

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 26, 2002**

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. 01-2609**

**Cir. Ct. Nos. 98-CV-518; 98-CV-519;  
98-CV-735; 98-CV-736; 99-CV-866**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**SCOTT BUYESKE AND ALLISON BUYESKE,**

**PLAINTIFFS,**

**NETWORK HEALTH PLAN OF WISCONSIN, INC.,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**WAUSAU UNDERWRITERS INSURANCE COMPANY, GULF  
INSURANCE COMPANY, TIG INSURANCE COMPANY,  
VILLAGE OF WINNECONNIE, GEO-CLEANSE MIDWEST,  
INC. AND GEO-CLEANSE INTERNATIONAL, INC.,**

**DEFENDANTS,**

**SECURITY INSURANCE COMPANY OF HARTFORD AND OMNI  
ASSOCIATES, INC.,**

**DEFENDANTS-RESPONDENTS,**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT.**

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**STEVEN SCHUTKOSKE AND LORI SCHUTKOSKI,**

**PLAINTIFFS,**

**NETWORK HEALTH PLAN OF WISCONSIN, INC.,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**WAUSAU UNDERWRITERS INSURANCE COMPANY, GULF  
INSURANCE COMPANY, TIG INSURANCE COMPANY,  
VILLAGE OF WINNECONNIE, GEO-CLEANSE MIDWEST,  
INC. AND GEO-CLEANSE INTERNATIONAL, INC.,**

**DEFENDANTS,**

**SECURITY INSURANCE COMPANY OF HARTFORD AND OMNI  
ASSOCIATES, INC.,**

**DEFENDANTS-RESPONDENTS,**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT.**

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**DARREN MARKERT AND SHAWNA MARKERT,**

**PLAINTIFFS,**

**v.**

**SECURITY INSURANCE COMPANY OF HARTFORD AND OMNI  
ASSOCIATES, INC.,**

**DEFENDANTS-RESPONDENTS,**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT,**

**GULF INSURANCE COMPANY, TIG INSURANCE COMPANY,**

**GEO-CLEANSE MIDWEST, INC., GEO-CLEANSE INTERNATIONAL, INC., AMERICAN FAMILY MUTUAL INSURANCE COMPANY, UNITED HEALTH OF WISCONSIN INSURANCE CO., INC., WAUSAU UNDERWRITERS INSURANCE COMPANY AND VILLAGE OF WINNECONNIE,**

**DEFENDANTS.**

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**HELEN SHANKLIN, INDIVIDUALLY AND AS PERSONAL ADMINISTRATOR FOR THE ESTATE OF TERRY O. SHANKLIN,**

**PLAINTIFFS,**

**V.**

**SECURITY INSURANCE COMPANY OF HARTFORD AND OMNI ASSOCIATES, INC.,**

**DEFENDANTS-RESPONDENTS,**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT,**

**GULF INSURANCE COMPANY, TIG INSURANCE COMPANY, GEO-CLEANSE MIDWEST, INC., GEO-CLEANSE INTERNATIONAL, INC., HERITAGE MUTUAL INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY AND VILLAGE OF WINNECONNIE,**

**DEFENDANTS.**

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**JEFF RYF AND CHERYL RYF,**

**PLAINTIFFS,**

**V.**

**SECURITY INSURANCE COMPANY OF HARTFORD AND OMNI ASSOCIATES, INC.,**

**DEFENDANTS-RESPONDENTS,**

**WEST BEND MUTUAL INSURANCE COMPANY,**

**DEFENDANT-APPELLANT,**

**GULF INSURANCE COMPANY, TIG INSURANCE COMPANY,  
GEO-CLEANSE MIDWEST, INC., GEO-CLEANSE  
INTERNATIONAL, INC., JOHN ALDEN LIFE INSURANCE  
COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY  
AND VILLAGE OF WINNECONNIE,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Winnebago County:  
ROBERT A. HAASE, Judge. *Affirmed in part; reversed in part and cause  
remanded.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. West Bend Mutual Insurance Company appeals from an order denying on summary judgment its claim for reformation of the policy it issued to Omni Associates, Inc. The circuit court held that West Bend owes coverage to Omni and that West Bend's coverage is primary to the coverage owed to Omni by Security Insurance Company of Hartford.<sup>1</sup> We conclude that the presence of factual disputes prevents disposition of West Bend's reformation claim on summary judgment. We also conclude that if West Bend owes coverage to Omni, the pollution exclusion provision in West Bend's policy does not apply. Finally, we hold that in the event West Bend owes coverage to

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<sup>1</sup> Omni Associates filed but later dismissed a cross-appeal from this order.

