COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP305 **Cir. Ct. No. 2007CV230**

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

WATERTOWN TIRE RECYCLERS, LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND THOMAS SPRINGER,

INVOLUNTARY-PLAINTIFFS,

V.

JAMES W. NORTMAN AND ROBERTSON RYAN & ASSOCIATES, INC.,

DEFENDANTS,

ACE PROPERTY AND CASUALTY INSURANCE COMPANY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. This is an insurance coverage dispute involving a Commercial General Liability (CGL) policy following a major stockpile fire at a tire recycling business. The fire and suppression efforts caused Watertown Tire Recyclers to incur liability for water clean-up costs asserted by the United States Environmental Protection Agency (EPA), and liability for debris clean-up costs assessed by the Wisconsin Department of Natural Resources.

¶2 Watertown made a claim for all of these clean-up costs under its CGL policy to Watertown's insurer, ACE Property and Casualty Insurance Co. ACE denied Watertown's claims for coverage based on the CGL's "absolute pollution" exclusion. Watertown pled several causes of action against ACE seeking coverage under the CGL policy: (1) declaratory judgment; (2) equitable estoppel; (3) breach of modified contract; (4) bad faith; and (5) reformation. Watertown also made a negligence claim against its insurance agent, James Nortman, and his employer Robertson Ryan & Associates, Inc, which was the subject of ***Watertown Tire Recyclers v. Nortman*** (***Watertown I***), No. 09-2465, unpublished slip op. (Wis. Ct. App. June 17, 2010).

¶3 In this case, the circuit court issued a declaratory judgment that coverage exists under the so-called "sublimit" exception to the "absolute pollution" and "owned property" exclusions up to a maximum of $300,000. The circuit court dismissed all of Watertown's claims seeking full coverage.

¶4 Both parties appeal from the court's declaratory judgment. ACE argues that the "sublimit" exception does not apply. Watertown argues that the circuit court erred in failing to include a monetary judgment after it determined that this coverage applies. We affirm the circuit court on both grounds. We

conclude the "sublimit" exception provides coverage for Watertown's liability as established under federal law resulting from fire damage to leased property. Yet the court reasonably exercised its discretion in determining that a monetary judgment against ACE based on coverage created by the "sublimit" exception was not appropriate, because the court was not presented with sufficient evidence to determine a fixed sum appropriate for a monetary judgment.

¶5 We affirm the court's dismissal of Watertown's claims seeking full coverage under the CGL policy. We conclude that the circuit court properly dismissed *the equitable estoppel claim*, because the policy language precluded coverage for clean-up costs, and equitable estoppel does not apply to exclusionary clauses in insurance contracts; *the breach of contract claim*, because there is no evidence that creates a genuine issue of material fact as to whether the parties' conduct unambiguously indicated a shared intent to modify the policy; *the bad faith claim*, because there was an objectively reasonable basis to deny coverage and because Watertown's claims of flaws in ACE's investigation, standing alone, are not enough to support a bad faith claim against ACE; and *the reformation claim*, because the insurance agent was not negligent in procuring an insurance policy that included the "absolute pollution" exclusion.

BACKGROUND

¶6 Watertown operated a stockpiling, shredding, and recycling scrap tire business on property that Thomas Springer, the LLC's sole member, leased to Watertown. On July 19, 2005, a stockpile tire fire ignited and burned for five days. Firefighters used an estimated ten million gallons of water to extinguish the fire.

¶7 In the aftermath, the EPA ordered Watertown (as operator) and Springer (as owner) to clean up the contaminated fire suppression water. Wisconsin's Department of Natural Resources ordered both to remove on-site debris. Watertown agreed to have the EPA treat the contaminated water and contracted with a private company to have the debris removed.

¶8 Watertown sought coverage for the water and debris clean-up expenses from ACE under the CGL policy. ACE rejected all clean-up claims under the policy based on the policy's "absolute pollution" exclusion.

¶9 The water clean-up bill ($663,457.08) that the EPA presented to Watertown remains unpaid. Springer paid the private company for the debris-removal costs and settled DNR's claims related to the cleanup.

¶10 In October 2009, the EPA sued Watertown and Springer in federal court to recover the costs of its response, resulting in a consent decree in favor of the EPA and against Watertown and Springer in the amount of $790,930.

¶11 Watertown filed this lawsuit. Watertown and ACE both submitted motions for summary judgment. Watertown moved for summary judgment on its declaratory judgment claim on the alternative grounds that: (1) the "absolute pollution" exclusion did not apply and therefore the CGL policy provided for full coverage of the fire-related clean-up costs, or (2) the $300,000 of coverage under the "sublimit" exception to the exclusion applies to the water clean-up expenses for EPA. ACE moved for summary judgment dismissing all of Watertown's claims.

