STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

Nestlé, USA, Inc.,
Plaintiff,
vs.
Advanced Boiler Control Services, Inc.,
John Fox,
The Cincinnati Specialty Underwriters
Insurance Company,
and Evanston Insurance Company,
Defendants.

Case No. 2020CV1292

DECISION AND ORDER REGARDING SUMMARY JUDGMENT ON INSURANCE COVERAGE

The above-styled matter is before this Court on bilateral opposing motions for Summary Judgment on insurance coverage. Nestlé seeks a summary judgment ruling that coverage exists through Cincinnati Specialty Underwriters Insurance Company's (Cincinnati) Commercial General Liability (CGL) policy issued to Advanced Boiler Control Services, Inc. (ABC) and by extension coverage exists under Evanston Insurance Company's (Evanston) excess or "follow form" policy. Cincinnati and Evanston both seek summary judgment that coverage does not exist as exclusions apply, eliminating either a duty to defend or indemnify ABC and its employee John Fox (Fox) under the particular facts of this case.

The various opposing motions have been well and thoroughly briefed by their respective sides and oral argument was heard by this Court on March 24, 2023. Nestlé was represented by Lee Seese and Adam Witkov; Cincinnati was represented by Erika Hammett; Evanston was represented by April Toy and Tomislav Kuzmanovic; ABC was represented by Peter Ryndak and Ramses Jalalpour, along with Michael Murray on the merits; and John Fox was represented by Paul Curtis on the merits.

Although other issues are before this Court, namely Nestlé's motion to exclude the expert report and opinions of Timothy M. Roy [Dkt.239], motion for summary judgment dismissing Nestlé's punitive damage claim or in the alternative, to bifurcate such a claim from the initial liability and damage claims [Dkt. 241,244], the Court established a briefing schedule at the hearing of March 24, 2023, and they will not be addressed by the Court in this decision.

The main thrust of this decision is a determination of whether summary judgment is available and, if so, to whom.

INTRODUCTION

This lawsuit arises out of an explosion at Plaintiff, Nestlé USA, Inc.'s (Nestlé) Burlington, Wisconsin, factory on August 2, 2019, when damages occurred to boiler #1 and attendant component parts. The Defendant, Advanced Boiler Control Services, Inc. (ABC), a boiler system tuning and maintenance company, was performing maintenance work on boiler #1 and its component parts at the time of the explosion. The Cincinnati Specialty Underwriters Insurance Company (Cincinnati) insured ABC and its employee, Defendant John Fox (Fox), under a Commercial General Liability policy (CGL) carrying $1 million in coverage. Defendant Evanston Insurance Company (Evanston) issued a "follow form" excess policy to ABC carrying the next $5 million in coverage. Cincinnati has defended ABC and Fox on the merits of this litigation subject to a reservation of rights pending determination of duty to defend and indemnification by declaratory or summary judgment.

Cincinnati filed a counterclaim against Nestlé for declaratory judgment raising eleven separate coverage defenses. These exclusions are relied upon by the excess carrier, Evanston, as well. Nestlé has filed a general denial of these allegations and now brings a motion for summary judgment on coverage. Cincinnati and Evanston have also filed for summary judgment on coverage.

The coverage defenses asserted by Cincinnati, referencing the CGL policy in summary are:

1. Recovery requested by Nestlé does not constitute sums ABC or Fox are legally obligated to pay because of property damage;
2. The event was not an "occurrence" within the meaning of the policy;
3. The event and damages did not occur during the policy period;
4. The Breach of Contract Exclusion applies;
5. Exclusion 2.b exclusion applies;
6. Exclusion 2j(5) "that particular part" exclusion applies;
7. Exclusion 2j(6) applies;
8. Exclusion 2(k) applies;
9. Exclusion 2(i) applies;
10. Exclusion 2(m) applies;
11. Exclusion of coverage for punitive or exemplary damages applies.[Dkt. 34 page 3-4 of 5]

Although Cincinnati raises eleven different and separate coverage defenses, Cincinnati and Evanston rely primarily on exclusions j(5) and j(6). The j(5) exclusion eliminates coverage for property damage to "that particular part" of real property on which ABC was performing operations, if the property damage arose out of those operations. The j(6) exclusion excludes coverage for property damage to "that particular part" of property that must be restored, repaired, or replaced because of ABC's work was incorrectly performed on the particular part damaged.