Omni, West Bend's coverage is excess to that afforded by Security. We affirm in part, reverse in part and remand for further proceedings.

¶2 This coverage dispute arises in the aftermath of an attempt to clean up gasoline which leaked from a service station's storage tanks. Omni was hired to investigate and devise a plan to address the gasoline leak. Omni recommended the "Geo-Cleanse" process, which involves injecting chemicals into the ground under pressure. In June 1997, during the Geo-Cleanse process, a residence exploded, causing personal injuries and property damage. The injured parties contended that the Geo-Cleanse process spread the gasoline contamination into sewer lines which then further dispersed the gasoline contamination in vapor form. The vapor ignited and caused an explosion. Omni was sued for engineering malpractice arising from its rendering of professional services in connection with the clean-up and its recommendation of the Geo-Cleanse process.

¶3 Omni had a professional liability policy with Security and a general liability policy with West Bend. West Bend intervened in the action and sought the following relief on summary judgment: (1) reformation of its insurance policy with Omni to add a professional services exclusion to the policy; (2) a declaration that West Bend does not owe coverage under its reformed policy; and (3) a declaration that West Bend's policy is excess to Omni's professional liability policy with Security. On summary judgment, the circuit court concluded that there were no material factual issues in dispute and denied West Bend's request for reformation of the policy to exclude liability for professional services. The court also held that West Bend owed primary coverage for the explosion-related claims.

¶4 The circuit court decided the reformation and primary/excess coverage questions on summary judgment. We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶5 To be entitled to reformation of an insurance contract, the party seeking reformation must offer clear and satisfactory evidence of the intended provisions of the contract which were omitted from the written agreement. *Jeske v. Gen. Accident Fire & Life Assurance Corp.*, 1 Wis. 2d 70, 78, 83 N.W.2d 167 (1957). Generally, a contract may be reformed when the “writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing.” *Vandenberg v. Cont'l Ins. Co.*, 2001 WI 85, ¶50, 244 Wis. 2d 802, 628 N.W.2d 876. Questions of the intent of parties to a contract are normally factual questions. *Cf. Armstrong v. Colletti*, 88 Wis. 2d 148, 153, 276 N.W.2d 364 (Ct. App. 1979) (where a contract is ambiguous, the question of intent is for the trier of fact).

¶6 West Bend sought to reform its policy to add a professional services exclusion which it mistakenly failed to include in the policy. Prior to 1995, the West Bend policy contained an exclusion for liability arising from the rendering of professional services. However, beginning in the 1995-96 policy year and continuing for the next three policy years, West Bend deleted the professional services exclusion from the policy. The text of the West Bend policy in effect at

the time of the claim did not contain a professional services exclusion to bar coverage for claims arising from Omni's professional services.

¶7 In its summary judgment submissions, West Bend offered evidence that its employees unintentionally and mistakenly removed the professional services exclusion from the policy in 1995 when West Bend changed the policy code to lower the premium and enhance the competitiveness of its pricing. Because West Bend changed the policy code, the exclusions which are normally generated for a general liability policy were no longer automatically generated, and West Bend's employees did not notice that the professional services exclusion had been unintentionally deleted.

¶8 Our review of the summary judgment record indicates that there are factual issues in this case which bar summary judgment. West Bend contends that it mistakenly deleted the professional services exclusion when it was satisfying Omni's request to provide a more competitively priced policy, West Bend did not intend to broaden the scope of the coverage it offered Omni to include professional liability insurance, and West Bend has never sold professional liability insurance to entities such as Omni. In its summary judgment materials, Omni offered the affidavit of its president stating that Omni has professional liability insurance from Security.