¶12 The circuit court granted Watertown's request for partial summary judgment on the declaratory judgment action and concluded that the "sublimit"

exception applied to cover EPA's clean-up expenses, but denied Watertown's request for a monetary judgment. The court also granted ACE's motion for summary judgment on all other claims.

¶13 ACE appeals from the declaratory judgment, and Watertown cross-appeals, arguing that the court erred in failing to include a monetary award. Watertown also challenges the circuit court's dismissal of its claims seeking coverage beyond the "sublimit" exception on the theories of equitable estoppel, breach of modified contract, bad faith, and reformation.

DISCUSSION

¶14 Before reaching the specifics of Watertown's arguments and the single issue appealed by ACE, we begin by briefly summarizing the companion appeal, ***Watertown I***, No. 09-2465, unpublished slip op. (Wis. Ct. App. June 17, 2010), because it is relevant to our discussion of the issues raised in this appeal. Then, we address whether the insurance policy provides initial coverage for the claims and whether the "sublimit" exception to the "owned property" and "absolute pollution" exclusions saves some coverage under ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶1, 264 Wis. 2d 60, 665 N.W.2d 257, and whether the court erroneously exercised its discretion in declining to enter a money judgment against ACE.

¶15 After determining these fundamental coverage issues, we turn to the five legal doctrines that Watertown relies on in seeking to overcome the "owned property" and "absolute pollution" exclusions that otherwise preclude full coverage under the CGL policy for clean-up expenses.

I. *Watertown I* and the "Owned Property" Exclusion

¶16 In ***Watertown I***, Watertown alleged that its insurance agent, Nortman, was negligent in obtaining a CGL insurance policy that included the "absolute pollution" exclusion, which resulted in denial of coverage for both clean-up claims. ***Watertown I***, No. 09-2465, ¶6. This court concluded that Nortman could not have been negligent on these grounds because, regardless of the "absolute pollution" exclusion, the CGL's "owned property" exclusion independently applies to exclude coverage. ***Id.***, ¶19. Therefore, Nortman's alleged negligence in including the "absolute pollution" exclusion in the policy could not have affected coverage. ***Id.***, ¶24.

¶17 The "owned property" exclusion precludes coverage for:

> "Property damage" to:
>
> > (1) Property you own, *rent*, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, *restoration* or maintenance of such property for any reason, including *prevention of* injury to a person or *damage to another's property* ….

(Emphasis added.)

¶18 We concluded that the "owned property" exclusion precluded coverage under these circumstances because Watertown's costs were to restore damaged property that it rented from Springer for the "prevention of … damage to another's property," specifically, to groundwater and nearby surface water on the Springer property. ***Id.***, ¶¶10, 13,19.

II. Declaratory Judgment Action regarding "Sublimit" Exception

¶19 With that background, we turn to the "sublimit" exception. ACE appeals from the declaratory judgment finding ACE to be obligated for coverage up to $300,000 under the "sublimit" exception, arguing that coverage under the CGL policy applies only to third-party liability claims to off-site property. Watertown appeals from the decision of the court that it lacked a sufficient basis to enter a monetary judgment under the "sublimit" exception. We first address ACE's obligation under its insurance policy.

A. The "sublimit" exception

¶20 The issue is whether Watertown's liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (2000), for the EPA's remediation triggered insurance coverage for Watertown under the "sublimit" exception to the "absolute pollution" and "owned property" exclusions.[1]

¶21 We review a grant of summary judgment de novo, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there is no genuine issue as to any material fact and that party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2) (2007-08).

[1] CERCLA is a federal law designed to promote the cleanup of hazardous waste. ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶1, 264 Wis. 2d 60, 665 N.W.2d 257. CERCLA enables the EPA to identify hazardous waste sites and pursue remedial action. ***Id.*** As part of this grant of authority, CERCLA authorizes the EPA to remediate hazardous waste sites, either by cleaning up identified sites and seeking compensation from responsible parties, or else by ordering polluters and other responsible parties to perform the cleanup themselves. ***Id.***

¶22 In order to determine whether coverage is available for Watertown's claims, we must interpret ACE's insurance policy, which presents a question of law that we review de novo. ***Smith v. Katz***, 226 Wis. 2d 798, 805, 595 N.W.2d 345 (1999).

