COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2014AP2050 **Cir. Ct. No. 1989CV16174**

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

JOHNSON CONTROLS, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA AND WESTCHESTER FIRE INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE and JOHN J. DIMOTTO, Judges. *Reversed and cause remanded with directions; cross-appeal dismissed*.

Before Stark, P.J., Seidl and Lundsten, JJ.

¶1 SEIDL, J. Central National Insurance Company of Omaha and Westchester Fire Insurance Company (collectively "Central National") appeal a summary judgment determining that Central National breached its duty to defend

Johnson Controls, Inc. (Johnson Controls) against potential liabilities for environmental contamination under multiple excess insurance policies. Johnson Controls cross-appeals from the circuit court's denial of additional attorney fees, prejudgment interest requests, and the rate at which postverdict interest was to be calculated. Based on the duty to defend language of the insurance policies at issue, which Johnson Controls concedes provides a duty to defend only if an occurrence is covered under the excess insurance policies but not covered under the underlying insurances, we conclude Central National owed no duty to defend Johnson Controls. We therefore reverse and remand with directions to enter judgment for Central National. The cross-appeal is dismissed as moot.

BACKGROUND

¶2 This case has been pending for nearly three decades. In the mid-1980s, Johnson Controls was identified as a potentially responsible party (PRP) in connection with environmental contamination at numerous sites across the country. Some of the sites were lead smelting plants where Johnson Controls delivered lead acid batteries for recycling and others were contaminated landfills. As a PRP, Johnson Controls could have been required to contribute to the environmental restoration and remediation costs incurred at those sites under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). As a result, Johnson Controls notified its numerous primary, umbrella, and excess insurers, and sought defense and indemnity under layered liability policies issued at various times between 1954 and 1985.

¶3 All the insurers refused to defend or indemnify Johnson Controls, contending that their policies did not cover costs imposed under CERCLA. In 1989, Johnson Controls brought suit against its insurers, seeking defense and

indemnification for various costs relating to environmental cleanup. Before the circuit court made a determination concerning the insurers' obligations, our supreme court decided ***City of Edgerton v. General Casualty Co. of Wisconsin***, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). In that case, the court determined that standard commercial general liability (CGL) policies did not provide indemnification coverage for an insured who cleaned up an environmentally contaminated site, regardless of whether the insured owned the property, when the remediation was done pursuant to a government directive or request under CERCLA, or its state counterparts. *See* ***id.*** at 782-86. The court also held that neither a PRP letter nor a comparable notification constituted a "suit" triggering the insurer's duty to defend. ***Id.*** at 771, 775.

¶4 As a result, the insurance companies sought summary judgment. The circuit court applied ***Edgerton***'s holding and determined there was no duty to defend or indemnify Johnson Controls. This court affirmed, noting that as long as ***Edgerton*** remained the law of this state, Johnson Controls could not prevail. *See* ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, Nos. 1995-179, 1995-2591, unpublished slip op. at 4 (WI App Oct. 13, 1998) (***Johnson Controls I***). A remand to the circuit court for factual determinations as to whether all the sites fit within the ambit of ***Edgerton*** determined there was no coverage under any of the policies for any of the contaminated sites. Johnson Controls again appealed, and we stated, "Although Johnson Controls believes that ***Edgerton*** was decided wrongly, we are obligated to follow its dictates." *See* ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2002 WI App 30, ¶5, 250 Wis. 2d 319, 640 N.W.2d 205 (2001) (***Johnson Controls II***).

¶5 In 2003, our supreme court overruled ***Edgerton***, concluding an insured's costs for "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, are covered damages under applicable CGL policies, provided that other policy exclusions do not apply." ***Johnson Controls, Inc. v. Employers Ins. of Wausau*** 2003 WI 108, ¶¶4-5, 264 Wis. 2d 60, 665 N.W.2d 257 (***Johnson Controls III***). The court also concluded that receipt of PRP letters "marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured," thereby triggering the insurer's duty to defend, provided the insured has coverage for the claim under the CGL. ***Id.***, ¶¶5, 92.

