ¶¶24, 28. In contrast, the ACE owned property exclusion has additional language making it clear that the exclusion extends to cleanup for purposes of preventing damage to another's property.

¶17 Watertown's reliance on other cases is similarly misplaced. In each instance the language at issue was narrower than the ACE owned property exclusion here. *See* ***Patz v. St. Paul Fire & Marine Ins. Co.***, 817 F. Supp. 781, 782-83 (E.D. Wis. 1993) (owned property exclusion precluding coverage for "property owned or occupied by or rented to the Insured" did not preclude coverage for groundwater contamination because it "was not damage to property owned by [the insured]"), *aff'd*, 15 F.3d 699 (7th Cir. 1994); ***City of Edgerton v. General Cas. Co. of Wis.***, 172 Wis. 2d 518, 554, 493 N.W.2d 768 (Ct. App. 1992) (paraphrasing the owned property language excluding "property damage to property owned or used by the insured" and stating that it does not apply to "natural resources belonging to the people of the state"), *rev'd in part on other grounds*, 184 Wis. 2d 750, 786, 517 N.W.2d 463 (1994).[2]

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[1] ***United Cooperative v. Frontier FS Cooperative***, 2007 WI App 197, 304 Wis. 2d 750, 738 N.W.2d 578, *review denied*, 2009 WI 23, 315 Wis. 2d 721, 764 N.W.2d 531 (No. 2006AP2704), actually addressed three policies that all contained similar owned property exclusions. *See* ***id.***, ¶22. The particular policy language quoted here can be found in the Brief of Respondents at 10, ***United Cooperative***, 304 Wis. 2d 750, http://libcd.law.wisc.edu/~wb/will0120/48779d46.pdf. None of the exclusions contained additional "another's property" language like the ACE policy in this case.

[2] As found in an appellant's appendix in ***City of Edgerton v. General Casualty Co. of Wisconsin***, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992), *rev'd in part on other grounds*, (continued)

¶18 Finally, we note that Watertown criticizes Nortman's reliance on ***State v. City of Rhinelander***, 2003 WI App 87, 263 Wis. 2d 311, 661 N.W.2d 509, a case in which we concluded, as we do here, that an owned property exclusion barred coverage for the cost of remediating damage to groundwater. *See* ***id.***, ¶¶6-7, 11-13. Watertown points out that the specific policy language at issue in ***City of Rhinelander*** is different than the disputed language here. Watertown's criticism is curious because, as we have just explained, Watertown itself asks us to rely on the bottom-line holding in cases that address different policy language. Regardless, we do not join in Watertown's criticism. Nortman's reliance on ***City of Rhinelander*** is a response to Watertown's argument that there is some sort of general rule based on concern for groundwater. Nortman accurately explains that Watertown's proposition conflicts with the holding in ***City of Rhinelander***, where an owned property exclusion was interpreted as removing coverage for expenses relating to the off-site remediation of damage to groundwater. ***Id.***, ¶12. Thus, Nortman demonstrates his understanding of the need to look at the specific policy language at issue.

¶19 In sum, we agree with Nortman and the circuit court that the owned property exclusion in the ACE policy precludes coverage because Watertown's expenses were incurred when it restored the damaged rented property to prevent damage to "another's property," namely, groundwater and nearby surface water.

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184 Wis. 2d 750, 786, 517 N.W.2d 463 (1994), the General Casualty exclusion paraphrased by the court states, in its original form: "This insurance does not apply … to property damage to … property owned or occupied by or rented to the insured ...." Appendix of Defendant-Appellant at 170, ***City of Edgerton***, 172 Wis. 2d 518, found in *Appendices and Briefs*, 172 Wis. 2d 518, at tab 1 (Wis. State Law Library).

B. Concurrent Causation

¶20 Watertown argues for the first time on appeal that, regardless of the owned property exclusion's effect, summary judgment in this case was improper. Because Watertown makes this argument for the first time on appeal, we conclude that the argument is forfeited, and reject it on that basis. *See* ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692 ("Although this court engages in summary judgment review de novo, we nonetheless may apply waiver to arguments presented for the first time on appeal."); *see also* ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977) ("It is the practice of this court not to consider issues raised for the first time on appeal since the trial court has had no opportunity to pass upon them.").