¶23 The goal of interpreting an insurance policy is to give effect to the shared intention of the parties. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. We interpret insurance polices as they would be understood by a reasonable person in the insured's position. ***Id.***, ¶25. We do not, however, interpret insurance policies to provide coverage for risks that the insurer did not contemplate or for which it has not been paid. ***Id.***

¶24 We follow three steps when interpreting an insurance policy. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. First, we determine whether the policy's insuring agreement makes an initial grant of coverage. ***Id.*** To make that determination, we examine the facts of the insured's claim and the insurance policy's language. ***Id.*** Second, if there is an initial grant of coverage, we then examine whether any exclusions preclude coverage. ***Id.*** Third, if an exclusion applies, we determine whether any exception to that exclusion reinstates coverage. ***Id.***

1. Initial Grant of Coverage

¶25 The CGL policy here provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or

'property damage' to which this insurance applies."[2] The parties dispute whether this language creates an initial grant of coverage for Watertown's liability imposed by CERCLA.

¶26 ACE concedes that, under ***Johnson Controls***, CERCLA response costs for restoring and remediating contaminated properties qualify as "damages" within the terms of a standard CGL policy, and that these damages may be claimed by third parties such as the EPA. However, ACE asserts that an initial grant of coverage is precluded here because Watertown's claims are for property damage to on-site property, and CGL policies do not cover on-site property damage claims, only off-site property damage claims. This assertion calls for consideration of ***Johnson Controls.***

¶27 In ***Johnson Controls***, our supreme court determined that CERCLA response costs for restoring and remediating contaminated properties are "damages" within the terms of a standard Comprehensive General Liability policy,[3] unless the policy otherwise precludes coverage for these damages. ***Johnson Controls***, 264 Wis. 2d 60, ¶120 (overturning ***City of Edgerton v.***

[2] The CGL policy defines "Property damage" to be:

> 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 of use shall be deemed to occur at the time of the "occurrence" that caused it.

[3] We assume that the Commercial General Liability policy at issue here and Comprehensive General Liability policy at issue in ***Johnson Controls*** are interchangeable for purposes of this appeal because neither Watertown nor ACE suggests that there is a difference that matters.

General Cas. Co. of Wis., 184 Wis. 2d 750, 517 N.W.2d 463 (1994)). As the court declared:

> The resulting rule should be clear, comprehensive, and logical: The liability imposed under CERCLA against an insured who has contributed to the contamination of property is covered "as damages" if the costs to satisfy that liability are expended to remediate, or pay for the remediation of, the damaged property, provided that the costs are not excluded by some other provision of the policy.

Id., ¶112. Therefore, according to ***Johnson Controls***, covered damages under applicable CGL policies include "an 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." ***Id.***, ¶5.

¶28 ***Johnson Controls*** explicitly follows the principle articulated in ***General Casualty Co. of Wisconsin v. Hills***, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), that the CGL policy "was designed to protect an insured against liability for negligent acts resulting in damage to third parties," and is also "expected to cover liabilities incurred because of prior damage to property." ***Johnson Controls***, 264 Wis. 2d 60, ¶¶60, 68, 122.

¶29 ACE interprets this language in ***Johnson Controls*** to mean that coverage for CERCLA liability is available under a CGL policy only when there is a claim by a third party such as a governmental agency charged with environmental clean-up obligations against the insured for damage to off-site property. Under ACE's view, ***Johnson Controls*** does not permit CERCLA coverage under a CGL policy unless the third party makes a claim against the insured for property damage to property that the insured does not own, lease, or control.

¶30 ACE's interpretation is faulty because ***Johnson Controls*** does not distinguish between on-site and off-site property damage triggering CERCLA liability coverage. Instead, consistent with the ***Hills*** rationale, ***Johnson Controls*** defers to applicable insurance policy language to determine whether coverage is available for CERCLA liability to third parties. ***Id.***, ¶112. ***Johnson Controls*** does not define what property must be damaged in order to constitute "property damage" by distinguishing between on-site and off-site properties. Instead, such specific policy language as the "owned property" exclusion will serve to address coverage.

¶31 In a related argument, ACE asserts that the circuit court erred in failing to recognize that under ***Johnson Controls*** and ***Hills*** only a "third-party liability claim," not a "first-party property claim," is covered by a CGL policy and therefore erred in allowing coverage for a claim for property damage suffered by the insured itself. We disagree. First, this is a third-party liability claim. A third party, EPA, did suffer losses by paying the cost of cleaning up the damaged property. Second, the damaged property is owned by Springer, not Watertown. Because Watertown is seeking coverage for its CERCLA liability to a third party, EPA, this is a loss sustained by a third party that constitutes damages due to property damages under ***Johnson Controls***.