¶6 Johnson Controls thus began resurrecting previously dismissed claims against the insurers. In 2005, Johnson Controls filed a motion for declaratory judgment against Employers Insurance of Wausau, one of its primary insurers, asserting it had breached its duty to defend. Johnson Controls sought reimbursement for remediation and defense costs in excess of $150 million. Johnson Controls subsequently settled these claims, and then filed a similar motion against another of its insurers. Sensing that Johnson Controls planned to file a motion for declaratory judgment against it, excess insurer London Market moved for partial summary judgment contending its policy was an indemnity-only excess umbrella insurance policy that contained no promise of defense. In the alternative, London Market sought a ruling that if its policy contained a duty to defend, that duty would not ripen "unless and until the underlying policies have been exhausted." After accepting certification of the appeal from this court, our supreme court concluded that London Market had a duty to defend, which was not conditioned upon exhaustion of the underlying policies, based upon the specific terms of an "other insurance" provision that triggered a duty to defend when the underlying insurer "denie[d] primary liability under its policy." *See* ***Johnson***

Controls, Inc. v. London Mkt., 2010 WI 52, ¶¶87-88, 325 Wis. 2d 176, 784 N.W.2d 579 (***Johnson Controls IV***).

¶7 In 2012, all remaining parties filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of Johnson Controls. With regard to Central National, the court reasoned, "[T]he principle remains that a duty to defend exists when coverage is *arguable*." The court stated:

> [I]t was unclear whether the claims were covered by the underlying policies. All of the insurers initially asserted that their policies did not cover the claim. Based on this fact, because it was "fairly debatable" whether any of the claims were "covered" or "not covered" by the underlying policies, [Central National] breached their duties to defend by failing to defend when it was fairly debatable whether the claim was covered.

¶8 The circuit court then appointed a special master on the issue of damages. Despite the fact that all other remaining insurers had now settled, Johnson Controls argued that Central National was responsible for the full amount of its damages as the "automatic consequence" of a breach of the duty to defend, which it argued resulted in all coverage limitations being waived.

¶9 The special master issued a written recommendation, which stated, in part, as follows:

> The Plaintiff submits that it is entitled to a judgment against each of the two remaining Defendants in the full amount of its damages, less appropriate credits. This would translate into a judgment in the approximate amount of either $136 million or $90 million (as calculated in these recommendations) against Central National and Westchester (not joint and several but an independent judgment against each). The gross inequity of this possible result advocated by the Plaintiff is more than transparent. It undoubtedly would shock the conscience of any reasonable Court. This problem with the Plaintiff's theory was best captured by Defendants' argument in a brief filed

> on this motion. They posed the question of whether any court in Wisconsin would allow a full judgment to be entered against 15 insurance carriers in this case if 15 of them failed or refused to reach a settlement with the Plaintiff. Under Plaintiff's theory, there could be judgments totaling in excess of $1.5 billion, a result that would shock the conscience of any reasonable Court or attorney.

¶10 The special master recommended an equal share apportionment of damages:

> [Equal share apportionment] is a fair and reasonable approach to a very complicated case. It recognizes the full actual damages of the Plaintiff, the breaching status of the Defendants, the equal status of the Defendants who have been found to have breached the duty to defend, and the payments received by the Plaintiff. It does no violence to the public policy of making the Plaintiff whole. It recognizes and enforces the policy of not allowing double damages. It does not reward Defendants for purposely waiting for everyone else to settle first, rewards which would violate Wisconsin's strong public policy that favors and encourages parties to settle.
>
> It may be true that we will never know with mathematical precision whether Plaintiff has technically been made whole. However we do know, from the standpoint of equity and with reasonable certainty, that Plaintiff has collected substantially all of its damages with a significant amount of additional payments applied to extra sites, additional releases of future claims, and indemnification agreements.

¶11 The special master noted that under an equal share approach, Johnson Control's damages,

> either $90,079,513 or $136,413,049 would be divided by 23, the number of insurance entities either settling (21) or litigating this case to a conclusion (2). Judgment would be entered against the two remaining Defendants, individually, in the amount of $3,916,500 or $5,931,002, depending on the Court's decision on prejudgment interest.

¶12 The circuit court declined to adopt the special master's recommendations and awarded Johnson Controls the full amount of its claimed damages, together with postjudgment interest at 4.25%. The court concluded that "[i]f the 'automatic consequences' that follow from a wrongful refusal to defend [are] merely an equal share portion of the damages, breaching insurers could ultimately be rewarded for engaging in a game of 'litigation chicken.'" The court stated that an equal share approach to damages "would also change the well-established case law dealing with the harsh consequences that are associated with breaching the duty to defend." However, the court rejected Johnson Controls' request for additional attorney fees and prejudgment interest.

