COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1506

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

BLUE MOUND GOLF AND COUNTRY CLUB,

PLAINTIFF-RESPONDENT,

V.

MUNICIPAL WELL & PUMP, INC.,
FRAZIER INDUSTRIES, INC. AND
RICHARD MILAEGER,

DEFENDANTS-APPELLANTS,

REGENT INSURANCE COMPANY AND
GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Municipal Well & Pump, Inc., Frazier Industries, Inc. and Richard N. Milaeger appeal from an order declaring that the commercial general liability (CGL) insurance policies issued to Municipal by Regent Insurance Company and General Casualty Company of Wisconsin do not provide coverage for the damages at issue in this appeal. Municipal argues that the CGL policies do provide coverage based on the insuring agreement and because none of the exclusions applies. Because the event here was not an accident, and therefore not an occurrence, the trial court did not err when it declared that the policies do not provide coverage to Municipal for the alleged breach of contract. Further, even if we were to interpret the event here as an occurrence, at least one exclusion applies and, therefore, there is no coverage under the CGL policies. We affirm.

I. BACKGROUND

¶2 On the grounds of Blue Mound Golf and Country Club (Blue Mound) is a fifty-year-old water well. In 1994, Blue Mound decided to recondition and increase the capacity of the well. It hired Municipal to do the work.

¶3 The existing well extended approximately 1,300 feet below the surface through two water-bearing limestone layers, known as "aquifers." The two water-bearing layers are separated by a shale barrier. The upper layer extended from thirty-six feet below the surface to 301 feet below the surface. The shale barrier extends from 301 to 485 feet below the surface. The lower layer extends from 485 to 737 feet. Prior to the commencement of work on the well, it contained a twelve-inch diameter hole from the surface to approximately 493 feet, and a ten-inch diameter hole from 493 to 1,300 feet. A steel liner extended

through the shale barrier from approximately 318 to 493 feet. The well drew water from both aquifers or layers of limestone.

¶4 In order to do the desired work, Blue Mound had to obtain the approval of the Department of Natural Resources (DNR). The DNR indicated it would issue a permit for either reconstruction of the existing well to meet certain requirements, or construction of a new well near the same site of the old well. Blue Mound chose the first alternative. As a condition for approval, the DNR required the installation of a steel liner from the surface through the upper layer to the existing steel liner in order to prevent water from the upper layer from entering the well.

¶5 Blue Mound contracted with Municipal to: (1) repair and reconstruct the well to comply with all applicable DNR regulations and requirements; (2) repair and reconstruct the well so that water would not flow from the upper layer to the lower layer; (3) install a new liner extending from the surface to the existing liner; (4) join and seal the new and old liners; (5) grout the new lines to seal off the annulus space between the new liner and the well hole; (6) seal the hole or elbow joint in the new liner through which grout was directed to the annulus space; and (7) install and maintain a submersible pump.

¶6 Municipal completed its work in January 1995, and charged Blue Mound $112,000 for the work. Blue Mound began operating the well in May 1995 and, shortly thereafter, began to experience difficulties. It discovered that the new pump contained sand and grout particles from the installation of the new liner. It further claims that Municipal failed to seal or join the interface between the new and existing liners. Thus, water still entered the well from the upper layer

in violation of DNR requirements. The new liner could not be repaired or removed.

¶7 After efforts to settle the matter failed, Blue Mound filed an action against Municipal and its insurers alleging breach of contract, misrepresentation, and negligence arising out of Municipal's failure to repair and reconstruct its existing well in compliance with DNR requirements. Blue Mound alleged that the failure might cause the well to be shutdown and require construction of a brand new well. Blue Mound seeks recovery of the $112,000 it paid to Municipal under the contract.

¶8 Regent and General Casualty issued insurance policies to Municipal and Frazier that contained identical commercial general liability coverage. The insurers moved for declaratory judgment contending that their policies provided no coverage for breach of contract claims or business risks. The trial court granted the motion. Municipal and Frazier (collectively, "Municipal") now appeal.

II. ANALYSIS

¶9 Municipal claims that the trial court erred in concluding that a claim against it for potential damages associated with the costs of constructing a new well to replace the existing well for its failure to comply with a DNR requirement is not covered by the insurers' CGL policies.[1]

[1] Although the well is currently operating under a permit extending until 2001, both parties assume that the DNR will prevent it from operating in its present condition.

III. STANDARD OF REVIEW

¶10 The interpretation of an insurance contract presents a question of law that we review independently. ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 212, 341 N.W.2d 689 (1984). Judicial interpretation of a contract, including an insurance policy, seeks to ascertain and give effect to the intent of the contracting parties. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. Insurance policies are construed as they would be understood by a reasonable person in the position of the insured. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). We do not, however, interpret insurance policies to provide coverage for risks that the insurer did not contemplate or underwrite, and for which it has not received a premium. ***Wisconsin Label***, 2000 WI at ¶25. We reject Municipal's assertion of trial court error for two reasons.

¶11 First, under the language of the policies at issue, there is no coverage for Municipal's claim. Regent's and General Casualty's policies provide:

> **COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> **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" ….

The policies define "property damage" as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

The policies define "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶12 In order for the CGL policies to provide coverage, the event at issue must be an accident. "A definition frequently adopted by the courts is that an accident is an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." 10 COUCH ON INSURANCE § 139:14 (3d ed. 2000). The event here involves the possibility that the well may be decertified for operation because water from the upper layer still flows into the well, contrary to the DNR's directive. In advancing their arguments, both parties assume that this will happen. Should that event occur, it will have been caused by the failure of Municipal to prevent the continuation of the prior existing condition which, by contract, it promised to accomplish. Simply put, Municipal then never would have brought the well into compliance with the DNR's permit requirements. No sudden, unusual or unexpected event would have occurred. The well is not in any worse condition than at the time Blue Mound contracted with Municipal. Thus, "physical injury" or "property damage" under the terms of the policy is conceptually impossible.

