Appeal No. 2005AP1092 **Cir. Ct. No. 2002CV13**

WISCONSIN COURT OF APPEALS
DISTRICT IV

GLENDENNING'S LIMESTONE & READY-MIX COMPANY, INC.,

PLAINTIFF,

V.

MICHAEL A. REIMER,

DEFENDANT,

HENK KENKHUIS AND LINDA KENKHUIS,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

WEST BEND MUTUAL INSURANCE COMPANY,

INTERVENOR-THIRD-PARTY DEFENDANT-RESPONDENT.

FILED

Feb. 9, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Deininger and Higginbotham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04)[1] we certify this appeal to the Wisconsin Supreme Court for its review and determination. The facts of the case provide the court with an opportunity to clarify or refine and

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

further apply its decision in ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, 268 Wis. 2d 16, 673 N.W.2d 65, holding that there was an "occurrence," as that term is used in a commercial general liability (CGL) policy, when a subcontractor provided faulty consulting services that were a cause of structural damage. The issue in the present case is whether there was an occurrence when a subcontractor allegedly failed to perform dairy facility modifications in the manner contracted for by the facility owner, causing the structure to be less suitable for its normal use.

The amended complaint of Henk and Linda Kenkhuis alleged that Michael Reimer entered into a contract to provide construction services to a dairy facility in which they had a leasehold interest; that the majority of the work on the facility was performed by subcontractors selected, retained, and paid by Reimer; and that the concrete subcontractor was negligent by pouring and finishing concrete for approximately 1450 cow stalls, such that the stalls have an inadequate slope, and by failing to pour the concrete over the top of a preexisting eight inch cement curb.

The complaint further alleged that the negligence of subcontractors hired by Reimer in performing their work caused the following accidental damage to the Kenkhuises' property:

> (a) The cow stalls are damaged in that they were not constructed per their specifications and must be repaired; (b) As a result of the inadequate slope, urine and manure gathers in puddles in the cow stalls and flows backwards rather than flowing to the designated drainage area; (c) As a result of the improper installation of rubber mats by Reimer and/or his subcontractors, the scraper which cleans manure has damaged the rubber mats; (d) The stall loops were irregularly and inconsistently installed by subcontractors throughout the building; and (d) The neck bars for the cows are loose and irregular and not attached to either end of the barn.

Finally, as another consequence of the alleged negligence, the Kenkhuises alleged that their cows' flanks and udders are dirty, creating potential for disease transmission and requiring the Kenkhuises to engage extra labor, at extra expense, to clean the udders prior to milking.

The complaint alleged that West Bend Mutual Insurance Company had a liability policy insuring Reimer. West Bend sought an order that its policy does not provide coverage on these facts. The circuit court granted West Bend's motion for summary judgment. On appeal, West Bend agrees with the appellants that the circuit court's ground for granting summary judgment was erroneous. West Bend relies on other arguments to sustain the judgment in its favor.

We regard the dispositive issue to be whether there was an "occurrence," as defined in West Bend's policy. Resolving the issue requires an interpretation and application of ***American Girl***, in which the court interpreted a definition of "occurrence" that is identical to the one now before us. *See* ***American Girl***, 268 Wis. 2d 16, ¶5. The present policy provides that coverage extends to bodily injury and property damage only if the injury or damage is caused by an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

In ***American Girl***, a soil engineering subcontractor gave faulty site-preparation advice to a general contractor in connection with the construction of a warehouse and, as a result, there was excessive settlement of the soil after the building was completed, causing the building's foundation to sink. ***Id.***, ¶3. This caused the rest of the structure to buckle and crack, and ultimately the building was declared unsafe and had to be torn down. ***Id.*** American Family had issued a

CGL policy to the general contractor, and the issue in litigation was whether the policy applied to the claim against the contractor by the building owner. ***Id.***, ¶4.

A significant portion of the ***American Girl*** opinion was devoted to the question of whether there was an "occurrence." ***Id.***, ¶¶37-49. Much of the discussion in the opinion focused on an argument that is not raised in the present case and is not directly related to the present issue, namely, whether the building owner's claim could not be an "occurrence" because it was for breach of contract/breach of warranty, and the CGL policy is not intended to cover contract claims arising out of the insured's defective work or product. ***Id.***, ¶39. The court concluded that classifying a claim as contract or tort does not answer whether there has been an occurrence, and that a breach of contract or breach of warranty claim can be an occurrence. ***Id.***, ¶¶39-47.