¶32 In sum, the rule set forth in ***Johnson Controls*** makes clear that Watertown's CERCLA liability constitutes "damages" for property damage under the CGL policy unless it is otherwise excluded by the policy. The liability imposed under CERCLA against Watertown for its contribution to the contamination of the property is covered "as damages" due to "property damage" under the CGL policy because the costs to satisfy the liability go to a third party,

EPA, to restore and remediate Springer's property. Accordingly, the policy makes an initial grant of coverage for these damages.

2. Exclusions and "Sublimit" Exception

¶33 Having resolved the "off-site" and "third-party" issues raised by ACE, the balance of the analysis is simple, because there is no dispute regarding either the exclusions or the "sublimit" exception. Regarding exclusions, the parties agree that, considered in isolation, both the "absolute pollution" exclusion[4] and the "owned property" exclusion operate to preclude coverage. Therefore, we move directly to the exception that restores coverage despite these exclusions.

¶34 ACE does not contest Watertown's assertion that coverage is available for the leased Springer property under the plain terms of the "sublimit" exception if the policy provides initial coverage. The "sublimit" exception is entitled "Damage to Premises Rented to You," which provides up to $300,000 of supplemental coverage for damages because of property damage caused by fire to leased property. It is an exception to the "absolute pollution" exclusion (exclusion f.) and the "owned property" exclusion (exclusion j.), specifically providing: "Exclusions c. through n. do not apply to damage by fire to premises

[4] The "absolute pollution" exclusion provides in relevant part:

> This insurance does not apply to any injury, damage, expense, cost, loss, liability or legal obligation arising out of or in any way related to pollution, however caused.
>
> Pollution includes the actual, alleged or potential presence in or introduction into the environment of any substance if such substance has, or is alleged to have, the effect of making the environment impure, harmful, or dangerous. Environment includes any air, land, structure or the air therein, watercourse or water, including underground water.

while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III-Limits Of Insurance." Section III of the insurance policy provides in pertinent part:

> [T]he Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or *in the case of damage by fire*, while rented to you or temporarily occupied by you with permission of the owner.

(Emphasis added.)

¶35 As discussed above, under the initial grant of coverage the CGL policy provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Therefore, regardless of exclusions, the "sublimit" exception provides coverage when the insured becomes liable for damages, including costs, resulting from property damage caused by fire to property it rents from another. In other words, the "sublimit" exception provides supplemental coverage for third-party claims that result from a fire to leased property.

¶36 In sum, we conclude that the "sublimit" exception provides coverage for the costs of government-ordered environmental remediation under CERCLA, including EPA's claim against Watertown, for costs incurred to remediate the damaged property that Watertown leased from Thomas Springer. The "sublimit" exception applies to the claim made by EPA to clean up Springer's property because EPA's CERCLA response costs for restoring and remediating contaminated property are third-party "damages" within the terms of a standard CGL policy, regardless of whether the property damage is to on- or off-site

property. *See* ***Johnson Controls***, 264 Wis. 2d 60, ¶112. Those "damages" resulted from property damage to the leased property caused by fire.

B. Declaratory Judgment without Money Judgment

¶37 We now address Watertown's cross-appeal regarding the declaratory judgment. Watertown asserts that the circuit court erred in failing to enter a monetary judgment in favor of Watertown after determining that the "sublimit" exception applies. ACE responds that Watertown waived its right to supplemental monetary relief by failing to file an application seeking relief pursuant to WIS. STAT. § 806.04(8), and that the circuit court properly exercised its discretion because the amount of damages cannot "be fairly and accurately determined." We conclude that the circuit court properly exercised its discretion on this issue, and therefore we need not reach the question of whether Watertown filed the proper application for relief.

¶38 The circuit court has discretionary authority to order supplemental relief, including monetary damages, under WIS. STAT. § 806.04(8), if the party seeking the relief petitions the court to grant such relief and the relief is necessary to carry out a declaratory judgment. *See* ***Westport Ins. Corp. v. Appleton Papers, Inc.***, 2010 WI App 86, ¶85, 327 Wis. 2d 120, 787 N.W.2d 894; ***Lemon v. Kurtzman***, 411 U.S. 192, 200 (1973) (trial court's discretion falls within court's exercise of its power to fashion equitable relief).

¶39 The role of declaratory judgment is not to take the place of an action for damages; however, when the court has determined the rights of the parties in the declaratory judgment and damages may be predicated on that determination of rights, the court may also enter an award for damages. ***F. Rosenburg Elevator Co., Inc., v. Goll***, 18 Wis. 2d 355, 363, 118 N.W.2d 858 (1963).

¶40 We will not reverse the circuit court's discretionary decision absent an erroneous exercise of discretion. ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 130 Wis. 2d 4, 11, 386 N.W.2d 53 (1986). An erroneous exercise of discretion occurs if the record shows that the circuit court did not exercise its discretion, the facts do not support the circuit court's decision, or the circuit court applied the incorrect legal standard. ***Id.*** at 11-12.