¶13 Here, in its pleadings, Blue Mound alleged that Municipal failed to fulfill the terms of its contract; i.e., it failed to seal the new liner, it failed to properly join the new and old liners, and it failed to keep sand and grout particles

out of the new pump. As the trial court observed, Blue Mound "did not allege that the damage was caused by an accident, but that the damage was caused by improper repair and reconstruction." Moreover, Blue Mound does not allege that the well caused any bodily damage, flooding or other damage to the property surrounding the well. The only property damage alleged is to the well itself. Blue Mound's claims refer to the expenses of repair and reconstruction directly incurred as a result of Municipal's allegedly defective work.

¶14 Second, even if the threshold of coverage is successfully crossed and, for the purposes of argument, even if we were to conclude that an "accident" occurred that caused "property damage," it is still necessary to determine whether any exclusions apply to the undisputed facts.

¶15 In the standard CGL policies, like those present here, coverage does not extend to "business risks"—risks relating to the repair or replacement of the insured's faulty work or product, or defects in the insured's work or product itself. ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 264-65, 371 N.W.2d 392 (Ct. App. 1985). A CGL policy's sole purpose is to cover the risk that the insured's goods, products or work will cause bodily injury or damage to property other than the product or the completed work of the insured. The coverage exists for "tort risks" not "business risks" or for economic loss resulting from contractual liability. ***Jacob v. Russo Builders***, 224 Wis. 2d 436, 447, 592 N.W.2d 271 (Ct. App. 1999). Therefore, a CGL policy is not a performance bond. ***Id.*** at 448.

¶16 In ***Bulen***, we adopted the majority rule expressed in ***Weedo v. Stone-E-Brick, Inc.***, 405 A.2d 788 (N.J. 1979):

> The so-called "business risk" refers to the expenses of repair or replacement incurred by the contractor in the event his work does not live up to its warranties.... The

> other risk refers to injury to people and damage to property caused by the contractor's faulty workmanship.… *Weedo* holds that comprehensive general liability insurance policies containing exclusionary language of the type in this case afford coverage for the latter type of risk but not the former, or so-called, "business risk."

Bulen, 125 Wis. 2d at 261-62; *see also* ***St. John's Home of Milwaukee v. Continental Cas. Co.***, 147 Wis. 2d 764, 434 N.W.2d 112 (Ct. App. 1988).

¶17 In asserting that the trial court erred in basing its decision upon the policy exclusions, Municipal analyzes six exclusions, which it claims are not applicable. We examine only one of the exclusions, which is crucial to Municipal's claim, and which we deem dispositive of this appeal.

¶18 The "business risk" exclusion dispositive to this decision provides:

> **2. Exclusions.**
>
> This insurance does not apply to:
>
> ….
>
> j. "Property damage" to:
>
> ….
>
> (5) That particular part of real property on which you … are performing operations, if the "property damage" arises out of those operations.

¶19 Municipal claims that exclusion 2.j.(5) does not preclude coverage for the damages claimed by Blue Mound for two reasons: (1) the exclusion applies only to damages that occur while its agents are "performing operations"; and (2) Blue Mound's well does not constitute "that particular part" of property upon which it was working.[2]

[2] The trial court based its decision upon Exclusions 2.j.(5) and 2.j.(6).

¶20 The first reason is based on the fact that Municipal had finished its work on the well in January 1995, at least four months before any alleged damage occurred, or was discovered. We reject Municipal's argument. The claims here allege that Municipal never brought the well into compliance with the DNR regulations and requirements. By contract, Municipal promised to install a new liner for the specific purpose of preventing water from entering the well from the upper aquifier. The lawsuit alleges that Municipal failed to do so. Therefore, if this failure constitutes property damage, it existed before, continued during, and remained after Municipal "performed operations." Any property damage was to property that Municipal was performing operations on and, therefore, this exclusion operates to preclude coverage for the claims remaining in this lawsuit.

¶21 In proffering the second reason, Municipal argues that because exclusionary clauses are to be narrowly construed against an insurer, the language in exclusion 2.j.(5), which provides that coverage does not apply to property damage to "that particular part" of property upon which the insured is performing operations, must necessarily apply only to that specific part of property upon which the insured is working. In this case, Municipal asserts that it was only working on the liner and pump—not on the well itself. This argument defies common sense.

¶22 The construction of insurance contracts should not produce absurd results. A well is an integrated system, the absence of an essential part of which renders it useless. As stated in the insureds' brief, "without a liner and pump, there is no well." Blue Mound hired Municipal to recondition its well so that it could continue its operation and expand its capacity. To seriously maintain that Municipal did not perform work on the well flies in the face of reality. Simply put, Municipal promised to repair and reconstruct Blue Mound's well to meet

DNR requirements. The promise was not fulfilled. Thus, Blue Mound now seeks damages associated with restoring, repairing, and replacing the well because Municipal failed to perform the agreed-upon work.

¶23 Based on the foregoing, we agree with the trial court that the business risk exclusion, 2.j.(5), applies to preclude coverage. Accordingly, the trial court correctly declared that the CGL policies at issue here do not provide coverage for the remaining claims in this lawsuit.

By the Court.—Order affirmed.

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