¶9 These submissions raise a factual question about whether West Bend mistakenly deleted the professional services exclusions and whether Omni intended to have professional services coverage from West Bend in light of evidence that Omni buys errors and omissions (or professional liability) insurance from Security. The summary judgment materials indicate that Omni confirmed for West Bend during each policy year that it had professional liability

insurance from another source. From these summary judgment materials, the circuit court could not determine as a matter of law that West Bend intentionally eliminated the professional services liability exclusion, made a unilateral mistake or participated with Omni in a mutual mistake in deleting the exclusion, or that reformation should occur as a matter of law. The circuit court erred in deciding the reformation issue on summary judgment, and we reverse for this reason.

¶10 West Bend argues that even if it owes coverage, its policy contains an absolute pollution exclusion which precludes coverage. The circuit court concluded that the pollution exclusion does not apply.

¶11 The West Bend policy states that the insurance does not apply to:

(1) “Bodily injury” or “property damage” arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

...

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured’s behalf are performing operations;

...

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

...



Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

¶12 “An insurance contract is to be construed as it would be understood by a reasonable person in the position of the insured, and the policy language is to be given its common and ordinary meaning.” *Dailey v. Secura Ins. Co.*, 164 Wis. 2d 624, 628, 476 N.W.2d 299 (Ct. App. 1991).

¶13 Based on the language in West Bend’s pollution exclusion clause, we agree with the circuit court that the exclusion does not apply in this case. By its terms, the pollution exclusion applies to property owned or otherwise used by Omni or to property on which Omni is performing operations. In this case, the pollutant discharged or otherwise escaped from property owned by a third party and the discharge occurred prior to Omni’s involvement. The allegations against Omni relate to its remediation plan for the property, not to any actual discharge of a pollutant from property owned, used or operated upon by Omni. Therefore, if there is coverage under West Bend’s policy, the pollution exclusion does not apply. We affirm this aspect of the circuit court’s decision.

¶14 Because we are reversing and remanding for further proceedings on the reformation claim which might result in a determination that West Bend owes coverage to Omni, we will address whether West Bend’s policy is primary or excess vis-à-vis the coverage offered by Security. The circuit court concluded that West Bend’s coverage is primary.

¶15 West Bend’s policy states:

Excess Insurance.

This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis:

- (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk of similar coverage for "your work[.]"

¶16 The interpretation of an insurance contract and whether the policy provides coverage are questions of law which we decide de novo. *Riccobono v. Seven Star, Inc.*, 2000 WI App 74, ¶7, 234 Wis. 2d 374, 610 N.W.2d 501. Giving the policy language its common and ordinary meaning, *Dailey*, 164 Wis. 2d at 628, we conclude that if West Bend owes professional liability coverage to Omni, that coverage is excess to the coverage offered by Security. It is undisputed that the Security policy affords coverage for Omni's work, i.e., its professional services. The circuit court erred in concluding that the West Bend policy affords primary coverage for professional services liability.<sup>2</sup> We reverse this aspect of the circuit court's decision.

¶17 Because the question of coverage under the West Bend policy remains to be decided, we do not address West Bend's request to be reimbursed for settlement payments and defense costs.

¶18 We conclude that there are factual disputes to be resolved relating to whether West Bend's policy should be reformed. We reverse and remand for proceedings to address these factual disputes. We also conclude that if West Bend

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<sup>2</sup> West Bend argues that its umbrella policy is excess coverage vis-à-vis Security. Security does not challenge that contention in its respondent's brief. However, the circuit court declined to decide where West Bend's umbrella coverage comes into play, preferring to wait until proof of damages at trial. Because the circuit court did not decide this question, we decline to do so.

owes coverage to Omni, West Bend's pollution exclusion provision does not apply to this case, and it is not a basis for denying coverage to Omni. Finally, we conclude that if West Bend owes coverage to Omni, its coverage is excess to that owed by Security.

¶19 No costs to either party on appeal.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded.

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