¶41 Watertown asserts that a consent decree entered into among Watertown, Springer, and the EPA following the fire provides the necessary evidence for the court to determine the amount of damages that ACE owes Watertown. Watertown claims that it is entitled to a money judgment in the amount of $300,000, the maximum available under the "sublimit" exception.

¶42 The circuit court declined to enter a monetary judgment in favor of Watertown "[b]ecause liability on the part of Watertown for the EPA claim has yet to be established" and therefore was premature. The circuit court concluded that "[t]here was not any evidence before the Court" regarding why the consent decree was entered among Watertown, Springer, and EPA and whether the sums Watertown became liable to pay under the consent decree were for sums covered under the insurance policy.

¶43 The facts support the circuit court's discretionary decision under the correct legal standard. Watertown failed to prove that it is entitled to any particular portion of the coverage up to its maximum of $300,000. Watertown needed to prove that it was legally obligated to pay EPA sums for damages due to "property damage" to which the insurance applies. No such evidence was introduced in the circuit court. The court record showed only that the EPA, Watertown, and Springer had entered into a consent decree in favor of the EPA

and against Watertown and Springer in the amount of $790,930 for "response costs." No other details regarding the consent decree were before the court and Watertown fails to offer any record citations to support its assertion that there was sufficient evidence before the court. Therefore, we conclude that the court did not erroneously exercise its discretion in declining to issue a money judgment.

III. Watertown's Claims for Full Coverage

¶44 We turn now to Watertown's challenges to the court's dismissal of its claims against ACE on summary judgment. Watertown does not challenge the circuit court's conclusion that the "absolute pollution" and "owned property" exclusions preclude full coverage of its claims. Rather, Watertown seeks to receive full coverage under the CGL policy for all of its clean-up expenses on the grounds that one or more of the following doctrines operates to overcome the effect of the exclusions: equitable estoppel, breach of modified contract, bad faith, or reformation.

A. Equitable Estoppel

¶45 Watertown's estoppel claim is based on allegations that: following the fire an ACE agent told Springer, as Watertown's representative, that the CGL policy would cover all clean-up costs; that Watertown detrimentally relied on this representation, and; that Watertown suffered damage when ACE later refused coverage based on the "absolute pollution" exclusion. In other words, Watertown asserts that coverage that would otherwise be excluded under the "absolute pollution" and "owned property" exclusions should be revived by operation of estoppel because of the agent's alleged representation.

¶46 The general rule is that equitable estoppel may be applied when the action or inaction of a party induces reliance by another person to that person's detriment. ***Nugent v. Slaght***, 2001 WI App 282, ¶19, 249 Wis. 2d 220, 638 N.W.2d 594. More specifically, equitable estoppel has four elements: "(1) action or non-action; (2) on the part of one against whom estoppel is asserted; (3) which induces reasonable reliance thereon by the other, either in action or non-action; (4) which is to the relying party's detriment." ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620.

¶47 In determining whether equitable estoppel is available to affect the operation of an insurance clause, the court first determines whether the clause that the insured seeks to estop the insurer from asserting is either (1) a scope of coverage clause that acts to include or exclude a potential claim, in which case doctrines of waiver or equitable estoppel do not apply, or (2) a forfeiture clause, in which case they can apply. ***Shannon v. Shannon***, 150 Wis. 2d 434, 450-51, 453-54, 442 N.W.2d 25 (1989).

¶48 The parties do not dispute that the "absolute pollution" and "owned property" exclusions are scope of coverage clauses of an exclusionary nature. Therefore, under ***Shannon***, equitable estoppel would not apply as a matter of law. *See* ***id.***

¶49 However, Watertown argues that the ***Shannon*** rule, first articulated in 1896, is "old and eroding." *See* ***id.*** at 451 (rule first announced in ***McCoy v. Northwestern Mut. Relief Ass'n***, 92 Wis. 577, 66 N.W. 697 (1896) (citation omitted)). As purported proof of erosion, Watertown cites four cases that it claims create exceptions to the rule that equitable estoppel does not apply to scope of

coverage clauses that either include or exclude coverage. We disagree that the cited cases support Watertown's claims in this case.

¶50 Watertown cites ***Jeske v. General Acc. F&L Assur. Corp., Ltd.***, 1 Wis. 2d 70, 83 N.W.2d 167 (1957), for the proposition that estoppel applies when an insurance agent modifies an insurance policy. However, that case is readily distinguishable from this one because in ***Jeske*** the parties verbally agreed to modify a policy, and the insurance agent issued a certificate representing that the insurance company intended to cover the risk at issue in the modification. ***Id.*** at 96. As explained below, the insurance contract in this case was not formally modified by the parties in this manner.