BACKGROUND

Nestlé operates a factory in Burlington, Wisconsin, that produces confectionary products. Nestlé maintains two boilers and attendant boiler component parts at the Burlington factory for effective operation of its production lines: referred to as boiler #1 and boiler #2[1]. For several years prior to the explosion, Nestlé contracted with ABC to perform regular tuning and maintenance services of boilers #1 and #2 and their attendant component parts.

On June 17, 2019, Nestlé entered into an agreement with ABC for tuning and maintenance services to be performed on their boiler systems. ABC agreed to perform services as described in Nestlé's Purchase Orders which incorporated the Service Agreement.[Dkt 175]. The Purchase Order contains the specifics of the work to be performed by ABC: "[T]o provide the services of (1) Standard Field Service Engineer for an estimated five (5) standard eight-hour days, inclusive of travel, to perform BMS Audit, Safety Checks and Combustion Tuning…"[Dkt 175][2].

In July 2019, ABC dispatched Fox to the Nestlé Burlington factory to perform tuning and maintenance work pursuant to the Agreement. Fox performed tuning operations at Nestlé for approximately two weeks leading up to August 2, 2019. Fox had concluded the tuning operations and transitioned into performing maintenance work on the Position Switch on Boiler #1. The Position Switch is a safety interlock for the burner management system (BMS) that ensures correct positioning to limit fuel gas flow through the Fuel Flow Control Valve. The Position Switch prevents the Fuel Flow Control Valve from supplying excess fuel gas to the burner.

At the time of the explosion on August 2, Fox was performing maintenance on the Position Switch, located as a component part of boiler #1, on a live fuel gas line. Fox attempted to install a new Position Switch as a component part of boiler #1 and finding out that it would not fit correctly, Fox attempted to adjust the existing Position Switch. Throughout this time, Fox was the only person performing maintenance, and the Position Switch and the Positioner attendant to Boiler #1 and were the only component parts he was working on or manipulating during the afternoon of August 2, 2019. In the course of Fox performing work on the Position Switch and Positioner, an internal explosion occurred, causing damage in the combustion chamber of boiler #1 and other component costs.

Both Nestlé's and the Defendant's experts have concluded that Fox's manipulation of the Position Switch and Positioner caused the explosion. The August 2, 2019 explosion resulted in damage to component parts of the Boiler #1 (bending exterior steel of the boiler) and to sections of the ventilation system and the stack feed lines shared by boilers #1 and #2. Nestlé claims it incurred

[1] Although counsel and various witnesses have referenced boiler #1 and boiler #2, it is patently obvious to this Court that a "boiler" is but one component part of a boiler system which includes many operational component parts and a boiler is just one of those components.
[2] BMS is an acronym meaning "burner management system."

damages due to the explosion, including rental boiler costs, repair costs and investigative costs of the cause of the explosion.

LEGAL STANDARD

By stipulation, Nestlé and Cincinnati have agreed that Wisconsin Law applies to the interpretation of the Cincinnati policy regarding coverages. This further applies to the interpretation of the agreement between ABC and Nestlé and this Court's interpretation of the Cincinnati policy regarding coverages, exclusions, and exceptions to exclusions. Due to the nature of Evanston's "follow form" policy of excess insurance, this Court's interpretation of the Cincinnati policy regarding coverage is binding upon Evanston[3].

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). When presented with a summary judgment motion, courts view affidavits and other proof in the light most favorable to the party opposing the motion but consider evidentiary facts in the record true if they are not contested by other proof. *L.L.N. v. Clauder,* 209 Wis.2d 674, 684, 563 N.W.2d 434 (1997). When both sides seek summary judgment, as is the case here, there is a concession that there exists no material issue of material fact and summary judgment is appropriate. *Smith v. State Farm Fire and Cas. Co.,* 127 Wis.2d 298, 300, 380 N.W.2d 372 (Ct.App. 1985).

