COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP365 **Cir. Ct. No. 2002CV226**

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

BRUNSWICK CORPORATION,

PLAINTIFF-APPELLANT,

V.

SENTRY INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Brunswick Corporation appeals from a judgment declaring that Sentry Insurance does not owe coverage for sums Brunswick expended in the cleanup of Hamilton Pond. Brunswick argues disputed issues of fact exist as to whether the cleanup was part of addressing private party claims for

which Sentry owes coverage. We affirm the circuit court's summary judgment determination because the cleanup was part of environmental remediation required by the government and the parties previously stipulated that Sentry did not provide coverage for the cost of government required remediation.

¶2 In prior litigation, the parties stipulated that Brunswick had incurred costs and was obligated to incur costs pursuant to a governmental order to address environmental contamination relating to Cedar Creek as a result of manufacturing plants Brunswick operated in the city of Cedarburg and that there is no coverage under the Sentry policies for environmental cleanup costs incurred pursuant to governmental order.[1] The stipulation expressly did not apply to any losses or claims for coverage under the Sentry policies "involving non-governmental and/or private party claims or governmental natural resource damage claims, even if such claims overlap with the Government Claims." The stipulation provided that Brunswick "reserved all rights" with respect to nongovernmental claims and acknowledged that "there is only one known potential claim at this time—that of the landowners at Hamilton Pond—and no such claims have been formally asserted, and the damages potentially at issue are undetermined and unknown at this time."

¶3 Brunswick commenced this action alleging that it had spent substantial sums of money repairing and restoring damaged property at the

[1] The stipulation made in April 2000 was in accordance with the then-current status of Wisconsin law as set forth in ***City of Edgerton v. General Casualty Co.***, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). In 2003, ***City of Edgerton*** was reversed in ***Johnson Controls, Inc. v. Employers Insurance of Wausau***, 2003 WI 108, ¶¶4-5, 264 Wis. 2d 60, 665 N.W.2d 257. Brunswick sought to have the stipulated judgment of no coverage re-opened, but that relief was denied. ***Allstate Ins. Co. v. Brunswick Corp.***, 2007 WI App 221, 305 Wis. 2d 400, 740 N.W.2d 888.

"Hamilton Pond Private Landowners Site," and that Sentry was obligated to reimburse and indemnify Brunswick for cleanup costs and repairs made pursuant to "private party claims." The complaint explains that due to the failure of the Hamilton Pond dam in April 1996, riverbed sediment was exposed and became the private property of thirty landowners along Cedar Creek and that the sediment suffered PCB contamination. Brunswick further alleged that in an effort to mitigate damages and defend itself with respect to private party claims asserted against it related to the Hamilton Pond site, it undertook the remedial activities for which it seeks reimbursement. Brunswick sought a declaration that Sentry was obligated to indemnify it for environmental cleanup damages expended at Hamilton Pond. Sentry answered, asserting that no claims for damages had been made against Brunswick and that the purported underlying claims were the subject of the stipulated settlement agreement between the parties.[2]

¶4 Sentry moved for summary judgment. We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2) (2007-08).[3]

[2] Sentry also asserted a plethora of affirmative defenses, including that the known loss and/or loss in progress doctrines barred coverage; that the claims do not arise out of an accident or occurrence as defined in the policies; that coverage was excluded by the terms, conditions, exclusions and limitations of the policies; and that occurrences giving rise to coverage took place before or after the effective dates of the policies.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 It is undisputed that Brunswick was and is required by governmental order to remediate environmental contamination with regard to Cedar Creek. Cedar Creek includes Hamilton Pond and the sediment thereof.[4] These facts are established by the parties' stipulation in the previous litigation. Any remediation at Hamilton Pond was cleanup required by governmental order. Within the terms of the parties' stipulation, Sentry owed no coverage for remediation required by governmental order.

¶6 After failure of the dam, Brunswick focused its efforts on the remediation of Hamilton Pond; that was out of sequence with initial plans to address the whole creek. Brunswick initiated the sediment removal process in 2001. Brunswick contends that it did that in response to concerns of the property owners. After failure of the dam, a fence was erected and signs posted warning about the PCB contaminated sediment. Brunswick received complaints from property owners and requests for remediation and removal of the fence. It obtained access agreements from the property owners to do testing and perform remediation work. It provided "agreement not to sue" letters to property owners or prospective purchasers seeking indemnity against cleanup requirements. It heard concerns about trees that might be removed during remediation.

[4] Brunswick asserts in its appellant's brief that "[t]here is no evidence that the WDNR ever ordered the remediation of the Hamilton Pond mudflats. There is no evidence that anything said by the DNR would have yet required cleanup, not even now in 2010." These assertions ignore that the stipulated declaratory judgment entered in June 2000 provides that Brunswick had been named a potentially responsible party for environmental contamination "at or in Cedar Creek and/or its impoundments, including, without limitation, Cedarburg Pond, Ruck Pond, Columbia Pond, Wire and Nail Pond and Hamilton Pond (including the sediments thereof and relating thereto)…." Brunwick also acknowledged the "whole creek strategy" that the government was pursuing to remediate all of Cedar Creek.

¶7 The investigations of property owners' concerns and meetings with property owners took place in the process of obtaining access agreements and informing property owners of what work would be performed. It largely occurred before Brunswick's stipulation that "no such [private party] claims have been formally asserted." Having stipulated that no private party claims had yet been asserted, Brunswick cannot later rely on those same property owner concerns as "private party claims" requiring remediation. Brunswick may have been motivated to appease homeowners and acted contrary to the government's wish to perform work at Hamilton Pond later, but that does not change the fact that Brunswick was required to do the very same remediation pursuant to governmental order to clean the entirety of Cedar Creek.

¶8 Brunswick suggests that the private party claims for remediation simply overlap with the governmental requirement. Brunswick has not paid any private party any compensation for contamination to property. Brunswick has not established that it was responding to a demand for compensatory, monetary relief from a nongovernment third-party. *See* ***Hydrite Chem. Co. v. Aetna Cas. & Sur. Co.***, 220 Wis. 2d 26, 37-38, 40, 582 N.W.2d 423 (Ct. App. 1998) (no coverage for remediation of damage to third-party property when undertaken pursuant to government directive in the absence of a demand for compensatory or monetary relief from a nongovernment third-party).

¶9 We need not address other arguments for or against coverage.[5] *See* ***Clark v. Waupaca Cnty. Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d

[5] Brunswick argues that the known loss doctrine does not negate coverage. As alternative theories supporting affirmance, Sentry argues that there was no "occurrence," that the pollution exclusion bar coverage, and that the "fortuity" doctrine bars coverage on these facts.

782 (Ct. App. 1994) (we need only address dispositive issues and decide the appeal on the narrowest ground). We acknowledge Brunswick's July 26, 2010 letter suggesting newly discovered facts about the definition of an "occurrence" under the policy. We need not discuss the possible ramifications of that discovery.

By the Court.—Judgment affirmed.

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