¶51 Watertown also cites ***Nugent v. Slaght***, 249 Wis. 2d 220, but that case addressed an insurance cancellation issue, not, as here, a scope of coverage issue. *See* ***id.***, ¶19. The ***Nugent*** court concluded that an insurance cancellation clause more closely resembled an "automatic lapse" or "forfeiture" clause than a scope-of-coverage clause and therefore the insurance company could be estopped from asserting cancellation as a defense under ***Shannon***. ***Id.***, ¶¶27-28.

¶52 Watertown further argues that ***Sugden v. Bock***, 2002 WI App 49, 251 Wis. 2d 344, 641 N.W.2d 693, suggests that equity and fairness could estop the insurer from denying coverage. In ***Sugden***, the parties disputed whether "anti-stacking" provisions in an insurance policy were coverage clauses or forfeiture clauses under the ***Shannon*** rule. ***Id.***, ¶13. The ***Sugden*** court did not decide which category the clauses fell into. Instead, the court decided against applying estoppel because no inequity would result from applying the rationale of ***Shannon***: insurers should not have to cover losses for which insureds paid no premiums. ***See id.***, ¶¶18, 21. The ***Sugden*** court concluded that the Sugdens had paid policies

with a $50,000 occurrence limit and "[a]llowing them to collect more than this amount would give the Sugdens more than they paid for and create coverage where none existed." ***Id.***, ¶18.

¶53 As in ***Sugden***, we fail to see what inequity results here from failing to apply estoppel to the exclusionary clauses. Allowing Watertown to collect from ACE above the "sublimit" for the clean-up costs would create coverage for Watertown where none existed under the plain language of the exclusions, and Watertown fails to explain what is unfair or inequitable about the insurer declining to cover costs for which Watertown paid no premium.

¶54 Watertown asserts that an insurer's misrepresentation could estop the insurer from asserting an exclusion, relying on ***Nolden v. Mutual Benefit Life Ins. Co.***, 80 Wis. 2d 353, 259 N.W.2d 75 (1977). However, that case is readily distinguishable. In ***Nolden***, the insured relied on statements made by his insurance agent that heart surgery would be covered under his medical policy. ***Id.*** at 364. The policy provided coverage for heart surgery, but the insurer argued that the policy should be voided by a statutory defense under WIS. STAT. § 209.06(1) (1973), namely that the insured made material misrepresentations in applying for insurance that increased the insurer's risk. ***Id.*** at 358, 360. The ***Nolden*** court concluded that estoppel was available because (1) the insured's disclosure to the insurer's agent was sufficient to estop the insurance company from raising the statutory defense and (2) the undisputed facts demonstrated detrimental reliance because the insured chose to proceed with the surgery, relying on the agent's statement. ***Id.*** at 369-70.

¶55 ***Nolden*** bears no resemblance to this case. Coverage here is excluded under the explicit "absolute pollution" and "owned property" exclusions,

while in ***Nolden*** the insurer sought to deny coverage based on a statutory defense of material misrepresentations by the insured increasing the insurer's risk.

¶56 Moreover, even if Watertown could rely on an estoppel theory to the extent that the insurance agent made the representations alleged by Watertown, we conclude that there are no triable issues of material fact because there is no evidence to suggest that Watertown detrimentally relied on the insurance agent's alleged representations. We agree with the circuit court that the detrimental reliance element of equitable estoppel was not met because Watertown failed to carry its burden as the party opposing summary judgment to set forth specific facts showing that there is a genuine issue of material fact as to whether Watertown detrimentally relied on the agent's statement. *See* ***Larson v. Kleist Builders, Ltd.***, 203 Wis. 2d 341, 345, 553 N.W.2d 281 (Ct. App. 1996) (summary judgment appropriate if party opposing summary judgment fails to offer specific evidentiary facts to demonstrate a genuine issue for trial in response to movant's submissions).

¶57 "Detriment" in the equitable estoppel context is associated with "prejudice" and means "'injury or damage.'" ***Nugent***, 249 Wis. 2d 220, ¶31 (citation omitted). "This injury or damage must be 'actual and material or substantial, and not merely technical or formal.'" ***Id.*** (quoting 28 AM. JUR. 2D *Estoppel and Waiver* § 83, at 508 (2000)).