Insurance policies are contracts and are governed by the same rules of construction as apply to contracts. The interpretation of terms and clauses in an insurance contract are a question of law to be determined by the court. *Olson v. Farrar,* 2012 WI 3, ¶ 3, 338 Wis.2d 215, 809 N.W.2d 1. Coverage under an insurance policy is generally a question of law. *Kremers-Urban Co. v. Amer. Employers Ins. Co.,* 119 Wis.2d 722, 351 N.W.2d 156,163 (1984). The objective is to ascertain the parties' intent. A bedrock principle of contract interpretation is to "effectuate the intent of the contracting parties." *Estate of Sustache v. American Fam. Mut. Ins. Co.,* 2008 WI 87,¶ 19, 311 Wis.2d 548, 751 N.W.2d 845; *American Fam. Mutual Auto Ins. Co. v. American Girl, Inc.,* 2004 WI 2, ¶ 23, 268 Wis.2d 16, 673 N.W.2d 65. "The language in an insurance contract should be given its ordinary meaning, the meaning a reasonable person in the position of the insured would give the terms." *Kalchthaler v. Keller Constr. Co.,* 224 Wis.2d 387, 393, 591 N.W.2d 169 (Ct.App.1999); *Acuity v. Society Ins.,* 2012 WI App 13,¶12, 339 Wis.2d 217, 810 N.W.2d 812 Insurance policies are interpreted from the perspective of a reasonable insured. *Acuity v. Bagadia,* 2008 WI 62, ¶ 13, 310 Wis.2d 197, 750 N.W.2d 817. Interpretation of insurance policies is best accomplished by interpreting "policy terms not in isolation, but rather in the context of the policy as a whole." *Connors v. Zurich Am. Ins. Co.,* 2015 WI App 89, ¶ 28, 365 Wis.2d 528, 872 N.W.2d

[3] It should be noted that Evanston has asserted in recent pleadings a choice of law issue regarding the use of Wisconsin vs. Delaware law. This Court has not ruled on that issue and for purposes of this ruling, Wisconsin law is applicable.

109; *Blum v. 1st Auto & Cas. Ins.,* 2010 WI 78, ¶ 20, 326 Wis.2d 729, 786 N.W.2d 78. When terms of the policy are unambiguous and plain on their face, policies should not be rewritten to include insurance coverage not agreed to by the parties and for which the insured has not been paid. *Smith v. Katz,* 226 Wis.2d 798, 595 N.W.2d 345, 350 (1999); *See also Preisler v. Gen.Cas. Ins. Co.,* 2014 WI 135, 360 Wis.2d 129, 857 N.W.2d 136.

If terms of an insurance contract are "fairly susceptible to more than one reasonable interpretation," the policy is ambiguous. *Id.* Like any contract, insurance policy language should be interpreted according to its "plain and ordinary" meaning. *Wilson Mut. Ins. Co. v. Falk,* 2014 WI 136,¶ 23, 360 Wis.2d 67, 857 N.W.2d 156; *Marnholtz v. Church Mut. Ins. Co.,* 2012 WI App, ¶ 11, 341 Wis.2d 478, 815 N.W.2d 708. To determine ordinary meaning, courts may consult non-legal dictionaries for guidance. *Preisler,* 2014 WI 135, ¶ 40. Policy language is not ambiguous merely because more than one dictionary definition exists or the parties disagree about its meaning. Similarly, policy language is not ambiguous merely because courts have come to different interpretations. *Peace v. NW Nat'l Ins. Co.,* 228 Wis.2d 106, 596 N.W.2d 429 (1999).

Summary judgment is an appropriate procedure to resolve insurance coverage disputes as interpretation of an insurance contract is a question of law to be determined by the trial court. *Danbeck v. Am. Fam. Mut. Ins. Co.,* 2001 WI 1, ¶10, 245 Wis.2d 186, 629 N.W.2d 150. In determining whether coverage exists under a policy, Wisconsin courts analyze the insurance agreement, construing the language "as[it] would be understood by a reasonable person in the position of the insured." *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,* 2004 WI 2, ¶ 23, 268 Wis.2d 16, 673 N.W.2d 65. Courts must then follow the three steps mandated in *American Girl* in making coverage determinations.

First, we examine the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage. [Second,][I]f it is clear that the policy was not intended to cover the claim asserted, the analysis ends there. If the claim triggers the initial grant of coverage in the insuring agreement, we next examine the various exclusions to see whether any of them preclude coverage of the present claim. Exclusions are narrowly or strictly construed against the insurer if their effect is uncertain. *Cardinal v. Leader Nat'l Ins. Co.*, 166 Wis.2d 375, 382, 480 N.W.2d 1 (1992). We analyze each exclusion separately; the inapplicability of one exclusion will not reinstate coverage where another exclusion has precluded it. [Third,][e]xclusions sometimes have exceptions; if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies. *Silverton Enters. v. Gen. Cas. Co.*, 143 Wis.2d 661, 422 N.W.2d 154 (Ct. App.1988), *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,* 2004 WI 2, ¶ 24.

