COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2570 Cir. Ct. No. 2003CV268

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

COTTONSEED, LLC,

PLAINTIFF-COUNTERCLAIM-DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

BRIAN COULTHARD,

DEFENDANT-COUNTERCLAIM-PLAINTIFF,

COMMODITY SPECIALISTS COMPANY,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

R. D. JAMES, VIRGINIA RILEY JAMES, INDIVIDUALLY, AND D/B/A A.C. RILEY COTTON COMPANY AND RILEY JAMES FAMILY LIMITED PARTNERSHIP,

THIRD-PARTY DEFENDANTS-APPELLANTS,

AMERICAN CENTRAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT,

THE RISTINE COMPANY,

THIRD-PARTY DEFENDANT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. R.D. James, Virginia Riley James, A.C. Riley Cotton Company and Riley James Family Limited Partnership appeal from a summary judgment order dismissing their insurer, American Central Insurance Company, from this multi-party lawsuit. We affirm for the reasons discussed below.

BACKGROUND

¶2 Cottonseed, LLC (the cottonseed seller) sold Brian Coulthard (the farmer) a batch of cottonseed which he fed to his dairy herd in Wisconsin. The farmer refused to pay the balance owing for the cottonseed, however, after his animals' milk production went down and testing revealed that the cottonseed contained significant levels of mold, yeast and aflatoxin.

¶3 The cottonseed seller sued the farmer for the unpaid balance on the account. The farmer filed a counterclaim against the cottonseed seller alleging

breach of contract based on the condition of the cottonseed.[1] The cottonseed seller then filed third-party actions for indemnity and contribution against Commodity Specialists Company (the intermediate cottonseed supplier) and A.C. Riley Cotton Company and its owners (collectively Riley Cotton or the cotton ginners), as well as Riley Cotton's insurer, American Central Insurance Company. The intermediate cottonseed supplier also filed a third-party complaint against American Central.[2]

¶4 American Central moved for summary judgment on the third-party claims against it. It argued that it had no indemnity or contribution obligation under its policy with Riley Cotton under the circumstances of this case. Riley Cotton then filed a cross-complaint against American Central alleging breach of the insurer's duty to defend and indemnify Riley Cotton under the insurance policy. Riley Cotton also filed a cross-motion for summary judgment on the coverage issue.

¶5 The trial court concluded that Riley Cotton's insurance policy did not provide coverage for breach of contract claims or claims arising from mold damage and it dismissed American Central from the lawsuit. It is that decision which is the subject of this appeal.

[1] The farmer also alleged negligence and strict product liability, but the tort claims were dismissed under the economic loss doctrine and are not at issue on this appeal.

[2] We omit discussion of several additional pleadings because they are not relevant to this appeal.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24.

DISCUSSION

¶7 The insurance policy in this case provides that American Central will cover amounts that Riley Cotton becomes legally obligated to pay as the result of property damage caused by an "occurrence." An "occurrence" is defined in the policy as an "accident including continuous or repeated exposure to substantially the same general harmful conditions." The first issue we must decide is whether the alleged basis for Riley Cotton's liability in this lawsuit—namely, selling and/or distributing contaminated cottonseed[3]—qualifies as an occurrence within the meaning of the policy.

¶8 Both parties agree that we must look to Missouri law to interpret the insurance policy because that is where Riley Cotton is located and where it bought

[3] Riley Cotton attempts to characterize the event for which it is claiming coverage as the mere "presence" of mold, yeast and aflatoxin in the cottonseed. However, the duty to defend is to be evaluated by comparing the language of the insurance policy against the allegations in the complaint. ***American States Ins. Co. v. Herman C. Kempker Const. Co., Inc.***, 71 S.W.3d 232, 236 (Mo. Ct. App. 2002). The third-party complaints at issue here focused not on whether Riley Cotton caused or failed to prevent the contamination of the cottonseed in the first instance, but on the allegation that it sold and/or distributed the contaminated cottonseed.

the policy. In ***American States Ins. Co. v. Mathis***, 974 S.W.2d 647 (Mo. Ct. App. 1998), the Missouri Court of Appeals held that a policy including an identical definition of "occurrence" did not provide coverage for a subcontractor's failure to perform certain work according to contract specifications. The court first noted that an "accident" commonly refers to "[a]n event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." ***Id.*** at 650. It then reasoned that performance of the contract at issue according to the terms specified therein was within the insured's control, and its failure to perform could not be described as undesigned or unexpected. ***Id.***

¶9 During the course of its discussion, the ***Mathis*** court made the broad statement that, under the common definition of accident which it had just cited, "breaches of contract are not 'accidents' or 'occurrences.'" ***Id.*** American Central contends that this statement establishes a bright line rule that no breach of contract can constitute an "occurrence" under similar policy language in Missouri. In contrast, Riley Cotton argues that this statement was merely dicta, and that the underlying conduct forming the basis for an alleged breach of contract could still constitute an occurrence if it was an "undesigned or unexpected event."

¶10 The problem with Riley Cotton's contention is that it has provided this court with no examples of cases in which a Missouri appellate court has actually held that the conduct underlying an alleged breach of contract constituted an occurrence under similar policy language. On the other hand, ***American Central*** has provided citations to other cases that have repeated the broad language of ***Mathias*** when finding no coverage. *See, e.g.,* ***Hawkeye-Security Ins. Co. v. Davis***, 6 S.W.3d 419, 426 (Mo. Ct. App. 1999). It thus appears that Missouri has in fact concluded that a breach of contract cannot constitute an "occurrence" triggering insurance coverage when the policy language defines an occurrence in

terms of an accident. We therefore agree with the trial court that, under the ***Mathias*** rule, Riley Cotton's policy did not provide coverage for the breach of contract allegations here. Accordingly, we conclude that the trial court properly dismissed American Central from this case.

¶11 In light of our determination that the insurance policy does not provide coverage for breach of contract claims, we do not consider the parties' additional arguments concerning whether the disease organism exclusion would apply here.

By the Court.—Order affirmed.

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