¶58 The record supports the circuit court's findings that any reliance by Watertown on the alleged statements of the agent did not increase Watertown's risks or contribute to its losses. Watertown's claim of detrimental reliance consisted only of Springer averring that he relied on the opinion of the agent that ACE would cover the water clean-up costs in deciding to (1) "cooperate" with the EPA and (2) allocate his funds to claims other than water cleanup. Yet it is

uncontested that Watertown was under orders of the federal and state governments to perform or pay for the clean-up efforts. Moreover, Watertown admitted that the clean-up costs far exceeded Watertown's ability to pay. Watertown's legal liability for the environmental cleanup was the same regardless of the scope of insurance coverage, and regardless of what Watertown believed the coverage to be after speaking with the insurance agent.

¶59 In summary, Watertown's claim of equitable estoppel fails on two levels. Summary judgment was proper because equitable estoppel is not applicable to exclusionary clauses and the undisputed facts do not establish the detrimental reliance element of equitable estoppel.

B. Breach of Modified Contract Claim

¶60 Watertown argues next that the circuit court erred in dismissing its breach of modified contract claim on the grounds that the alleged enforceable modification was not supported by new consideration. We agree with ACE that the circuit court correctly dismissed this claim because undisputed facts fail to support an unambiguous intent to modify the insurance contract to cover the clean-up costs, and therefore we have no need to reach the new consideration issue.

¶61 A written contract may be modified by subsequent conduct of the parties. *See* ***Nelsen v. Farmers Mut. Auto. Ins. Co.***, 4 Wis. 2d 36, 56, 90 N.W.2d 123 (1958). However, one party to a contract cannot alter its terms without the assent of the other. ***Id.*** at 55. Instead, there must be a meeting of the minds as to the proposed modification. ***Id.*** at 55-56. In addition, the acts relied on to establish a modification of a prior contract must be unequivocal. ***Id.*** "'Acts which are ambiguous in their character, and which are consistent either with the continued

existence of the original contract, or with a modification thereof, are not sufficient to establish a modification.'" ***Id.*** (citation omitted).

¶62 Watertown does not argue that there are disputed issues of material fact regarding this claim. We therefore consider whether the undisputed facts create a triable legal issue on Watertown's claim that the conduct of both parties evidenced an unambiguous intent to modify the insurance contract.

¶63 Watertown claims that its representative asked the agent whether Watertown was covered for clean-up costs, and the agent simply responded with the agent's opinion that coverage was available. The agent's response is not evidence that the agent purported to modify any term of the contract on ACE's behalf; the allegation is only that the agent gave an opinion as to what the contract could cover.

¶64 This allegation does not create a genuine issue of material fact as to whether the parties' conduct unambiguously indicated a shared intent to modify the insurance policy. This does not even amount to an allegation that the agent expressed an intent to modify any term of the policy, much less that there was a meeting of the minds on an intent to modify any term. Watertown no doubt wanted modification at that point, but it could not make the modification unilaterally. *See* ***Schaefer v. Dudarenke***, 89 Wis. 2d 483, 492, 278 N.W.2d 844 (1979). Accordingly, we do not address Watertown's new consideration argument.

C. Bad Faith Claim

¶65 Next, Watertown asserts that the circuit court erred in entering summary judgment against Watertown on its bad faith claim on the grounds that

the court improperly decided a disputed factual question, namely whether ACE conducted a neutral and detached investigation of Watertown's claims.

¶66 To establish a claim of bad faith, the insured must show that an insurer (1) lacked a reasonable basis for denying benefits of the policy and (2) had "'knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 377, 541 N.W.2d 753 (1995) (citation omitted). The first prong of the test is objective: do the facts establish a reasonable basis for denial. ***Id.*** at 377-78. The second prong is subjective: did the insurer know there was a reasonable basis for denying the claim or act with reckless disregard for the truth. ***Id.*** at 377.

¶67 Under the objective "reasonable basis" prong, "the insured must establish that under the facts and circumstances, a reasonable insurer would not have denied or delayed payment of the claim." ***Id.*** Absence of a reasonable basis for denying a claim exists when the claim is not "'fairly debatable.'" ***Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶33, 261 Wis. 2d 333, 661 N.W.2d 789 (citation omitted). When either the law or facts are "fairly debatable," an insurer is entitled to debate the claim. ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). Bad faith claims cannot be maintained where an insurer makes an investigation of the facts and law and concludes on a reasonable basis that the claim was "fairly debatable." ***Id.*** at 693.

¶68 The subjective test comes into play only if the objective test is not met. *See* ***Mills v. Regent Ins. Co.***, 152 Wis. 2d 566, 575, 449 N.W.2d 294 (Ct. App. 1989). Therefore, "'if there is an objectively reasonable basis to deny coverage, existence of investigative flaws, standing alone, are not enough to

permit recovery in tort against an insurer ….'" ***Id.*** at 576 (citation omitted). This is because "'it is almost impossible to conduct an investigation as to which some question of its adequacy, sufficient to get to the jury, cannot, in hindsight, be raised.'" ***Id.*** (citation omitted). Accordingly, when an objective reasonable basis to deny coverage exists, we need not consider allegations of investigative flaws or the subjective element of bad faith. *See* ***Samuels Recycling Co. v. CNA Ins. Cos.***, 223 Wis. 2d 233, 250, 588 N.W.2d 385 (Ct. App. 1998).