Any doubt or ambiguity as to coverage must be resolved in favor of the insured. *Sola Basic Indus., Inc. v. United States Fid. & Guar. Co.,* 90 Wis.2d 641, 646, 280 N.W.2d 211 (1979). To the extent a Court finds that the policy in issue is subject to multiple reasonable interpretations, the Court must apply the interpretation that would result in coverage. *Id.* A trial court must interpret exclusionary language narrowly. *Acuity, A Mut. Ins. Co. v. Chartis Specialty Ins. Co.,* 2015 WI 28,

¶ 43, 361 Wis.2d 396, 861 N.W.2d 533. " Ambiguities in the coverage terms of an insurance policy are construed broadly, while ambiguities in an insurance policy's exclusion are construed narrowly." *Id.*

Commercial General Liability (CGL) Policies

The standard commercial general liability (CGL) policy contains two general insurer obligations. The first is the duty to indemnify, or the insurer's obligation to pay, up to the policy limits, any damages for which the insured is found liable, provided such damages fall within the coverage provisions of the policy and are not excluded. *5 Walworth, LLC v. Engerman Contracting, Inc.,* 2021 WI App 51, ¶ 20, 399 Wis.2d 240, 963 N.W.2d 779; *Water Well Solns. Serv. Grp., Inc. v. Consolidated Ins. Co.,* 2016 WI 54, ¶ 14, 369 Wis.2d 607, 881 N.W.2d 285; *American Family Mut. Ins. Co. v. American Girl, Inc.,* 2004 WI 2, ¶ 24, 268 Wis.2d 16, 673 N.W.2d 65. The second obligation is duty to defend, in which the insurer agrees to undertake the insured's defense in any suit in which the insured is merely alleged to be liable for damages. *Estate of Sustache,* 311 Wis.2d 548, ¶ 20.

DISCUSSION

INITIAL COVERAGE UNDER THE CGL POLICY

Nestlé has the burden to prove an initial coverage grant under the Cincinnati CGL policy. The insuring agreement in the Cincinnati policy provides, in relevant part, as follows:

> **1. Insuring Agreement**
>
> **a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> **…**
>
> **b.** This insurance applies to "bodily injury" and "property damage" only if:
>
> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
>
> **(2)** The "bodily injury" or "property damage" occurs during the policy period;
>
> [Dkt.97 page 20 of 101]

Three of the eleven coverage defenses relate to this initial grant, namely "property damage," "occurrence," and policy period coverage.

It is undisputed that the damage-producing event occurred on August 2, 2019, well within the policy period of September 15, 2018 to September 15, 2019. [Dkt.97 page 1 of 101].

To establish initial policy coverage, Nestlé must prove (1) that it suffered "property damage" as that term is defined in the Policy; (2) that the "property damage" was caused by an "occurrence" that took place in the "coverage territory"; and (3) that the "property damage" occurred during the policy period. Each of these requirements have been satisfied.

Nestlé sustained property damage as a result of the August 2, 2019 explosion. The policy defines "property damage" to include "tangible injury to physical property…" [Dkt. 97,¶ 17 page 35 of 101] As a result of the August 2, 2019 explosion, there was tangible injury to the refractory brick inside the boiler unit itself, the steel walls of the combustion chamber of boiler #1 were displaced, and there was damage to ventilation system and stack lines that are shared by boiler #1 and boiler #2. The above-quoted provision further contains coverage "because of" which must be broadly construed under Wisconsin Law providing additional coverage for property damage caused by the explosion. *State v. Am. Family Mut. Ins. Co.*, 2005 WI App 23, 278 Wis.2d 656, 693 N.W.2d 79.

The property damage here was an "occurrence." The policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." [Dkt. 97,¶13 page 34 of 101] Although "accident" is not defined within the policy, *American Family Mut. Ins. Co. v. American Girl, Inc.,* 2004 WI 2,¶ 37, 268 Wis.2d 16, 673 N.W.2d 65 and its progeny *Henshue Const., Inc. v. Terra Engineering & Const. Corp.,* 2013WI App 84, ¶57, 348 Wis.2d 762, 833 N.W.2d 873 (*unpublished opinion)* have certainly defined that term in reference to interpreting CGL policies in Wisconsin. There was an accident here in the form of an explosion that damaged specific component parts of boiler #1 at the Nestlé Burlington facility. There is no contention here that the explosion and resulting damage was from other than an accidental means or cause.

