**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 23, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2014AP222** **Cir. Ct. No. 2013CV36**

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

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**KARL ANDERSON,**

**PLAINTIFF-APPELLANT,**

**V.**

**VIKING INSURANCE COMPANY OF WISCONSIN,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Burnett County: JEFFERY ANDERSON, Judge. *Affirmed*.

Before Hoover, P.J., Kessler, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Karl Anderson appeals a summary judgment dismissing his action against Viking Insurance Company of Wisconsin (Viking). Anderson argues the circuit court erred by concluding there was no liability

coverage under a Viking-issued policy for the cost of removing a vehicle from Clam Lake. We reject Anderson's arguments and affirm the judgment.

## BACKGROUND

¶2 In March 2012, Joseph McGeshick's truck fell through the ice as he was driving on Clam Lake. McGeshick hired Anderson to remove the truck from the lake. Anderson recovered the vehicle and billed McGeshick $15,510.60 for his services. At the time of the accident, McGeshick's automobile policy with Viking provided $50,000 in liability coverage for "property damage." McGeshick sought reimbursement from Viking for the recovery cost and Viking denied the claim.

¶3 McGeshick then assigned "whatever causes of action he may have against Viking Insurance as a result of the March 2012 incident" to Anderson, who filed the underlying suit. The circuit court granted Viking's motion for summary judgment, concluding there was no property damage entitling McGeshick to liability coverage. This appeal follows.

## DISCUSSION

¶4 This court reviews summary judgment decisions independently, applying the same standards as the trial court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 Further, the construction or interpretation of an insurance policy presents a question of law we review independently. ***Hull v. State Farm Mut.***

***Auto. Ins. Co.***, 222 Wis. 2d 627, 636, 586 N.W.2d 863 (1998). Any ambiguity in the policy language is to be construed in favor of coverage. *See* ***Cardinal v. Leader Nat'l Ins. Co.***, 166 Wis. 2d 375, 382, 480 N.W.2d 1 (1992). Where language in an insurance contract is unambiguous, we simply apply the policy language to the facts of the case. *See* ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis. 2d 437, 447, 492 N.W.2d 131 (1992).

¶6 Here, the policy provided, in relevant part:

> We will pay damages for which any insured person is legally liable because of bodily injury and/or property damage caused by a car accident arising out of the ownership, maintenance or use of a car or utility trailer.
>
> ….
>
> Property damage means damage to or destruction of tangible property, including loss of its use.

Anderson contends the accident exposed McGeshick to legal liability under both common and statutory law, as the State could have sued for environmental and property damage to Clam Lake had McGeshick not removed the vehicle. The policy, however, provides coverage when the insured "is" legally liable for property damage, not when the insured "may" be legally liable.

¶7 Citing ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis. 2d 96, 522 N.W.2d 542 (Ct. App. 1994), Anderson contends McGeshick is legally liable under the policy's terms even though the State had not yet sued for environmental or property damage. ***Nischke***, however, is distinguishable on its facts. There, the defendant bank possessed a gasoline tank buried on Lois

Nischke's farm.[1] ***Id.*** at 110. After discovering that the tank leaked gasoline into the farm's soil and water, the DNR notified Nischke that because she was legally responsible for the contamination under WIS. STAT. § 144.76(3) (1993-94),[2] she was required to conduct a site investigation and take remedial action if necessary. ***Id.*** at 103-04. Nischke filed suit against the bank for damages, alleging that its negligence made her legally obligated to incur the cost of restoring her property. ***Id.*** at 104.

¶8 A jury awarded Nischke $250,000 and the court reduced the award to $49,000 to reflect the diminution in the property's value. ***Id.*** at 105. Relevant to the present matter, the court also reasoned that, "given the DNR's backlog of cases, it was too speculative that Nischke would ever be required by the DNR to absorb the cleanup costs." ***Id.*** at 118. Nischke appealed and this court determined that Nischke's "obligation to take these measures does not hinge upon the DNR's caseload or whether it has brought an enforcement action against her." ***Id.*** at 120.

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[1] In 1966, Rowley Oil Company installed and leased a gasoline pump and underground storage tank on the Nischke farm in exchange for the Nischkes agreeing to buy all their gasoline from Rowley. Rowley later borrowed money from the bank, using the gasoline tank as collateral for the loan. When Rowley defaulted, the bank took possession of the collateral. ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis. 2d 96, 103, 110, 522 N.W.2d 542 (Ct. App. 1994).