¶13 Central National now appeals, contending its policies "included a contingent and limited defense provision that applied *only* when occurrences covered by [its] policies were 'not covered' by underlying insurance." According to Central National, since the scope of coverage for environmental liabilities between the primary and excess policies was identical, Central National could have no duty to defend. Johnson Controls cross-appeals as to damages, challenging the circuit court's denial of additional attorney fees and prejudgment interest. Johnson Controls also contends it was entitled to 12% postjudgment interest.

DISCUSSION

¶14 We apply the summary judgment standards set forth in WIS. STAT. § 802.08(3) (2015-16), in the same manner as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. ***Lambrecht v. Estate of***

Kaczmarczyk, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. Summary judgment here turns on the interpretation of an insurance policy which is a question of law that we review independently. *See* ***Plastics Eng'g Co. v. Liberty Mut. Ins. Co.***, 2009 WI 13, ¶27, 315 Wis. 2d 556, 759 N.W.2d 613.

¶15 The duty to defend is separate from the duty to indemnify. *See* ***Johnson Controls IV***, 325 Wis. 2d 176, ¶28. With regard to primary insurance policies, the standard industry practice is to provide a defense along with indemnification. *See* ***id.***, ¶31. True excess coverage exists as part of layered coverage intended to come into play only after liability reaches a certain "excess" monetary level. *See* ***id.***, ¶¶57-58. An excess policy generally does not provide a defense from the outset of any suit against the insured; rather, true excess coverage attaches when an insured has several policies that cover the same loss but only one policy is written with the expectation that the primary insurer will conduct all investigations, negotiations, and defense of claims until its limits are exhausted. *See* ***id.***, ¶57.

¶16 However, the above description of general practices does not dictate the result in particular cases. Excess insurers and insureds are free to contract around these general rules, and some excess policies contain a contractual duty to defend under certain circumstances even when the primary coverage is not exhausted. Whether an insurer has a duty to defend "depends on the language of the [relevant] policies." *See* ***id.***, ¶58. Moreover, we refuse to rewrite insurance policies by filling in gaps left in the draftsmanship. Rather, we look to the policy language itself. ***Id.***, ¶42.

¶17 The present case involves a layered program of primary, umbrella, and umbrella excess CGL policies. Central National issued five umbrella excess

policies to Johnson Controls: each excess policy was above at least one umbrella policy written by another insurer, which in turn was above a primary policy issued by Wausau Insurance Companies (Wausau).

¶18 Johnson Controls, quoting the pertinent duty-to-defend policy language, concedes in its appellate brief that Central National "agreed to provide a defense *only* for 'occurrences covered under [Central National's] policy, but not covered under the underlying insurances.'"[1] (Emphasis added.) Moreover, it is undisputed that the scope of coverage for the environmental claims brought by Johnson Controls was the same in the Wausau policies as in the excess insurance policies.

¶19 In light of the above acknowledgements, if an occurrence was covered under the underlying insurances, then Central National had no duty to defend because the excess insurance policies promised a defense only when an occurrence was "not covered under the underlying insurances." If the occurrences were not covered under the underlying insurances, then those occurrences were

[1] The excess policies contain nearly identical policy language regarding when the excess carriers have a duty to defend, and we therefore address the policy language collectively, as did the circuit court below and the parties herein. The following is representative of the duty to defend language:

> As respects *occurrences covered under this policy, but not covered under the underlying insurances* as set out in the attached schedule or under any other collectible insurance, the Company shall: (a) defend in his name and behalf any suit against the insured alleging liability insured under the provisions of this policy and seeking damages on account thereof, even if such suit is groundless, false or fraudulent ….

(Emphasis added.)

not covered by the excess insurance either because the scope of coverage for environmental liability in the primary and excess policies was the same.

¶20 In ***Johnson Controls IV***, the court makes one essential point exceedingly clear: our duty to defend analysis is to be "driven by policy language—not generalizable concepts about the role of excess insurance and the duties of excess insurers." ***Johnson Controls IV***, 325 Wis. 2d 176, ¶86 n.20. The circuit court in the present case did not focus first on the policy language concerning whether the occurrences were covered under Central National's policy but not covered by the Wausau primary policies. Rather, the court relied on general concepts, leading it to conclude that "because coverage under the facts of the claim was fairly debatable, the court could find that there was a duty to defend …."

¶21 However, a primary insurer generally has the primary duty to defend a claim. ***Id.***, ¶57. Thus, if coverage was "fairly debatable," the primary insurer would have the primary duty to defend. "An excess insurer usually is not required to contribute to the defense of the insured so long as the primary insurer is required to defend." ***Id.*** (*quoting* 2 Arnold P. Anderson, *Wisconsin Insurance Law* § 11.33 (5th ed. 2004)).