The explosion of August 2, 2019 clearly took place in the "covered territory." Covered territory is defined in the policy to include the United States of America. [Dkt. 97,¶ 4 page 32 of 101]

Accordingly, Nestlé has met its initial burden in establishing the insuring policy grants coverage for the event before the bar.

EXCLUSIONS

The Court now shifts to the second *American Girl* requirement: determining if any of the policy exclusions preclude coverage in this case. This Court must, and will, review all claimed restrictions strictly and narrowly against the insurer. It is Cincinnati and Evanston's burden to prove that an exclusion applies to some part or all of Nestlé's claims, thereby eliminating coverage. *See, American Girl,* 268 Wis.2d, ¶ 24.

Exclusions 2J(5) and 2J(6)

The primary argument for exclusion of insurance coverage in this case is reliance upon exclusions 2j(5) and 2j(6) found in the policy.[Dkt. 97 page 24 of 101] These exclusions are referred to as "that particular part" exclusion and have been the subject of litigation in Wisconsin and foreign jurisdictions regarding their meaning and applicability to specific factual situations. Exclusions 2j(5) and 2j(6) in the Cincinnati policy read as follows:

> **2. Exclusions**
>
> **j. Damage to Property**
>
> "Property damage" to:
>
> **…**
>
> **(5)** That particular part of real property on which you or any contractor or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
>
> **(6)** That particular part of any property that must be restored, repaired or replaced because of "your work" was incorrectly performed on it.

"THAT PARTICULAR PART" EXCLUSION 2J(5)

In summary fashion, Nestlé asserts that the work performed by ABC and its employee, Fox, immediately prior to the explosion was to a particular component part of Boiler #1's system: the Position Switch and Positioner. The explosion did not damage the Position Switch or the Positioner. The explosion caused damage to specific component parts of the boiler #1 system not then being worked on by Fox: specifically, the steel walls of Boiler #1's combustion chamber, the refractory brick inside boiler #1, the ventilation system, and the stack lines. Cincinnati and Evanston ask this Court to utilize a broad interpretation of the word "boiler" and to adopt what they claim is a "common sense" definition of boiler which, in their opinion, would include not only the boiler unit itself but all of the attendant component parts to a boiler system. This Court is unwilling to adopt such a definition.

Similar if not the exact same exclusions in CGL policies have been addressed in *Acuity v. Society Ins.,* 2012 WI App 13, 339 Wis.2d 217 (Ct.App. 2012) and most recently in *Wiegert v. TM Carpentry, LLC,* 2022 WI App 28, 403 Wis.2d 519 (Ct.App. 2022). Both of these cases were discussed extensively at the oral argument conducted in this matter and are instructive to this Court.

Weigert interpreted *Acuity's* handling of the phrase "that particular part" and drawing on decisions from other jurisdictions analyzing the same policy language, determined that the term "that particular part," "limited the exclusion's reach to 'those parts of a building on which the defective work was performed, which is determined by the scope of the construction agreement.'"*Weigert* ¶ 24. *Weigert* further stated "We recognized further that the inclusion of '[t]hat particular part' in the exclusion was intended to narrow the focus to the smallest component of the building on which the insured's work was performed." *Weigert* ¶ 24. The Court citing to a Sixth Circuit case described the exclusion "that particular part" as "trebly restrictive, straining to the point of awkwardness to make clear that the exclusion applies only to building parts on which defective work was performed, and not to the building generally." *Weigert* ¶ 24; *Fortney & Weygandt, Inc. v. American Mfrs. Mut. Ins. Co., 595 F.3d 308, 311 (6th Cir. 2011). See also Minergy Neenah, LLC v. Rotary Dryer Parts, Inc.,* No. 05-C-1181, 2008 WL 1869040, at *4 (E.D. Wis. Apr. 24, 2008)

The *Weigert* court, as this Court determined that "looking through this restrictive lens," examination should be made of the "contractual scope of work" and the nature of the damage claimed. *Weigert,* ¶ 24.