[2] The statute provided:

> A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands, or waters of the state.

WIS. STAT. § 144.76(3) (1993-94). "Nischke ha[d] a duty as a landowner in possession of discharged hazardous substances to take remedial measures to restore the environment." ***Nischke***, 187 Wis. 2d at 119.

Based on this language, Anderson contends McGeshick is liable for the vehicle's recovery costs even though the DNR had not ordered its removal.

¶9 The ***Nischke*** court added, however, that "[u]nder the statute and the code, Nischke is obligated to take these steps *once notified by the department*." ***Id.*** (emphasis added). Unlike ***Nischke***, McGeshick was never notified by the DNR of any obligation or legal responsibility to remediate the lake. Anderson nevertheless intimates that McGeshick's truck could have caused environmental damage by harming a spawning bed or leaking toxic fluid into the lake, and McGeshick, in turn, could have been liable to the State for remediation costs. This court, however, does not decide cases based on speculative assertions. *See* ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis. 2d 808, 814, 456 N.W.2d 597 (1990).

¶10 Anderson further contends McGeshick was legally liable pursuant to WIS. STAT. §§ 30.12(1) and 287.81.[3] WISCONSIN STAT. § 30.12(1) prohibits depositing a structure or material in the bed of a navigable waterway without a permit. Our supreme court has held, however, that § 30.12 regulates only the willful deposit of materials in a lake. ***State v. Deetz***, 66 Wis. 2d 1, 22, 224 N.W.2d 407 (1974). Because neither party contends McGeshick intentionally sunk his truck, his responsibility under that statute is not established.

¶11 Viking concedes that under the littering statute, WIS. STAT. § 287.81, the State could have fined McGeshick up to $500 had he abandoned his truck in the lake. *See* WIS. STAT. § 287.81(2)(c). The penalties available for violating both this statute and WIS. STAT. § 30.12, however, are not contingent

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

upon evidence of "property damage." Therefore, Anderson fails to establish how application of either statute is relevant to the insurance coverage question.

¶12 To the extent Anderson cites ***Johnson Controls, Inc. v. Employers Insurance of Wausau***, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257 to support his coverage claim, his reliance on that case is misplaced. ***Johnson Controls*** involved application of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which empowered the Environmental Protection Agency to identify hazardous waste sites and pursue remedial activities from responsible parties. ***Id.***, ¶1.

¶13 Johnson Controls was classified as a "responsible party" for several lead smelting plants and contaminated landfills and sought coverage under its comprehensive general liability policies for clean-up costs. ***Id.***, ¶¶7, 12. The question there was whether the costs of remediating damaged property were covered "damages" under applicable comprehensive general liability policies. Our supreme court held that "[a]n insured's costs of restoring and remediating damaged property, whether the costs are based on remediation efforts by a third party (including the government) or are incurred directly by the insured, are covered damages under applicable [comprehensive general liability] policies, provided that other policy exclusions do not apply." ***Id.***, ¶5.

¶14 The present matter does not involve any environmental regulation comparable to CERCLA and McGeshick did not receive an environmental clean-up order. Moreover, the clean-up orders in ***Johnson Controls*** required the company to remediate lead and other environmental damage—contamination that was plainly "property damage." Here, there was no evidence of "property damage" to the lake.

¶15 Further, as the ***Johnson Controls*** court acknowledged, an order from the government to do something that requires incurring costs does not necessarily render the costs "damages." ***Id.***, ¶69. Rather, '"[a] claim for damages must be distinguished from a demand for compliance with a legal duty.'" ***Id.*** (quoting ***Wisconsin Power & Light Co. v. Century Indem. Co.***, 130 F.3d 787, 791 (7th Cir. 1997)). An order to remediate environmental damage is the former, while an order to remove one's truck from another's property is the latter.

¶16 Ultimately, the cost Anderson seeks to recover does not constitute "damages" arising from any legal liability for "property damage," as contemplated under the subject policy. Rather, it is merely the cost McGeshick owes Anderson for towing his truck out of the water. The circuit court, therefore, properly determined there was no insurance coverage.

*By the Court.*—Judgment affirmed.

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