¶22 Johnson Controls insists that whether Wausau had the primary duty to defend the claims "is immaterial" under Central National's policies. Johnson Controls argues:

> Whether another insurer had a "defense obligation" is immaterial under [Central National's] own policy. [It] "agreed to provide a defense *only* for occurrences covered under this policy, *but not covered under the underlying insurances*." ***Johnson Controls III*** was significant because it confirmed Johnson Controls' reasonable expectations for a defense. ***Johnson Controls III*** *did not* establish that the

> claims were in fact "covered" by underlying insurance. If [Central National] believed that the claims for environmental contamination were, in fact, "covered" by underlying insurance, [it was] obligated to defend Johnson Controls while seeking a final case specific judicial declaration on that point.

(Citations omitted.)[2] Johnson Controls further argues that "[i]t is not illogical to conclude that both an excess and an underlying insurer have a duty to defend at the same time, even under the type of 'covered/not covered' defense provision here."

¶23 It is unclear why Johnson Controls believes we may, in effect, ignore specific policy language that gives us an answer and instead look to generalized concepts and the results in cases with different policy language. What is clear is Johnson Controls' argument does not address the implications of its concession, under which the claims against Johnson Controls were never going to trigger Central National's duty to defend because it is undisputed that the excess policies and the underlying policies provided the same scope of coverage for the environmental liabilities claimed in this case. Therefore, under the policy language it was logically impossible for an occurrence to be "covered" under the Central National excess policies but "not covered" under the Wausau policies—as would be required to trigger Central National's duty to defend. Because the

[2] Johnson Controls argues that Wausau argued it was entitled to conduct discovery on whether coverage was excluded by other provisions, such as the pollution exclusion, owned property exclusion, and failure to give timely notice, upon remand from ***Johnson Controls, Inc. v. Employers Insurance of Wausau*** 2003 WI 108, ¶¶4-5, 264 Wis. 2d 60, 665 N.W.2d 257 (***Johnson Controls III***). Johnson Controls asserts "[c]overage issues were never resolved on remand, and Wausau was never found in breach, because Wausau settled with Johnson Controls." However, Johnson Controls also argues that "[e]ven if ***Johnson Controls III*** established 'coverage' of underlying insurers, that 2003 decision did not eliminate the 'fairly debatable' nature of the law that existed for the preceding fourteen years."

excess policies' coverage for environmental claims was identical to the underlying policies' coverage, the claims against Johnson Controls presented only two options: either the occurrences were covered by all policies, in which case there was no duty to defend under the excess policies—or there was no coverage under any of the policies, also resulting in no duty to defend for Central National.

¶24 The ***Johnson Controls IV*** court recognized that under Wisconsin law, an excess insurer's duty to defend may be triggered prior to the exhaustion of the primary policy, under certain circumstances. In that case, the excess policies incorporated a duty to defend because "follow form" language incorporated broad duty to defend language in the relevant underlying policy.[3] *See* ***Johnson Controls IV***, 325 Wis. 2d 176, ¶¶34-37, 60-61. This part of the court's analysis, however, did not resolve when the excess insurer's duty to defend begins. The answer to that question was resolved by looking to a separate "other insurance" provision in the policy. It provided, "If the insurer affording other insurance to the named insured denies primary liability under its policy, [the excess insurer] will respond under this policy as though such other insurance were not available." ***Id.***, ¶62.

¶25 ***Johnson Controls IV*** stated that a reasonable person in the position of the insured would interpret this "other insurance" provision as "promising that, where the excess insurer has a contractual duty to defend, it will step in and provide a defense in the event that the primary insurer refuses to do so." ***Id.*** The

[3] An excess policy may be written in two forms: as a stand-alone policy or as a policy that "follows form." A stand-alone excess policy is an independent insuring agreement. By contrast, a follow form excess policy incorporates by reference the terms and conditions of the underlying policy and is designed to match the coverage provided by the underlying policy. *See* ***Johnson Controls, Inc. v. London Mkt.***, 2010 WI 52, ¶34 n.7, 325 Wis. 2d 176, 784 N.W.2d 579.

court found the duty to defend was not conditioned upon exhaustion of the underlying policies. Rather, under the specific terms of the "other insurance" provision, the "[excess insurer]'s duty to defend was triggered when the underlying insurer 'denie[d] primary liability under its policy.'" ***Id.***, ¶¶87-88.