In the present case, ABC's and accordingly Fox's contracted for work was limited "to perform BMS Audit, Safety Checks and Combustion Testing" [Dkt. 175 page 3 of 13] on Nestlé's two boiler systems.[4] What is clear to this Court is that a boiler is one part of a multi-component part system which work together to cause the boiler portion of the system to generate its required and intended purpose. Nestlé is not claiming compensation for those specific component parts of the boiler #1 system, which Fox was working immediately before the explosion. It is undisputed that Fox was not working on the steel walls of the boiler combustion chamber, the refractory brick inside the boiler, the ventilation system, and the stack lines, which are all parts of Boiler #1's component boiler system at the time of the explosion. (*See* Witkov Aff. ¶ 6, Ex. 5;
Lyles Dep. Ex. 28.)

This Court's reading of the unambiguous content of the maintenance agreement supports the conclusion that the maintenance agreement between Nestlé and ABC did not contemplate or require work on all component parts of the boiler systems of Nestlé. Reading the scope of the contact between ABC and Nestlé in its obviously limiting scope, exclusion 2j(5) is not applicable to the present case. The claimed damaged items required to be restored, repaired or replaced include damage to the steel walls of boiler #1's combustion chamber, the refractory brick inside the boiler, the ventilation system, and the stack lines. These areas were not ever worked on by ABC or Fox, who was working on the Position Switch and the Positioner at the time of the explosion. These are separate and distinct component parts of the boiler system which were damaged by the explosion.

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[4] This Court rejects the proffered interpretation of this contractual agreement to require ABC to work on Nestlé's boilers "as a whole."

In reading the above-referenced exclusions narrowly and in the context of the maintenance agreement, this Court finds that the exclusion does not apply. Simply stated, ABC and Fox were not working on the claimed-damaged parts at the time of the explosion. The proffered argument that the term "boiler" includes all the ancillary and component parts used or required for its operation is a definition unacceptable to this Court. Cincinnati, who is the author of the CGL policy, could have included a broader exclusion but did not. Reading the policy as a reasonable insured, Cincinnati's interpretation is not only unrealistic but illogical under the case law construing this exclusion. This Court's adoption of Cincinnati's interpretation of the exclusionary language to include the entire boiler #1 system and its component parts would render the exclusionary language of "that particular part" meaningless as the exclusion would always apply to "interconnected" components based on "project-wide responsibilities" which was not contracted for between ABC and Nestlé in the present case. *See 5 Walworth, LLC v. Engerman Contracting, Inc.,* 2021 WI App 51,¶14, 399 Wis.2d 240 (Ct. App. 2021). This Court cannot ignore the plain language of the insuring agreement. *Acuity v. Society Ins.,* 2012 WI App 13, ¶ 47, 339 Wis.2d 217 (Ct. App. 2012). Accordingly, this Court holds that exclusion 2j(5) is not applicable to the undisputed facts of this case.

"YOUR WORK" EXCLUSION 2J(6)

Cincinnati further argues that, regardless of whether 2j(5) applies, exclusion 2j(6) bars coverage because the policy excludes property damage to "your work," which in their view includes the entire boiler #1 and its component parts without limitation. Such a reading of this exclusion, in light of the contractual agreement between ABC and Nestlé, is unreasonable in this case because it renders meaningless "that particular part" exclusion of 2j(5). Again, this Court cannot ignore the plain language of the insuring agreement. This exclusion states that coverage under the policy is excluded for "property damage" to "that particular part of any property that must be restored…" In this case, the facts are undisputed that ABC or Fox was not working on any of the property for which damages are sought. Nestlé is not seeking to restore, repair or replace faulty work of ABC or Fox because they did not perform any work on the specific areas claimed to be damaged by the explosion. While it is true that the damages claimed were cause by the alleged faulty work of ABC's employee, Fox, on the Position Switch and Positioner, Nestlé's claim is not for faulty work performed on those specific items. This Court holds that exclusion 2j(6)
is not applicable to the undisputed facts of this case. *See Acuity,*¶47,48.

"YOUR PRODUCT" EXCLUSION

Cincinnati's policy provision "2k" entitled "Damage to Your Product" excludes "property damage" to "your product" arising out of it or any part of it…"(Dkt.97, ¶k page 24 of 101). This exclusion does not apply because neither Boiler #1 nor the attached equipment (component parts) were ABC's product. This Court holds that this exclusion "2k" does not apply to the undisputed facts of this case.