¶21 We observe, however, that, even if we were to address the merits of Watertown's causation argument, we would reject it. Watertown contends that it does not need to prove that Nortman's negligence is the sole cause of Watertown's injury, but rather that it is *a* cause. More specifically, Watertown relies on ***Merco Distributing Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458-59, 267 N.W.2d 652 (1978), for the proposition that the element of causation in a negligence claim does not require proof that the tortfeasor's negligence is the sole cause of an injury, but rather what is required is that the alleged negligence be "a" substantial causal factor.

¶22 Watertown likens the situation here to two motorcyclists who simultaneously pass a plaintiff's horse, which is frightened and runs away. Each motorcyclist has caused the result and "'neither can be absolved from responsibility upon the ground that the harm would have occurred without it, or there would be no liability at all.'" ***Chapnitsky v. McClone***, 20 Wis. 2d 453, 466,

122 N.W.2d 400 (1963) (quoting PROSSER, LAW OF TORTS (2d ed.), at 220-21, § 44). According to Watertown, the situation here is like the two motorcyclists who frighten a horse—the absolute pollution exclusion is like one of the motorcyclists and the owned property exclusion is like the other. This analogy is inapt for at least two reasons.

¶23 First, the "causes" in this case are not concurrent in a temporal sense. Although the ACE policy was the first to contain an absolute pollution exclusion, it was not the first to contain the coverage-killing owned property exclusion. As the circuit court noted, the immediately preceding policy contained identical owned-property-exclusion language.[3] Accordingly, when Nortman committed the allegedly negligent act of procuring a policy with the absolute pollution exclusion, the status quo was that Watertown did not have coverage for the clean-up expenses it incurred.

¶24 Second, Watertown's theory was and is that Nortman was negligent "when he procured the [ACE] policy with an Absolute Pollution Exclusion Endorsement." Notably, Watertown does not argue more generally that Nortman was negligent in failing to procure a policy that covered the risk of a major stockpile tire fire. Thus, the comparison inherent in Watertown's formulation of the issue is this:

1) Nortman procuring the ACE policy without the pollution exclusion, and

2) Nortman procuring the ACE policy with the pollution exclusion.

[3] Our independent review of the record confirms that the two prior policies, from a different insurance company, contained the same owned property exclusion clause.

Under this theory of negligence, no reasonable jury could conclude that Nortman's actions with respect to the pollution exclusion were a substantial cause of the loss of coverage because there was no coverage to start with. *See* ***Cefalu v. Continental Western Ins. Co.***, 2005 WI App 187, ¶9, 285 Wis. 2d 766, 703 N.W.2d 743 ("Whether negligence was a cause-in-fact of an injury is a factual question for the jury if reasonable people could differ on the issue, and the question only becomes one of law for judicial decision if reasonable people could not disagree.").

¶25 Finally, we note that it is apparent that Watertown initially pursued a narrow theory of negligence—based on the inclusion of the absolute pollution exclusion—because that was the reason ACE gave for denying Watertown's claim. What is less clear is why Watertown did not broaden its negligence argument after Nortman presented his defense based on the owned property exclusion. It may be that there are proof problems with a more general claim that Nortman's negligence was in failing to procure a policy that covered all of Watertown's clean-up expenses. Whatever the reason, we have limited our discussion to the arguments made by Watertown. We do not address whether dismissal of the complaint was in error because the complaint can be construed as stating the more general negligence claim.[4]

[4] Because we conclude that the circuit court properly granted summary judgment in favor of Nortman, we need not address Nortman's alternative argument concerning judicial estoppel. This estoppel argument involves an "add back" provision in the ACE policy that prompted the circuit court to conclude that the policy provided $300,000 in coverage for cleanup. We observe that the arguments addressed in the text above are not affected by this "add back" provision because those arguments are directed at whether Watertown is entitled to coverage in addition to the $300.000.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.