The discussion in ***American Girl*** that is more directly related to the present case is that concerning the word "accident." "Accident" is used within the definition of "occurrence" but is not defined by the policy. The pertinent paragraphs are these:

> ¶37. Liability for "property damage" is covered by the CGL policy if it resulted from an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policy. The dictionary definition of "accident" is: "an event or condition occurring by chance or arising from unknown or remote causes." *Webster's Third New International Dictionary of the English Language* 11 (2002). Black's Law Dictionary defines "accident" as follows: "The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." *Black's Law Dictionary* 15 (7th ed. 1999).

> ¶38. No one seriously contends that the property damage to the 94DC was anything but accidental (it was clearly not intentional), nor does anyone argue that it was anticipated by the parties. The damage to the 94DC occurred as a result of the continuous, substantial, and harmful settlement of the soil underneath the building. Lawson's inadequate site-preparation advice was a cause of this exposure to harm. Neither the cause nor the harm was intended, anticipated, or expected. We conclude that the circumstances of this claim fall within the policy's definition of "occurrence."
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> ¶48. The court of appeals has previously recognized that the faulty workmanship of a subcontractor can give rise to property damage caused by an "occurrence" within the meaning of a CGL policy. In ***Kalchthaler v. Keller Construction Co***., 224 Wis. 2d 387, 395, 591 N.W.2d 169 (Ct. App. 1999), a general contractor subcontracted out all the work on a construction project; the completed building subsequently leaked, causing over $500,000 in water damage. The court of appeals noted that the CGL defined "occurrence" as "an accident," and further noted that "[a]n accident is an 'event or change occurring without intention or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result.'" ***Id***. at 397 (quoting *Webster's Third New International Dictionary* 11 (1993)). The court of appeals concluded that the leakage was an accident and therefore an occurrence for purposes of the CGL's coverage grant. ***Id***.
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> ¶49. The same is true here. We conclude that the property damage to the 94DC was the result of an "occurrence" within the meaning of the insuring agreement. This brings us to the policy exclusions. American Family invokes several.

Id., ¶¶37-38, 48-49 (footnotes omitted).

The parties disagree as to how ***American Girl*** applies to the present facts. The Kenkhuises argue that the facts of this case are very similar to ***American Girl***. In their view, their claim is against the general contractor for negligence of a subcontractor that has caused property damage; the language of the relevant policy is identical; and the damage was accidental, in the sense that it

was not intentional or anticipated. Therefore, according to the Kenkhuises, the policy provides an initial grant of coverage.

In contrast, West Bend argues that ***American Girl*** is distinguishable. The main distinction, according to West Bend, is that the Kenkhuises' complaint does not allege accidental *conduct* by the subcontractor, only an accidental *result*. In other words, West Bend points out that the subcontractors in this case intended to do the work in the manner that they did, even though it may have been deficient. West Bend argues that the details and end-product of a construction project are matters that can be, and usually are, planned to occur. They argue that the term "accident" should not include the "overt, blatant, volitional acts" alleged in the Kenkhuises' complaint. West Bend contrasts these facts with ***American Girl*** in which, they argue, the failure of the subcontractor to give proper advice about soil conditions can properly be characterized as a mistake or accident. This argument rests in part on one of the dictionary definitions relied on in ***American Girl***, which stated that a "result, though unexpected, is not an accident; the means or cause must be accidental." ***Id.***, ¶37. Finally, West Bend argues that the Kenkhuises' interpretation of ***American Girl*** would have the practical effect of making *all* substandard work by subcontractors an "occurrence" under the policy.

In short, we see the dispositive issue as this: should ***American Girl*** be read broadly to mean that all faulty work by subcontractors is an occurrence? Or, should it be read more narrowly to say that negligence by subcontractors can be an occurrence under some circumstances? And, if subcontractor negligence is an occurrence under only certain circumstances, what are the analytical tools or definitions that will enable courts, litigants, and parties to proposed insurance contracts to reliably and consistently determine whether particular circumstances qualify as occurrences?

Because the above questions raise statewide concerns of interest to all insurers and holders of CGL policies, and they require interpretation of a recent supreme court opinion and further development or modification of analysis in a supreme court opinion, we believe the supreme court is the better court to decide this appeal.