"DAMAGE TO YOUR WORK" EXCLUSION

Cincinnati's policy provision "2i" entitled "Damage to Your Work" excludes:

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".(Dkt. 97,¶ I page 24 of 101). This exclusion only applies when the policyholder has actually completed its work. Such is not the case here. ABC and Fox were still performing work on the Position Switch and Positioner associated with Boiler # 1 at the time of the explosion. This Court holds that this exclusion "2i" does not apply to the undisputed facts of this case.

DAMAGE TO PROPERTY IMPAIRED OR NOT PHYSICALLY INJURED EXCLUSION

Cincinnati's policy provision "2m" reads as follows:

> **m. Damage to Impaired Property Or Property Not Physically Injured**
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> **(1)** A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
>
> **(2)** A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
>
> This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use. [Dkt. 97, ¶m page 24 of 101].

The above exclusion 2m was primarily argued by Evanston at the recent in-court hearing on insurance coverage. Evanston proffers that the exclusion eliminates coverage for the repair of "boiler tubes", which were not physically damaged as a result of Fox's actions on the date of the Explosion, but were, however, physically displaced, requiring repair or replacement.

The policy defines "impaired property" (Section V-Definitions 8.a. & 8.b.) [Dkt. 97 p.33 of 101]. This provision must also be read with the Coverage A [Dkt. 97 p. 20 of 101] wherein Cincinnati agrees to pay "those sums that the insured becomes legally obligated to pay as damages *because of*…"property damage"…"[Dkt. 97 p. 20 of 101].*italic emphasis added.* In the present case, ABC

and Fox did not supply or work on the boiler tubes under any maintenance agreement. It is alleged in this case that the explosion caused significant property damage, which included repair or reconnection of the boiler tubes. This action by Nestlé regarding the boiler tubes was undoubtedly and without question due to the explosion. Applying the exclusion must be construed narrowly according to their terms and in context with the entire policy. In so doing this, Court holds that this exclusion is not applicable to the present case. It is for a jury to determine if Nestlé's actions regarding the boiler tubes and resulting claimed damages were reasonable and worthy of compensation. This Court is not determining the amount of recovery on any item of claimed damage by Nestlé, only whether the CGL policy covers such a claimed loss and whether it is excluded by the terms of the policy.

MISREPRESENTATION
INSURANCE COVERAGE FOR INCREASED INVESTIGATION COSTS

Cincinnati and Evanston both seek rulings that any misrepresentation by ABC or Fox regarding the events leading up to the explosion and claimed addition investigation costs incurred by Nestlé are not covered under the CGL policy and Evanston's excess policy[5]. A misrepresentation, whether negligent or intentional, is a volitional act removing it from insurance coverage as an "occurrence" under a liability insurance policy. *Stuart v. Weisflog's Showroom Gallery, Inc.,* 2008 WI 86, 311 Wis.2d 492, 512, 753 N.W.2d 448; *Everson v. Lorenz,* 2005 WI 51, ¶¶ 20,29, 280 Wis.2d 1, 695 N.W.2d 298. The foregoing proposition is well-settled law in Wisconsin. However, the misrepresentation by ABC or Fox, is not the "occurrence" in the present case. The occurrence is the explosion which necessitated incurrence of investigation costs by Nestlé. These costs and other attendant costs are covered under the broad coverage found in the CGL policy in conformity with Wisconsin Law. *See. State v. Am. Family Mut. Ins. Co.,* 2005 WI App. 23,¶ 14, 278 Wis.2d 656, 693 N.W.2d 79. To the extent ABC and/or Fox misrepresented what Fox was doing immediately prior to the explosion, it caused Nestlé to incur additional investigation costs to determine the cause of the explosion. In a July 13, 2022 report, Nestlé's causation expert, Christopher Schemel, asserted that Fox represented that the signal generator was not connected to the Positioner at the time of the explosion, when it was in fact connected. According to Schemel, had ABC and Fox initially revealed what actually occurred at the time of the explosion, that scenario could have been tested revealing the actual cause of the explosion rather than engaging in extensive testing to rule out other causes. Ultimately, Schemel determined that the previously undisclosed actions of Fox was the cause of the explosion. The now known action of Fox as being the cause of the explosion is not now contested. Schemel opined that the "lack of frank exchange of information about Fox's actions at the time of the explosion resulted in extensive, otherwise unnecessary testing of the Boiler's components to determine what turned out to be a non-existent cause of this explosion." [Toy aff., Ex. E at 6 of 64] It must be noted that ABC and Fox did not disclose, at least to Nestlé, that Fox initiated the light off without first removing the signal