¶69 We conclude that Watertown's coverage claims for the water and debris clean-up bills readily meet the "fairly debatable" standard under the "owned property" exclusion. Accordingly, ACE was entitled to dispute coverage for both claims.

¶70 Consistent with our conclusion in ***Watertown I***, the question of whether the "owned property" exclusion precludes coverage for both claims is, at a minimum, "fairly debatable." A reasonable insurer could have denied coverage under the "owned property" exclusion because both of Watertown's claims sought coverage for "property damage" to property that Watertown leased from Springer. The exclusion plainly excludes coverage for "property damage" to "property that you own, rent, or occupy."

¶71 It also appears that coverage of both clean-up bills were "fairly debatable" under the "absolute pollution" exclusion. Watertown does not suggest why ACE was unreasonable for concluding that the "absolute pollution" exclusion precludes coverage for either EPA's water clean-up costs to address "contamination" at the site or for clearing debris. However, we do not decide whether coverage was "fairly debatable" based on this exclusion because ACE had

an objectively reasonable basis to deny coverage based on the "owned property" exclusion.

¶72 Without explanation or legal analysis, Watertown also asserts that ACE acted in bad faith because ACE allegedly (1) failed to consider that one of its agents modified the policy by promising to cover the water clean-up expenses and (2) did not offer Watertown the $300,000 "sublimit" coverage. These arguments are so undeveloped that we do not need to consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W. 2d 633.

¶73 Applying the objective test to undisputed facts, we conclude that the circuit court did not err in finding that ACE did not act in bad faith. Whether the policy covered the clean-up claims was "fairly debatable." Therefore, we do not reach the issue of whether there are disputed issues of material fact regarding alleged flaws in ACE's investigation of Watertown's claims.

D. Reformation Claim

¶74 Watertown's reformation claim must also be resolved against Watertown for the reasons we set forth in ***Watertown I***. Watertown claims that the insurance policy failed to cover the clean-up costs solely due to the alleged negligence or mistake of its insurance agent in procuring the CGL policy with the "absolute pollution" exclusion, and therefore the policy should be reformed to remove the exclusion, which would result in a contract expressing the parties' intention. Watertown argues that the circuit court erred when it entered judgment against Watertown on its reformation claim because disputed facts remain as to whether the insurance agent was acting as a specific agent of ACE and if so, whether the alleged agent was negligent or mistaken in procuring the policy in order to establish mutual mistake between ACE and Watertown.

¶75 The general rule is that an insurance 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. Continental Ins. Co.***, 2001 WI 85, ¶50, 244 Wis. 2d 802, 628 N.W.2d 876 (citation omitted). Further, "'[a] mistake due to the negligence of an agent … is satisfactory ground for reformation, since the insured ordinarily relies upon the agent to set out properly the facts in the application.'" ***Id.***, ¶54 (citing ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 187, 148 N.W.2d 641 (1967)). Therefore, "[a]n action for reformation is permitted … when there is a mistake by an agent even though the mistake is not technically mutual." ***Vandenberg***, 244 Wis. 3d 802, ¶54.

¶76 Watertown's claim fails because alleged negligence or mistake by the agent in procuring a CGL policy that included an "absolute pollution" exclusion could not have resulted in a denial of coverage because coverage was also excluded by the "owned property" exclusion. *See* ***Watertown I***, No. 09-2465, ¶19**.** Therefore, even assuming in Watertown's favor the question of whether Nortman was acting as an agent of ACE in preparing and offering the policy, there would be no ground for reformation related to the "absolute pollution" exclusion in the policy bearing on coverage in this case because, as concluded in ***Watertown I***, Nortman was not negligent in procuring an insurance policy that included the "absolute pollution" exclusion. Watertown has not alleged any error by Nortman in including the "owned property" exclusion in the policy. Accordingly, we conclude that Watertown failed to raise a ground for reformation.

CONCLUSION

¶77 In sum, we affirm the circuit court's grant of summary judgment on Watertown's declaratory judgment action declaring that the "sublimit" exception is available to Watertown, including the court's discretionary decision that a money judgment was not appropriate based on the state of the record before the court. We also affirm the court's order dismissing Watertown's claims seeking full coverage under the CGL policy.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.