¶26 However, the sort of policy language creating a duty to defend in ***Johnson Controls IV*** does not exist in the present policies. Thus, there is no reason to suppose that the result in that case sheds light on the meaning of *different* duty to defend language here. In light of Johnson Controls' concession regarding the pertinent duty to defend language, no reasonable insured would expect the Central National policy language to establish a duty upon Central National to drop down and provide a defense in the event the primary insurer refused to do so where it is undisputed the primary and excess policies provided identical coverage for the claimed loss.

¶27 ***Johnson Controls IV*** cited another case involving additional policy language. In ***Hocker v. New Hampshire Insurance Co.***, 922 F.2d 1476, 1482 n.5 (10th Cir. 1991), an excess policy provision established a duty to drop down and defend for risks "not covered, as warranted" by the primary policy. *See* ***Johnson Controls IV***, 325 Wis. 2d at ¶¶84-85. The Court explained the "as warranted" modification—also not found in the present case—created a duty to drop down and provide a defense, even absent exhaustion of the underlying policy limits, when the primary insurer wrongfully refused to defend:

> [I]nclusion of the term "as warranted" modifies "not covered" and changes [the excess insurer's] obligation; the excess carrier agrees to drop down when the terms of the underlying policy warrant that coverage is provided for the

> occurrence, but the primary insurer nevertheless wrongfully denies coverage.

Hocker, 922 F.2d at 1482 n.5.

¶28 The ***Johnson Controls IV*** court's emphasis on the additional policy language mentioned above would be meaningless under Johnson Controls' argument. If the argument's premise was correct, the ***Johnson Controls IV*** court would have only needed to say that coverage was "fairly debatable" to trigger the excess insurer's duty to defend. Instead, the court based its analysis on specific policy language that does not exist here. The court emphasized that "a different result is contingent upon different policy language." ***Id.***, ¶86 n.20.

¶29 Despite its concession regarding the particular duty to defend language at issue in the present case, Johnson Controls also attempts to persuade us that we should look to the results and general rules found in several cases purportedly creating an obligation for an excess insurer to automatically drop down and defend when the primary insurer refuses to do so. We now turn to those cases and explain why they do not assist Johnson Controls in light of ***Johnson Controls IV***'s directive to look to actual policy language and what the parties contracted for.

¶30 Johnson Controls first contends that we "addressed an analogous situation" in ***Southeast Wisconsin Professional Baseball Park District v. Mitsubishi Heavy Industries America, Inc.***, 2007 WI App 185, 304 Wis. 2d 637, 738 N.W.2d 87. According to Johnson Controls, the excess insurer in that case "recognized that its obligations ripened" and it dropped down to defend when the primary insurer breached its duty to defend.

¶31 In ***Southeast Wisconsin***, four companies issued five layered insurance policies covering the Miller Park Baseball Stadium construction, and if one policy paid its limits then the next policy in line became responsible. ***Id.***, ¶4. The excess insurer in that case undertook the defense under a reservation of rights because the primary insurer had exhausted its policy limits for certain claims, after which the primary insurer was no longer responsible for the defense of those claims. ***Id.***, ¶¶8-9. The duty to defend issues addressed in the decision concerned the primary insurer's duty to re-assume the defense after new claims were filed implicating unexhausted primary coverage. The question of whether an excess insurer was required to defend was not before the court, and the case nowhere holds that an excess insurer always has a duty to drop down and defend whenever the primary insurer does not. In fact, we held that because primary coverage was not exhausted for new claims, the excess insurer "had no duty to defend the claims arising out of the Amended Complaint and related pleadings. Only [the primary insurer] had such a duty." ***Id.***, ¶62.

¶32 Johnson Controls also relies upon the following dicta in ***American Motorists Insurance Co. v. Trane Co.***, 544 F. Supp. 669, 692 (W.D. Wis. 1982):

> If the underlying insurer has refused to defend, asserting that there is no coverage under the substantive provisions of the underlying policy, the excess insurer will have a duty to defend, provided there is coverage under the excess policy and the claim falls within the policy limits of the excess insurer.

However, the ***Trane*** Court did not attempt to ground such a purported duty to defend in specific policy language, thus engaging in the use of "generalizable concepts" about the duties of excess insurers that ***Johnson Controls IV*** rebuked.

¶33 Johnson Controls insists ***Johnson Controls IV*** "approved of ***Southeast*** and its reliance on [***Trane***]." We are unpersuaded. We did not rely on ***Trane*** in ***Southeast Wisconsin***. We merely referred to ***Trane*** in a footnote in the factual background portion of our decision. *See* ***Southeast Wis.***, 304 Wis. 2d 637, ¶8 n.4. We did not otherwise analyze ***Trane***.