[5] Evanston further asserts that, as an excess insurer, they were not privy to any of these alleged misrepresentations and consequently they cannot be held liable for them.

generator and ohm meter; and Fox later admitted these facts, under oath, in his deposition, on March 10, 2022. [Dkt. 163, Schemel Rpt, page 21; Dkt. 196]

Although argued by ABC and Fox that the misrepresentation or misinformation is an issue of fact to be determined by the fact finder, the issue before this Court is whether insurance coverage under the CGL policy for any additional investigatory and boiler rental costs incurred by Nestlé due to the misrepresentations by ABC and Fox exists. Whether an actual misrepresentation was made by Fox as to what Fox was doing immediately prior to the explosion and that Fox later, at his deposition, under oath, admitted to doing the acts he previously denied may well be an issue for a jury to decide. This issue cannot be answered as a matter of law by this Court and must await a jury determination.

This begs the specific request of Nestlé that CGL, Evanston, and all Defendants be "estopped" from raising the reasonableness of investigatory costs and boiler rental costs based on two separate instances: (1) Expert opinion testimony in Cincinnati's possession on October 23, 2019 that the "likely cause" of the explosion was the actions of their insured Fox; and (2) the deposition date of Fox, March 10, 2022, in which he discloses an apparent reversal of what he was doing immediately before the explosion.
This Court, rejecting that the alleged misrepresentation of Fox relieves Cincinnati from legal responsibility for investigation costs, determines that Cincinnati may still challenge the reasonableness of Nestlé's investigation costs but only after the deposition of Fox on March 10, 2022. Thereafter, if a misrepresentation is found by the jury and additional costs were incurred by Nestlé due to Fox's misrepresentation, Cincinnati may assert that ABC and Fox should be liable to Nestlé for those additional investigation and boiler rental costs.

The jury will have to be provided specific verdict forms reflecting the above ruling.

PUNITIVE DAMAGE EXCLUSION

Form CSGA401 02 13 [Dkt.97 page 40] provides in relevant part:

> **2. Exclusions**
>
> This insurance does not apply to:
> Any claim or indemnification for punitive or exemplary damages. If a suit is brought against any insured for a claim covered by this Coverage Part, seeking both compensatory and punitive or exemplary damages, we will provide a defense to such action. However, we will not have an obligation to pay for any costs, interest, or damages, attributable to punitive or exemplary damages. If state law provides for statutory multiple damage awards, we will pay only the amount of the award before the multiplier is added.

The plain and unambiguous language of the exclusion does not eliminate coverage for Nestlé's claims for damages. The exclusion would eliminate coverage under Cincinnati's and Evanston's excess policy for any damages constituting punitive or exemplary damages. To the extent that an award for punitive or exemplary damages is made, such damages are excluded from coverage under the Cincinnati and Evanston policies. ABC alleges that this exclusion does not specifically address coverage for double, treble, multiple, or statutory damages. While that is true, it has not been pled or asserted by Nestlé that they are claiming any double, treble, multiple, or statutory damages, but exemplary damages contemplate all those statutory variables and they too are excluded under the punitive damage exclusion. This exclusion does not relieve Cincinnati from its duty and obligation to provide a defense to ABC and Fox.

Conclusion

This Court finds initial coverage for the loss under the Cincinnati CGL policy. This Court further finds that none of the exclusions eliminate that coverage. Having made the previous findings, this Court is not required to look for exceptions to the exclusions that might restore coverage as mandated by *American Girl,* 143 Wis.2d 661,¶ 24. These rulings are based upon an unambiguous reading of the limiting agreement between Nestlé and ABC, the uncontested facts of this case, and the unambiguous reading of the CGL policy.

Accordingly, upon all the files, pleadings and proceedings heretofore had in this matter,

IT IS ORDERED, that summary judgment regarding insurance coverage to the Plaintiff Nestlé is **GRANTED**;

IT IS FURTHER ORDERED, that summary judgment denying insurance coverage of Cincinnati and Evanston are **DENIED**.

Dated this 11th day of April, 2023,

Honorable Eugene A. Gasiorkiewicz

CC: File
All parties via e-File.