¶34 Moreover, ***Johnson Controls IV*** did not "approve" the ***Trane*** dicta, nor did the court cite it in support of its holding. The ***Johnson Controls IV*** court simply cited ***Trane*** as one of several examples illustrating why there is no general rule of law requiring exhaustion of all primary policies before the duty to defend can be triggered. *See* ***Johnson Controls IV***, 325 Wis. 2d 176, ¶76. ***Johnson Controls IV***'s citation to ***Trane*** did not suggest the court's endorsement of a general rule that "[i]f the underlying insurer has refused to defend, … the excess insurer will have a duty to defend …." *See* ***Trane***, 544 F.Supp. at 692. As mentioned, such an endorsement would undermine ***Johnson Controls IV***'s admonition "that our analysis is driven by policy language—not generalizable concepts about … the duties of excess insurers." ***Johnson Controls IV***, 325 Wis. 2d 176, ¶86 n.20.

¶35 Furthermore, in other contexts we have recognized that a primary policy covers an occurrence when the occurrence is within the policy terms, even when the primary insurer fails to meet its contractual obligations. *See*, *e.g.*, ***Lechner v. Scharrer***, 145 Wis. 2d 667, 674 n.1, 429 N.W.2d 491 (Ct. App. 1988). In that case, we held a loss was "covered" by the primary insurance policy, even though the loss was not "recoverable" because of the primary insurer's

insolvency.[4] ***Id.*** This result is contrary to the dicta in ***Trane*** suggesting such an occurrence would be "uncovered" because the primary insurer was unwilling or unable to defend—and that an excess insurer must therefore drop down and defend.

¶36 ***Johnson Controls IV*** noted that ***Trane*** had "more recently been revisited" by our decision in ***Azco Hennes Sanco, Ltd. v. Wisconsin Insurance Security Fund***, 177 Wis. 2d 563, 568-69, 502 N.W.2d 887 (Ct. App. 1993). According to the circuit court, "***Azco*** did not disturb the [***Trane***] conclusion that an excess insurer with a contractual duty to defend might be obligated to assume the defense if the primary insurer refused to do so."

¶37 Significantly, the ***Azco*** excess policy stated it would defend the insured against any suit regarding "occurrences which are covered under its policy, but not covered under the underlying insurance." ***Id.*** at 566. We stated:

> The policy language is plain: Mission's duty to defend is limited to suits against Azco stemming from occurrences which are covered under its policy, "but not covered under the underlying insurances" ….
>
> ….
>
> The policy defines "'occurrence as an accident … result[ing] in injury ….'" Thus, Mission would have a duty to defend only if the accident – the explosion in which the suing employees were injured – was not covered by the underlying insurance; and in this case it was.

Id. at 567, 569.

[4] The circuit court disregarded ***Lechner v. Scharrer***, 145 Wis. 2d 667, 429 N.W.2d 491 (Ct. App. 1988), because it involved the duty to indemnify rather than defend. That distinction is irrelevant to our holding that the term "covered" referred only to whether the policy terms provided coverage, not whether the loss was "recoverable."

¶38 Our holding in ***Azco*** is contrary to the dicta in ***Trane*** suggesting that an excess insurer must drop down and defend when a primary insurer fails to do so. Although Johnson Controls seeks to distinguish ***Azco*** on the basis that the primary insurer actually provided a defense in that case, our analysis focused on whether the primary policy itself provided coverage, not on the actions of the primary insurer. We concluded the excess insurer would have a duty to defend only if the occurrence was not covered by the underlying insurance. *See* ***Azco***, 177 Wis. 2d at 569. In that regard, we reiterate that the policy language in the present case required Central National to provide a defense only for occurrences covered under *this policy*, but not covered under the underlying *insurances*.

¶39 Accordingly, we conclude Central National owed no duty to defend Johnson Controls. We therefore reverse and remand with directions to enter judgment for Central National. Given our conclusion that Central National owed no duty to defend, we need not reach issues regarding damages. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938). The cross-appeal is dismissed as moot.[5]

By the Court.—Judgment reversed and cause remanded with directions; cross-appeal dismissed.

Not recommended for publication in the official reports.

[5] Johnson Controls submitted a motion to file a sur-reply letter memorandum, to address ***Burgraff v. Menard, Inc.***, 2016 WI 11, 367 Wis. 2d 50, 875 N.W.2d 596, concerning the consequences for breach of the duty to defend. We dismiss the motion as moot.